

Rules and Regulations

Federal Register

Vol. 73, No. 217

Friday, November 7, 2008

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 294, 359, 362, 451, 530, 531, 532, 534, 536, 550, 591, 630, 831, and 842

RIN 3206-AK88

Changes in Pay Administration Rules for General Schedule Employees

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing final regulations on pay setting rules for General Schedule employees. The final regulations revise the interim regulations by making a number of technical modifications, corrections, and clarifications.

DATES: The regulations are effective on December 8, 2008.

FOR FURTHER INFORMATION CONTACT: Carey Johnston by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On May 31, 2005, the U.S. Office of Personnel Management (OPM) published interim regulations (70 FR 31278) to implement section 301 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411, October 30, 2004), hereafter referred to as "the Act." On December 19, 2005, OPM corrected minor errors in the interim regulations (70 FR 74995). Section 301 of the Act amended provisions in 5 U.S.C. chapter 53 relating to the administration of special rates, locality rates, and retained rates. The statutory and regulatory changes were designed to correct a variety of pay administration anomalies that resulted in unfair pay reductions or unwarranted pay increases, to allow locality rates and special rates to be treated in similar

ways, and to improve the operation of the special rates program.

The 60-day comment period ended on August 1, 2005. We received comments from eight agencies, one union, and several individuals. This **Federal Register** notice addresses the comments we received on the interim regulations and makes a number of technical revisions and clarifications, which are summarized below. In addition, we issued guidance, including examples, to address many of the questions we received about the interim regulations. We encourage agencies and employees to review these materials on OPM's Web site at <http://www.opm.gov/oca/pay/HTML/factindx.asp>. We will continue to provide additional guidance on pay administration, as necessary.

Comment Applicable to the Effective Date

One commenter objected to the effective date of the interim regulations. The commenter stated he was a manager who had to redo personnel actions because of the retroactive implementation of the rules. The commenter stated OPM should have published the rules before they became effective.

Section 301(d) of the Act provided that section 301 would take effect the first day of the first pay period beginning on or after the 180th day of enactment of the Act. The 180th day after enactment was April 28, 2005, and the first day of the first pay period following that date was May 1, 2005. On November 1, 2004, OPM issued a memorandum to agencies notifying them of changes resulting from the Federal Workforce Flexibility Act of 2004. (See <http://www.opm.gov/oca/compmemo/2004/2004-22.asp>.) On April 25, 2005, OPM issued an additional memorandum to agencies notifying them of changes to special rate schedules and special rate entitlements resulting from the Act. (See <http://www.opm.gov/oca/compmemo/2005/2005-06.asp>.) While OPM did not publish interim regulations until May 31, 2005, the regulations became effective on May 1, 2005, in order to implement the statutory changes mandated by the Act. The regulations must be applied prospectively from that date. OPM has no authority to waive or change this statutory effective date.

Comments Applicable to Senior Executive Service Saved Rates

An agency recommended that OPM revise § 359.705, which provides the rules on establishing, adjusting, and terminating saved rates for former members of the Senior Executive Service (SES) who are guaranteed placement in a position covered by another pay system. The agency suggested that OPM clarify that an employee who is placed under 5 CFR part 359, subpart G, in a General Schedule (GS) position is not subject to the limitation on GS basic pay in 5 U.S.C. 5303(f) of the rate for level V of the Executive Schedule (EX). This statement was included in former § 359.705(c) as in effect prior to May 1, 2005. In addition, a commenter requested that OPM clarify what pay limitations apply to SES saved rates.

Under § 359.705(a), an appointee placed under subpart G in a position outside the SES is entitled to receive basic pay at the highest of (1) the rate of basic pay in effect for the position in which the appointee is being placed; (2) the rate of basic pay currently in effect for the position the appointee held immediately before being appointed to the SES; or (3) the rate of basic pay in effect for the appointee immediately before removal from the SES. Under 5 U.S.C. 5382, the maximum SES rate for an agency with a certified performance appraisal system is the rate for EX-II, and the maximum SES rate for an agency without a certified performance appraisal system is the rate for EX-III. Consistent with the purpose of the SES saved pay provision, we are revising § 359.705(c) to clarify that an employee placed under subpart G in a position outside of the SES pay system is subject to the limitation on SES pay in 5 U.S.C. 5382 of the rate for level II of the Executive Schedule.

Comments Applicable to General Schedule Basic Pay Setting

Definitions of Demotion and Promotion (§ 531.203)

A commenter recommended that OPM revise the definitions of *promotion* and *demotion* in § 531.203 to cover situations involving movements between pay systems. Specifically, the commenter would like the definitions to be the same as or similar to the definitions of *promotion* and *change to*

lower grade in the Guide to Processing Personnel Actions (GPPA).

We are not adopting this recommendation. The same or similar terms may be used and defined in different ways in the GPPA and the CFR, depending on the purpose of the term and statutory requirements. In the GPPA, a *promotion* is an employee's movement to a position at a higher grade level within the same job classification system and pay schedule, or to a position with a higher rate of basic pay in a different job classification system and pay schedule. In § 531.203, a *promotion* is a GS employee's movement from one GS grade to a higher GS grade while continuously employed. It is necessary for the definition of *promotion* in § 531.203 to be more narrow than the definition of *promotion* in the GPPA because the two-step promotion rule in 5 U.S.C. 5334(b) and 5 CFR 531.214 applies only to GS employees who are promoted to a higher grade under the General Schedule without a break in service. Similarly, the demotion rules in § 531.215 apply only to employees who move from one GS grade to a lower GS grade while continuously employed. As a result, we cannot revise the definitions of *promotion* and *demotion* in § 531.203 to be consistent with the GPPA definitions. Agencies need to be aware of these different definitions. For example, an employee who moves from a non-GS pay system to the GS pay system may receive an increase in basic pay, and the nature of action may be documented as a *promotion* as that term is defined in the GPPA. However, for GS pay-setting purposes, the movement would be considered a *transfer* or *reassignment* as those terms are defined in § 531.203, depending on whether the movement occurs within the same agency or between agencies.

Superior Qualifications and Special Needs Pay-Setting Authority (§ 531.212)

An agency recommended that OPM clarify what constitutes a candidate's existing salary in § 531.212(c)(2). Section 531.212(c) provides the factors an agency may consider, as applicable in the case at hand, to determine the step at which to set an employee's rate of basic pay using the superior qualifications and special needs pay-setting authority. The agency stated it would be helpful to clarify whether bonuses or overtime premium pay should or could be a factor in the candidate's existing salary.

We are not adopting this recommendation. Bonuses or overtime pay could be a factor in determining the step at which to set an employee's

payable rate of basic pay, since those payments could be considered "other relevant factors" under § 531.212(c)(10). However, this is a matter that must be decided at the agency level.

Setting Pay Upon Promotion (§ 531.214)

A commenter requested clarification on why the locality pay associated with his previous worksite was not considered in setting his pay upon promotion at his new worksite. He stated that the interim regulations provide that locality rates are considered basic pay in applying GS pay administration provisions (e.g., GS promotion provisions).

When an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee to the applicable pay schedule(s) and rate(s) of basic pay for the new official worksite based on the employee's position of record before the promotion, as provided in § 531.205, before processing a simultaneous promotion action. See § 531.214(b) and 5 U.S.C. 5334(g). Therefore, the geographic conversion rule must be applied before the use of any applicable locality rates in applying the GS pay-setting rules. A major objective of the geographic conversion rule is to provide the same pay result that would have occurred if the employee in question had moved laterally without a change in position (such as grade) to the new geographic location and then underwent a position change.

An agency recommended OPM revise § 531.214(b) to state that the rate resulting from the geographic conversion rule must be used as the existing rate in processing a promotion. While the converted rate is used as the *existing rate*, we are not adopting the recommendation because the geographic conversion rule is adequately stated in §§ 531.205, 531.206, and 531.214(d)(1). We also note that the definition of *existing rate* in § 531.203, which is a term used in § 531.214, includes "For example, the *existing rate* immediately before a promotion action must reflect any geographic conversion under § 531.205 and any simultaneous within-grade increase or quality step increase."

Three commenters, who were apparently entitled to special rates prior to May 1, 2005, expressed concerns that their basic pay had decreased upon promotion. In the past, special rates were viewed as a rate of basic pay replacing the corresponding GS base rates of pay. Under current law and regulations, a special rate is viewed as consisting of a base rate (GS rate or law enforcement officer special base rate)

and a special rate supplement—similar to the base-plus-supplement concept we have long used for locality rates. In other words, special rate employees have the same base rates as non-special rate employees, but have a different supplement. Changing the way special rates are documented is not a reduction in basic pay. Special rates are still considered basic pay for the purposes specified in § 530.308, including retirement contributions and benefits.

It appears the commenters were promoted either from or to positions where special rates had recently been terminated. Section 301 of the Act amended 5 U.S.C. 5305(h) so that an employee is not entitled to a special rate if he or she is entitled to a higher rate of basic pay under another authority (e.g., a locality rate or a retained rate). The termination of these special rates did not result in a loss in pay for any covered employees, since all affected employees continued to receive the higher locality rate to which they were otherwise entitled.

Furthermore, by law, OPM was required to issue regulations governing the extent to which special rates and locality rates would be used in applying the GS promotion rule. (See 5 U.S.C. 5334(b), as amended by section 301(a)(3) of the Act.) Under the law and regulations in effect before May 1, 2005, a special rate employee promoted to a grade with underlying special rates (where locality rates were higher at all steps of the grade) would have received a higher pay increase than the normal GS promotion increase. Section 301 of the Act was designed to correct this anomaly and restore fairness by ensuring that locality rates would be considered in applying the promotion rule. This intent was documented in the legislative history of the Act:

Section 301(a)(3)(A) would amend Sec. 5334(b), which covers employee entitlement to basic pay rates upon promotion * * *. OPM would prescribe regulations on the circumstances under which and the extent to which special rates or locality-adjusted rates would be considered to be basic pay in applying this subsection. This amendment would authorize OPM to determine how special rates and locality rates should be used in applying the two-step promotion rule (upon promotion to a higher General Schedule grade, an employee is generally eligible for a pay increase at least equal to two steps in the grade from which he or she is promoted) in order to remedy existing pay administration problems arising in situations involving promotions, special rates, and retained pay when locality pay is not considered to be basic pay. This amendment would also allow OPM to prescribe regulations to avoid current windfalls resulting from employees receiving a two-step promotion (based on the higher special

rate schedule) and then receiving locality pay on top of the adjusted rate.

H.R. Rep. No. 108-733 (2004), 2005 U.S.C.A.N. 2289, 2298-2299.

The promotion rules in § 531.214 meet the statutory requirements and the Congressional intent of the Act and further changes are unnecessary.

One of the commenters requested to be “grandfathered in,” stating that changes should apply to new personnel entering the workforce. OPM is not able to accommodate any requests to be grandfathered in because the Act contained no special grandfathering provisions. Pay actions must be processed using the law and regulations that are in effect at the time of the pay action.

Using a Highest Previous Rate Under the Maximum Payable Rate Rule (§ 531.221-223)

An individual objected to the revised rule in § 531.221 of the interim regulations for determining an employee’s maximum payable rate when the employee’s highest previous rate is a rate under the Federal Wage System (FWS). The individual stated that the revised rule is neither consistent with the President’s intention for locality pay nor legal. The individual also stated that even though he received an increase in total pay (i.e., basic pay and locality pay), his basic pay was reduced.

We do not agree that the current maximum payable rate rule is inconsistent with Presidential or Congressional intent. In applying the former maximum payable rate rule in cases where an employee was moving from an FWS position to a GS position, a highest previous rate based on an FWS rate of pay was compared to the underlying GS base rate range for the employee’s grade, excluding locality pay. The maximum payable rate was set at the lowest step rate in the underlying GS base rate range that equaled or exceeded the highest previous rate, not to exceed the rate for step 10 of the GS grade. This process of comparing a locality-based FWS rate to a GS rate range that did not include a locality adjustment resulted in substantial pay increases for affected employees—an anomalous result not intended by the maximum payable rate rule. At the same time, in cases where an employee was moving from a GS position to an FWS position, the employee’s highest previous rate was based on the GS base rate, excluding locality pay, and was compared to the locality-based FWS rate range. This process resulted in an FWS rate that was significantly lower than

the employee’s former GS locality rate, which also was an anomalous result not intended by the FWS highest previous rate rule. Both types of anomalies have been corrected under the current OPM regulations, which require that GS locality rates be considered in applying these pay-setting rules.

Under the current GS maximum payable rate rule, when an employee moves from an FWS position to a GS position, his or her highest previous rate is compared to the GS rate range for the employee’s grade, including locality pay. The maximum payable rate is set at the lowest rate in the locality rate range that equals or exceeds the highest previous rate. The current rule more logically compares a locality-based FWS rate of pay to a GS locality rate range to determine the employee’s maximum payable rate and avoids substantial pay increases not intended by the maximum payable rate rule.

A commenter requested clarification regarding how the maximum payable rate rule applies to employees in the GM pay plan. (A GM employee is a GS employee who was formerly covered by the Performance Management and Recognition System under 5 U.S.C. chapter 54 on October 1, 1993, and became covered on November 1, 1993, by section 4 of Public Law 103-89, the Performance Management and Recognition System Termination Act of 1993.) As noted in § 531.221(a)(1), special rules for GM employees are provided in § 531.247.

In the Supplementary Information for the interim regulations published May 31, 2005, we invited comments on a proposal to establish a regulatory time limit on the period of time from which an employee’s highest previous rate may be drawn. The purpose of the proposed time limit was to reduce the administrative burden associated with identifying an employee’s highest previous rate over an entire career and comparing the highest previous rate with pay schedules in effect many years ago.

We received mixed reactions regarding establishing a regulatory time limit. Two agencies supported this proposal and three agencies did not support the proposal. Two agencies stated it would be better if the time limit was discretionary. One agency did not think a time limit was necessary, but stated, if a time limit is established, OPM should mandate a time limit rather than allowing each agency to establish its own policy. The agencies also expressed different views regarding the length of the time limit.

We have decided not to establish a regulatory time limit. We note that each

agency continues to have discretion to set an employee’s pay at any rate equal to or less than the maximum payable rate; thus, an agency could take into account the recentness of an employee’s highest previous rate in exercising that discretion.

An agency suggested that OPM specify that a rate of pay earned during military service may not be used as an employee’s highest previous rate. We agree. While § 531.222(a)(1)(i) already provides that a highest previous rate must be a “rate of basic pay previously received * * * while employed in a civilian position * * *”, we have added a new paragraph § 531.223(i) to expressly exclude a rate of pay received as a member of the uniformed services from rates of pay that may be used as the highest previous rate. “Uniformed services” is defined in 5 U.S.C. 2101.

A commenter requested clarification on determining an employee’s maximum payable rate when the employee has a retained rate under part 536. We have added a new paragraph § 531.223(j) excluding retained rates from rates of pay that may be used as the highest previous rate. Under part 536 of the interim regulations, a retained rate is based on an employee’s highest applicable rate, including any applicable locality rate after any geographic conversion. This clarification is consistent with the policy in effect before May 1, 2005, that a locality-adjusted retained rate could not be used as a highest previous rate. The agency may use the rate of pay the employee received immediately before his or her entitlement to pay retention as the employee’s highest previous rate.

Comment Applicable to Removal of Special Pay Adjustments for Law Enforcement Officers

The interim regulations removed subpart C of part 531, which dealt with special geographic adjustments for law enforcement officers (LEOs) under section 404 of the Federal Employees Pay Comparability Act of 1990, because all of the special geographic adjustments for LEOs have been surpassed by regular locality payments under 5 U.S.C. 5304. One commenter asked hypothetically whether an employee would become entitled to special geographic adjustments for LEOs if locality payments were to decrease and fall below the LEO special geographic adjustments. Although such a scenario seems unlikely under current circumstances, OPM would address such a situation by regulation if it were to occur.

Comment Applicable to General Schedule Within-Grade Increases

One agency asked if an increase in pay an employee receives when moving from a non-GS pay system to the GS pay system would be an equivalent increase, as determined under the rules in § 531.407. Section 531.407 provides a list of personnel actions that are considered equivalent increases for the purpose of determining when GS employees are entitled to their next within-grade increase. The within-grade increase rules take into account personnel actions that occur within the GS pay system and within a non-GS pay system (for the purpose of determining when an employee is eligible to receive a within-grade increase after movement from a non-GS to a GS position). Personnel actions that occur within the GS pay system are listed in § 531.407(a). Personnel actions that occur within a non-GS system are listed in § 531.407(b).

We have revised § 531.407(b) to clarify that the personnel actions listed in paragraph (b) must have occurred in the non-GS pay system. If an employee receives an increase in pay as a result of moving between non-GS pay systems, from a non-GS to the GS pay system, or from the GS pay system to a non-GS pay system, such personnel actions are not considered equivalent increases.

However, when certain personnel actions occur simultaneously with a pay system change under authority of the non-GS pay system and those personnel actions are within-level or within-range increases that result in forward movement in the rate range that applies to the employee's new position, such actions are considered equivalent increases. This would include, for example, a pay increase that is paid simultaneously with a pay system change to account for the value of accrued within-grade increases under the former system or to provide a promotion-equivalent increase. We have revised § 531.407(b)(2) to clarify that such a simultaneous personnel action is considered an equivalent increase. We also have revised § 531.407(b)(2)(ii) to clarify that placement under a new basic pay schedule within the same pay system is not an equivalent increase when such placement results in a nondiscretionary basic pay increase to account for occupational pay differences.

Comments Applicable to Locality Rates

Determining an Employee's Official Worksite (§ 531.605)

In the Supplementary Information for the interim regulations published on

May 31, 2005, we invited comments on a proposal to revise the regulations so that, in cases involving a temporary promotion or reassignment, the official worksite for the employee's permanent position of record would be considered to be the official worksite of the temporary position of record for pay-setting purposes (unless the employee receives relocation benefits under 5 U.S.C. 5737).

One agency supported the proposal. Another agency suggested revising the proposal to provide agencies with the flexibility to determine whether or not the official worksite should be changed, depending on which location would provide the employee with the greatest pay entitlement. Revising the proposal as suggested would not be equitable to an employee who is permanently reassigned or promoted to a different location and cannot receive the same benefit due to the geographic conversion rule in § 531.205. A third agency summarized conflicting comments it received from its subcomponents on this issue.

We will consider these comments further as we review the need for changes in OPM requirements related to documentation of personnel actions. Accordingly, we have not included the proposed changes in these final regulations.

The interim regulations implemented changes in determining an employee's official worksite that OPM proposed on January 5, 2005, as part of a larger notice of proposed rulemaking (70 FR 1068). Under § 531.605(a), the official worksite generally is the place where the employee regularly performs his or her duties. We are making clarifying revisions in § 531.605(a) to provide that, when an employee's work involves recurring travel or the work location varies on a recurring basis, the official worksite is the location where the work activities for his or her position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work.

Under § 531.605(d) (as issued in the May 2005 interim regulations), a teleworker must report to the regular worksite at least once a week on a regular and recurring basis in order for the regular worksite to be the employee's official worksite. One agency recommended removing this portion of the regulations because of the "potentially adverse impact that the interim regulations will have on employees who are currently teleworking from outside their locality pay area."

We do not agree. It is not consistent with the law (5 U.S.C. 5304) to pay locality payments based on an employee's regular worksite if the employee generally does not perform his or her duties in that locality pay area. We do not see any reason to remove the requirements in § 531.605(d). The public had an opportunity to comment on the proposed regulations issued in January 2005, and we addressed the comments we received on those proposed regulations in the Supplementary Information accompanying the interim regulations issued in May 2005.

Another agency suggested that OPM delete "at least once a week" from the regulation and allow the agency to determine what constitutes having an employee report to the official worksite on a regular and recurring basis. We do not agree that the determination of an employee's official worksite should be made by individual agencies without criteria or parameters. Providing certain specific criteria in regulations is essential to ensure that agencies pay employees fairly and consistently, especially in situations such as telework arrangements. However, we have revised § 531.605 to replace the once-a-week standard with a twice-a-pay-period standard. Revised § 531.605 allows an agency to treat the regular worksite for a telework employee's position of record as the employee's official worksite if the employee works at the regular worksite for the employee's position of record at least twice each biweekly pay period on a regular and recurring basis. We are identifying additional examples of temporary situations in which an agency may make an exception to the twice-a-pay-period standard: (1) An extended period of approved absence from work, (2) a period during which the employee is in temporary duty travel status away from the official worksite, or (3) a period during which an employee is temporarily detailed to work at a location other than a location covered by a telework agreement. These changes will provide agencies some additional flexibility in determining official worksites for teleworkers while continuing to ensure such determinations are made consistently and meet the intent of the locality pay law.

Relationship of Locality Rates to Other Pay Rates (§ 531.608)

A union and an agency requested that OPM waive § 531.608 for certain Department of Defense civilian engineers until implementation of the National Security Personnel System

(NSPS) in October 2006. The agency noted that an employee's entitlement to a special rate is terminated when an employee's locality rate exceeds a corresponding special rate; the agency was concerned how this loss of entitlement to the special rate would affect the employee's promotion entitlement. The agency also expressed concerns about possible recruitment and retention problems.

OPM has no authority to delay the effective date of this regulation until implementation of NSPS. The provisions regulated under § 531.608(b) are required by law at 5 U.S.C. 5305(c). See the discussion in the "Comment Applicable to the Effective Date" section within this Supplementary Information. Also see the discussion of promotions involving special rates under "Comments Applicable to General Schedule Basic Pay Setting" within this Supplementary Information. To address any existing or likely staffing problems, an agency may request that OPM establish or increase special rates under § 530.305 or use other tools such as recruitment and retention incentives under 5 CFR part 575.

Treatment of Locality Rates as Basic Pay (§ 531.610)

In the Supplementary Information for the interim regulations published May 31, 2005, we invited comments on whether the final regulations should make a change in the treatment of locality rates in computing danger pay allowances and post differentials. Since August 2004, OPM regulations have provided that locality rates are considered basic pay in computing danger pay allowances and post differentials in foreign areas for which the State Department has authorized danger pay allowances, as long as the employee's official worksite is located in a locality pay area (i.e., within the 48 contiguous States or the District of Columbia). (See 69 FR 47353, August 5, 2004.) Employees receiving locality rates are eligible for post differentials only when they are temporarily detailed (including a work assignment while in temporary duty travel status) to a post differential area for at least 42 consecutive days.

OPM received comments on the August 2004 interim regulations from three agencies that a locality rate should be considered basic pay for the purpose of computing danger pay and post differentials for all employees on temporary duty assignments at overseas posts designated for post differentials as well as for those posts designed for danger pay.

OPM solicited comments in the May 2005 interim regulations on whether it is appropriate to continue the current rules and consider special rates as basic pay in computing post differentials where danger pay allowances do not apply, while locality rates are not considered rates of basic pay in this same situation. Two agencies responded that the difference in treatment is not appropriate because it is not consistent with the intent of the new pay administration regulations, which is to treat both locality rates and special rates as supplements to the General Schedule. OPM also solicited comments on whether we should maintain the existing policy of using detailed employees' locality rates in computing danger pay allowances and post differentials only in danger pay areas or establish a new policy requiring the use of detailed employees' locality rates to compute post differentials authorized in any area (regardless of whether danger pay applies). Three agencies clearly supported extending the policy to other post differential areas. No commenters opposed the proposals.

We agree with the commenters. We are revising § 531.610(f) to treat locality pay as basic pay for the purpose of computing danger pay under 5 U.S.C. 5928, post differentials for foreign areas under 5 U.S.C. 5925(a), and post differentials for nonforeign areas under 5 U.S.C. 5941 when an employee's official worksite is in a locality pay area.

Miscellaneous Provisions (§ 531.611)

Section 531.611(a) of the interim regulations provides that a locality rate may be paid only for those hours for which an employee is in a pay status. An agency requested that OPM clarify the situations where an employee is in a pay status.

An employee is in a pay status during the hours for which an employee receives pay, such as when the employee works or uses paid time off. This provision was in the former § 531.606(d). Under 5 U.S.C. 5304(c)(2)(B), a locality-based comparability payment must "be paid in the same manner and at the same time as the basic pay payable to such employee pursuant to any provision of law outside of this section."

Comments Applicable to Grade and Pay Retention

Definitions of Management Action, Position of Record, and Temporary Reassignment (§ 536.103)

An agency requested that OPM clarify an employee's entitlement to grade or pay retention in situations in which an

employee is reduced in grade or pay for inability to perform the duties of his or her position because of a medical or physical condition beyond the employee's control. The agency noted that the definition of *reduced in grade or pay for personal cause* states that such a reduction is not considered to be for personal cause. However, the agency requested that OPM clarify whether such a reduction is caused or influenced by a management action or if the employee is reduced in grade or pay at the employee's request. The agency recommended that OPM revise the regulations to provide that a determination to grant or not to grant grade or pay retention in demotions based on physical or mental inability to perform should be based on the individual circumstances of each case and should be left to the discretion of the agency.

We do not believe it is necessary to revise the regulations. An employee who is reduced in grade or pay for inability to perform the duties of his or her position because of a medical or physical condition beyond the employee's control would not be entitled to mandatory or optional grade retention because that is not a basis for grade retention. However, such an employee normally will be eligible for optional pay retention under § 536.302 if the reduction in grade or pay is the result of a management action, unless the employee's reduction satisfies one of the conditions for mandatory pay retention in § 536.301.

Another agency requested clarification regarding the definition of *position of record* in § 536.103. The definition in the interim regulations stated that it excludes "any position to which an employee is temporarily detailed." The agency asked OPM to clarify whether the exclusion of any position to which an employee is temporarily detailed includes any temporary action (including temporary promotion). The exclusion refers only to situations when the employee is temporarily detailed. We are revising the definition of *position of record* in §§ 530.302, 531.203, 531.602, and 536.103 to clarify that a position to which an employee is temporarily detailed is not documented as a *position of record*. An employee who is on detail is considered for pay and strength count purposes to be permanently occupying his or her regular position. Unless the agency chooses to use a Standard Form 50 (Notification of Personnel Action), a detail is generally documented with a Standard Form 52 (Request for Personnel Action).

The same agency also asked whether there is a Nature of Action Code for a *temporary reassignment*. The agency stated that previously temporary reassignments have not been processed by the GPPA.

Section 536.102(c) provides that a temporary reassignment is not a basis for grade or pay retention. A *reassignment* is defined in § 210.102(b)(12) as a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion. An agency may intend to reassign an employee to another position for a specified period of time, but the agency would still use the Nature of Action (NOA) Code 721 for reassignments. OPM staffing regulations make no distinction between permanent and temporary reassignments. However, certain OPM regulations recognize this distinction. For example, application of the pay retention regulation requires that the time-limited nature of a reassignment be documented in some way beyond a NOA code.

Mandatory Grade Retention or Optional Grade Retention (§§ 536.201 and 536.202)

An agency requested that OPM clarify whether a reclassification process, as that term is used in § 536.201(a)(2), includes the correction of an erroneous classification. It does. See 5 CFR part 511, subpart G.

Another agency requested that OPM clarify whether mandatory or optional grade retention applies when an employee moves without a break in service of more than 3 days from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (NAFI) to a position under a covered pay system in the same agency. The agency stated that § 536.201(e) and § 536.202(d) of the interim regulations appeared to have the same wording.

We have determined that the regulations in effect prior to May 1, 2005, did not provide grade retention to a NAFI employee who moved to a position in a covered pay schedule. A NAFI employee would not have a reduction-in-force right to a competitive or excepted service position under OPM's 5 CFR part 351 regulations. In addition, OPM has previously determined that the movement from NAFI to another pay system would not be as a result of a reclassification process. (See discussion in 57 FR 182, September 18, 1992.) Therefore, neither mandatory nor optional grade retention applies when an employee moves without a break in service of more than

3 days from a position in a Department of Defense or Coast Guard NAFI to a position under a covered pay system in the same agency. Adding the NAFI-related provisions in §§ 536.201(e) and 536.202(d) in the interim regulations was an error. Accordingly, we are removing §§ 536.201(e) and 536.202(d). These changes bring the grade retention regulations in conformity with § 536.102(b)(8) and (d). If an agency provided grade retention to an employee moving from a NAFI position to a position under a covered pay system based on the erroneous provision in the interim regulations, that action should be corrected.

Loss of Eligibility for Grade Retention and Termination of Grade Retention (§§ 536.207 and 536.208)

An agency recommended that OPM clarify whether an employee who is eligible for optional grade retention would be ineligible for optional pay retention if he or she waives optional grade retention. The agency recognized that, under §§ 536.207(c) and 536.208(d) of the interim regulations, an employee is not eligible for pay retention if the employee elects to terminate mandatory eligibility for grade retention. The agency believed it was not clear that an employee is also ineligible to receive pay retention if he or she waives optional grade retention.

We agree that clarification is needed. Both § 536.207(a) and § 536.208(d) cross reference § 536.207(a)(5), which deals with loss of eligibility for mandatory grade retention. While the provision dealing with loss of eligibility for optional grade retention in § 536.207(b) refers to the conditions in § 536.207(a), we agree that the effect on optional grade retention is not clear. Accordingly, we have revised §§ 536.207(c) and 536.208(d) to clarify that an employee is not eligible for pay retention if the employee elects to terminate mandatory or optional eligibility for grade retention. This is consistent with the provision in § 536.207(b)(1) concerning loss of eligibility for optional grade retention.

Mandatory Pay Retention (§ 536.301)

A commenter requested clarification about whether an employee whose payable rate of basic pay otherwise would be reduced as a result of a management action that places the employee in a formal employee development program generally used Governmentwide is entitled to pay retention under § 536.301(a)(5) when the employee is moving from a non-covered pay system to a covered pay system. The commenter believed the

employee would be entitled to pay retention.

We agree that mandatory pay retention under § 536.301(a)(5) can apply to an employee who is moving from a non-covered pay system to a covered pay system, but only if this movement is within the same agency so that it qualifies as a "placement," as required by § 536.301(a)(5). If such a movement involves a "transfer" to a different agency, the gaining agency may provide optional pay retention as long as the employee is otherwise eligible. We have revised § 536.301(a) to clarify that, subject to the requirements in § 536.102 and § 536.301, an agency must provide pay retention to an employee who moves between positions under a covered pay system, or from a position not under a covered pay system to a position under a covered pay system, and whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as a result of one of the actions listed in paragraph (a). The actions listed in paragraph (a) include placement in a position under a formal employee development program generally used Governmentwide.

Another commenter suggested revising § 536.301(a)(6) to be consistent with the promotion rules in § 531.214. The commenter noted that, under § 536.301(a)(6), an agency must provide pay retention to an employee in a position under a covered pay system whose payable rate of basic pay otherwise would be reduced as a result of the application of the promotion rule for GS employees under 5 U.S.C. 5334(b) and 5 CFR 531.214 when the employee's payable rate of basic pay after promotion exceeds the maximum rate of the highest applicable rate range. The commenter requested clarification because step D of the promotion rules in § 531.214(d)(3)(i) and (4)(i) provides that, if the rate identified in step C exceeds the maximum of the rate range identified in step D, the employee's payable rate is (1) that maximum rate, or (2) if the employee's existing rate is higher than that maximum rate, a retained rate under 5 CFR part 536 equal to that existing rate. The commenter also requested that OPM clarify a similar provision under § 536.301(a)(7), which states that an agency must provide pay retention to an employee in a position under a covered pay system whose payable rate of basic pay otherwise would be reduced as a result of the application of the promotion rule for prevailing rate employees under 5 CFR 532.407 when the employee's payable rate of basic pay after

promotion exceeds the maximum scheduled rate of the grade, as described in 5 CFR 532.407(b).

We agree that a revision to § 536.301 is needed to clarify how a retained rate is created when application of a promotion increase rule for GS or prevailing rate employees results in a rate of basic pay that exceeds the maximum rate of the highest applicable rate range for the employee's new position. We are deleting former paragraphs (a)(6) and (a)(7) and inserting a new paragraph (b) in § 536.301 to address retained rates resulting from application of a promotion rule. We are adding a reference to the GS and prevailing rate promotion increase rules and noting that, under those rules, a retained rate is created only when an employee's existing rate before promotion exceeds the maximum rate of the grade to which promoted, and such retained rate is set to equal that existing rate. Retained rates created under the GS or prevailing rate system promotion rule are not created based on a finding that pay would otherwise be reduced, because the promotion rules themselves prevent such a reduction. These promotion-rule retained rates should be rare, since they should occur only when an employee is being promoted from the high steps of a high special rate range to a non-special rate range. Employees with an existing retained rate under 5 CFR part 536 who are promoted are excluded from this provision because they are covered by the rules in § 536.304(c)(3)–(5).

Determining an Employee's Pay Retention Entitlement (§ 536.304)

Two commenters requested that OPM allow their agencies to continue paying locality payments on top of retained rates.

OPM is not able to accommodate the commenters' request. Section 301(a)(1) of the Act amended the definition of "scheduled rates of basic pay" in 5 U.S.C. 5302 so that a retained rate was no longer considered a scheduled rate of basic pay. Locality pay under 5 U.S.C. 5304 is paid on top of a scheduled rate of basic pay (see 5 U.S.C. 5304(c)(1)(B)). Thus, locality pay ceased to be payable on top of a retained rate effective May 1, 2005. Instead, § 536.304 provides that an eligible employee is entitled to a retained rate if his or her rate of basic pay (including any locality payment or special rate, but after geographic conversion under § 536.303(a)) exceeds the maximum rate of the highest applicable rate range for the new position or geographic area. The retained rate will equal the employee's former rate of basic pay (including any

locality payment or special rate supplement).

Comment Requesting Definition of "One Year"

One agency recommended that OPM define what constitutes "one year" as provided in §§ 531.223(b), 531.407(a)(5), and 536.203(b). We did not change the use of the term "one year" in the interim regulations, and the clarification is not directly related to changes made by the Federal Workforce Flexibility Act of 2004. We will review the need to clarify "one year" in future regulations, and, if warranted, we will invite comments on the use of the term.

Additional Miscellaneous Changes

The final regulations also include additional miscellaneous changes to correct technical errors or omissions and to improve clarity. For example, in various places in parts 530, 531, and 536, we are clarifying that references to a "rate" being used in lieu of a "step" refer to the relative position in range of a GM employee's off-step rate. We also are revising the definition of special rate supplement in §§ 530.302, 531.203, and 531.602 to clarify that, when a special rate schedule covers both law enforcement officer positions and other positions, the value of the *special rate supplement* will be less for law enforcement officers because they have a higher base rate. Additional miscellaneous changes are described below.

In subpart G of part 359 (dealing with SES saved rates), we are making the following changes:

- Adding a parenthetical explanation in § 359.705(a)(1) to clarify that the rate of basic pay in effect for the position in which the appointee is being placed refers to a rate of basic pay within the normal rate range of that position, consistent with the rules of the pay system covering such position.
- Correcting an omission by adding a paragraph (c)(3) to § 359.705 to provide that an SES saved rate is considered to be an employee's rate of basic pay for the same purposes that apply to a retained rate under part 536. This is consistent with OPM's stated purpose for making changes to § 359.705, which was explained in the Supplementary Information for the interim regulations—namely, to "make changes that are consistent with * * * the changes made in the pay retention provisions in part 536 * * * ." (See 70 FR 31286.)

In subpart C of part 530 (dealing with special rates), we are making the following changes:

- Removing the words "under 5 CFR 359.705 or 5 CFR part 536" from the

definition of *rate of basic pay* in § 530.302 because these references are included in the definition of *retained rate* in the same section.

- Revising the last sentence of § 530.304(a) to make the language regarding the limitation on special rates more consistent with the language in 5 U.S.C. 5305(a)(1).

- Revising § 530.309(d) to add a cross reference to § 530.308 and to update a reference to an action under § 930.214. OPM revised the administrative law judge program regulations in 5 CFR part 930, subpart B, in March 2007, which included renumbering § 930.214 as § 930.211.

In subpart B of part 531 (dealing with GS basic pay setting), we are making the following changes:

- Revising the definition of *rate of basic pay* in § 531.203 to clarify that, for the purpose of applying the maximum payable rate rule using a rate under a non-GS pay system as an employee's highest previous rate, the non-GS rate may not be a type of rate that is generally excluded under § 531.223. We are also adding references to 5 CFR 530.308, 531.610, and 536.307. Those regulations address the purposes for which a special rate is considered a rate of basic pay, a locality rate is considered a rate of basic pay, and a retained rate is considered a rate of basic pay, respectively.

- In § 531.205, replacing "(or rate)" with "(or a GM employee's GS rate)" in the second sentence.
- Revising § 531.212(a)(3) to clarify a "non-permanent appointment" excludes a Schedule C appointment under 5 CFR part 213. An agency may not use the superior qualifications and special needs pay-setting authority when an employee moves from a Schedule C appointment to a non-Schedule C appointment, unless the employee has a 90-day break in service. We are also listing non-permanent appointments and time-limited appointments separately to increase clarity.

- Adding employment under the Student Career Experience Program under 5 CFR 213.3202(b) as a new paragraph (3)(v) in § 531.212(a). A similar provision was included in the former superior qualifications and special needs pay-setting regulations, but it was inadvertently left out of the interim regulations.

- Revising § 531.215 to clarify an agency is not limited in pursuing action for misconduct or other problems and setting pay in accordance with such action when an employee is in a supervisory probationary period, consistent with 5 U.S.C. 3321(b)(2). Such an action, however, would have to

be taken in accordance with applicable laws and regulations.

- Revising § 531.221(a)(1) to clarify that the maximum payable rate rule may be used when an employee moves from a non-GS pay system to the GS pay system without a change in position. We are also clarifying that an agency may use the maximum payable rate rule upon termination of grade or pay retention.

- In § 531.244, replacing “rate of basic pay” in each place it appears with “GS rate” and replacing “GM rate” in paragraph (a)(2) with “GS rate”.

- Replacing “rate of basic pay” in § 531.246 with “GS rate”.

- Replacing steps 1–6 with steps A-F in § 531.247 to be consistent with other tables in the regulations.

In subpart D of part 531 (dealing with GS within-grade increases), we are making the following changes:

- Deleting the last sentence of § 531.406(b)(2). The sentence is not necessary because § 531.406(b)(3) sufficiently states that time in a nonpay status that is in excess of the allowable amount extends a waiting period for a within-grade increase by the excess amount, except as provided in § 531.406(c).

- Revising § 531.407(a)(2) to improve clarity.

In subpart F of part 531 (dealing with locality-based comparability payments), we are updating a reference in § 531.611(d) to the administrative law judge program regulations. OPM revised 5 CFR 930, subpart B, in March 2007, which included renumbering § 930.214 as § 930.211.

In 5 CFR part 536 (dealing with grade and pay retention), we are making the following changes:

- Replacing the term *representative rate* with *comparison rate* throughout part 536, including the definition of *representative rate* in § 536.103. OPM’s regulations in 5 CFR 351.203 define the term *representative rate* for reduction-in-force purposes. Separate terms will help reduce any confusion since the terms are defined differently.

- Correcting an omission by clarifying in § 536.208 that termination of grade retention benefits takes effect at the end of the day before separation from service if termination is the result of a break in service. We are also adding in § 536.208 a necessary exception to the rule that the termination of grade retention benefits takes effect at the end of the last day of the pay period in which the employee elects to terminate grade retention benefits. The exception is that, if an employee’s election specifically provides that the termination will take effect at the end of a later pay period,

the election is considered to be made effective on the last day of that later pay period.

- Revising § 536.304(c)(3) and (c)(4) to add references to the terminating conditions in § 536.308.

- Adding, in § 536.307, an explicit reference to adverse action provisions in 5 CFR part 752 as a purpose for which a retained rate is considered a rate of basic pay, consistent with longstanding policies and OPM’s interpretation of the interim regulations. We also are removing “OPM” from § 536.307(a)(11) to clarify that a retained rate is considered a rate of basic pay for the purpose of computing and applying other provisions as specified in regulations of OPM or other agencies.

- Revising the language in § 536.308(a)(2) to clarify that entitlement to an equal or higher rate of basic pay during a temporary promotion or temporary reassignment does not terminate an employee’s preexisting entitlement to pay retention, but that the pay retention entitlement is held in abeyance.

- Correcting an omission in § 536.308 by clarifying that termination of pay retention benefits takes effect at the end of the day before separation from service if termination is the result of a break in service.

- Correcting an omission in § 536.308 by clarifying that termination of pay retention benefits takes effect at the end of the day before the employee becomes entitled to an equal or greater rate as described in § 536.308(a)(2).

In 5 CFR part 550 (dealing with miscellaneous pay administration matters), we are making the following changes:

- In §§ 550.202 and 550.703, adding the word “supplement” after “special rate” in paragraph (1) of the definition of *rate of basic pay*.

- Deleting a reference to a temporary appointment pending establishment of a register (TAPER) in the definition of *nonqualifying appointment* in § 550.703 because the TAPER authority is no longer used.

We are replacing the term *representative rate* with *comparison rate* in §§ 550.703, 831.503, and 842.206 and clarifying those definitions. Under 5 CFR 536.102(b)(6), an agency may not provide grade or pay retention under part 536 to an employee who moves between positions not under a covered pay system or from a position under a covered pay system to a position not under a covered pay system. However, the severance pay (§ 550.703) and discontinued service retirement provisions (§§ 831.503 and 842.206) do not have this same exclusion. Therefore,

although paragraph (2) in the definition of new term *comparison rate* in § 536.103 of the grade and pay retention regulations refers to comparing grades or levels of work in making reasonable offer determinations when one of the grades or levels of work is not under a covered pay system, this comparison for making reasonable offer determinations for severance pay or discontinued service retirement purposes is not limited to whether the offered position is under a covered pay system.

Title 38 Market Pay

Since publication of the interim regulations in May 2005, OPM has used its authority under 5 U.S.C. 5371 to delegate to certain agencies authority to provide market pay to physicians and dentists under 38 U.S.C. 7431(c), consistent with the authority of the Department of Veterans Affairs. Under this OPM delegation, title 38 market pay may be paid on top of General Schedule base rates in lieu of locality payments under 5 U.S.C. 5304, special rate supplements under 5 U.S.C. 5305, or grade and pay retention under 5 U.S.C. 5361–5365. We decided it would not be necessary to amend the regulations related to locality payments, special rate supplements, and grade and pay retention to address the exclusion of physicians and dentists receiving title 38 market pay. Those exclusions are not effected under the authorities related to those payments, but are based on OPM’s administrative authority under 5 U.S.C. 5371. Title 38 market pay is generally not considered basic pay for GS pay administration purposes; however, it may be used in establishing an employee’s highest previous rate. (See revised definitions of *rate of basic pay* and *special rate* in § 531.203 and new paragraph (a)(5) in § 531.221.)

Pay Setting for NAFI Employees Who Move to GS Positions

This notice finalizes the rules in 5 CFR 531.216, as published in the May 2005 interim regulations, concerning pay setting for nonappropriated fund instrumentality (NAFI) employees who move to GS positions. However, section 1114 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181, January 28, 2008) amended 5 U.S.C. 5334(f) to provide that a NAFI employee in the Department of Defense (DOD) or the United States Coast Guard (USCG) (as described in 5 U.S.C. 2105(c)) who moves voluntarily to a GS position in DOD or USCG, respectively, without a break in service of more than 3 days may (at the employing agency’s discretion) have the GS rate of basic pay set at the lowest

step rate of the applicable GS grade that equals or exceeds the former NAFI rate. This amendment became effective on January 28, 2008. Under previous law, the employee's GS rate of basic pay could not exceed the formerly applicable NAFI rate in such voluntary movements; thus, setting the rate at a GS step for these former NAFI employees generally resulted in a reduction in pay. The amendment permits DOD and USCG to set pay at the next higher step rate, avoiding a pay reduction. OPM has issued proposed regulations to conform with this statutory change. (See 73 FR 50575, August 27, 2008.)

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR 294, 359, 362, 451, 530, 531, 532, 534, 536, 550, 591, 630, 831, and 842

Administrative practice and procedure; Air traffic controllers; Alimony; Claims; Decorations, medals, awards; Disability benefits; Firefighters; Freedom of information; Government employees; Hospitals; Income taxes; Intergovernmental relations; Law enforcement officers; Pensions; Reporting and recordkeeping requirements; Research; Retirement; Students; Transportation and travel expenses; Wages.

Office of Personnel Management.

Michael W. Hager,
Acting Director.

■ The interim rule published May 31, 2005, at 70 FR 31278 and amended at 70 FR 74995 (December 19, 2005) is adopted as final with the changes set forth below, and OPM further amends 5 CFR chapter I as follows:

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

■ 1. The authority citation for part 359 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3302, and 3596, unless otherwise noted.

Subpart G—Guaranteed Placement

■ 2. In § 359.705, revise paragraphs (a)(1) and (c) to read as follows:

§ 359.705 Pay.

(a) * * *

(1) The rate of basic pay in effect for the position in which the appointee is being placed (i.e., a rate of basic pay within the normal rate range of the position in which placed, consistent with the rules of the pay system covering such position);

(c)(1) For an employee placed in a General Schedule position, a saved rate established under this section may not be supplemented by a locality payment under 5 U.S.C. 5304, a special rate supplement under 5 U.S.C. 5305, or a similar payment under other legal authority.

(2) A saved rate established under this section is subject to the limitation on Senior Executive Service pay in 5 U.S.C. 5382 of the rate for level II of the Executive Schedule.

(3) A saved rate established under this section is considered an employee's rate of basic pay for the same purposes as a retained rate under 5 CFR part 536, as described in 5 CFR 536.307.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 3. The authority citation for part 530 continues to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338 and sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103-89, 107 Stat. 981.

Subpart C—Special Rate Schedules for Recruitment and Retention

■ 4. In § 530.302—

■ a. Revise the definition of *position of record*;

■ b. Amend the definition of *rate of basic pay* by removing the words “under 5 CFR 359.705 or 5 CFR part 536”; and

■ c. Revise the definition of *special rate supplement*.

The revisions read as follows:

§ 530.302 Definitions.

* * * * *

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not

documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Special rate supplement means the portion of a special rate paid above an employee's GS rate. However, for a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, the special rate supplement equals the portion of the special rate paid above the officer's LEO special base rate. When a special rate schedule covers both LEO positions and other positions, the value of the special rate supplement will be less for law enforcement officers receiving an LEO special base rate (since that rate is higher than the corresponding GS rate). The payable amount of a special rate supplement is subject to the Executive Schedule level IV limitation on special rates, as provided in § 530.304(a).

■ 5. In § 530.304, revise the last sentence of paragraph (a) to read as follows:

§ 530.304 Establishing or increasing special rates.

(a) * * * A special rate may not exceed the rate for level IV of the Executive Schedule.

* * * * *

■ 6. In § 530.309, revise paragraph (d) to read as follows:

§ 530.309 Miscellaneous provisions.

* * * * *

(d) Consistent with § 530.308, the reduction or termination of an employee's special rate supplement in accordance with the requirements of this subpart is not an adverse action under 5 CFR part 752, subpart D, or an action under 5 CFR 930.211.

■ 7. In § 530.322, revise the first sentence of paragraph (a) to read as follows:

§ 530.322 Setting pay when a special rate schedule is newly established or increased.

(a) *General rule.* When an employee holds a position that becomes covered by a newly established special rate schedule (including a schedule for which coverage is expanded) or increased special rate schedule (including an increased special rate range within a schedule), the agency must set the employee's special rate at the step (or relative position in range for

a GM employee) of the grade on the new special rate schedule that corresponds to the employee's existing numerical step (or relative position in range for a GM employee) as in effect immediately before the new special rate schedule takes effect, except as otherwise provided in this section. * * *

* * * * *

§ 530.323 [Amended]

■ 8. In § 530.323, remove the parenthetical clause "(or rate)" in both places in paragraph (c) and add "(or relative position in range for a GM employee)" in each place.

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 9. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

Subpart B—Determining Rate of Basic Pay

■ 10. In § 531.203, revise the definitions of position of record, rate of basic pay and special rate supplement to read as follows:

§ 531.203 Definitions.

* * * * *

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative

action for the position held by a GS employee before any deductions, including a GS rate, an LEO special base rate, a special rate, a locality rate, and a retained rate, but exclusive of additional pay of any other kind. For the purpose of applying the maximum payable rate rules in §§ 531.216 and 531.221 using a rate under a non-GS pay system as an employee's highest previous rate, rate of basic pay means a rate of pay under other legal authority which is equivalent to a rate of basic pay for GS employees, as described in this definition, excluding a rate under § 531.223. (See also 5 CFR 530.308, 531.610, and 536.307.)

* * * * *

Special rate means a rate of pay within a special rate schedule established under 5 CFR part 530, subpart C, or a similar rate for GS employees established under other legal authority (e.g., 38 U.S.C. 7455). The term special rate does not include an LEO special base rate or an adjusted rate including market pay under 38 U.S.C. 7431(c).

* * * * *

Special rate supplement means the portion of a special rate paid above an employee's GS rate. However, for a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, the special rate supplement equals the portion of the special rate paid above the officer's LEO special base rate. When a special rate schedule covers both LEO positions and other positions, the value of the special rate supplement will be less for law enforcement officers receiving an LEO special base rate (since that rate is higher than the corresponding GS rate). The payable amount of a special rate supplement is subject to the Executive Schedule level IV limitation on special rates, as provided in 5 CFR 530.304(a).

* * * * *

§ 531.204 [Amended]

■ 11. In § 531.204, amend paragraph (c) by removing the parenthetical clause "(or relative position)" and adding in its place "(or relative position in range for a GM employee)".

■ 12. In § 531.205, revise the second sentence to read as follows:

§ 531.205 Converting pay upon change in location of employee's official worksite.

* * * The agency must first set the employee's rate(s) of basic pay in the applicable pay schedule(s) in the new location based on his or her position of record (including grade) and step (or a GM employee's GS rate) immediately

before the change in the employee's official worksite. * * *

■ 13. In § 531.212—

- a. Revise paragraph (a)(3)(i);
■ b. Remove "or" at the end of paragraph (a)(3)(ii);
■ c. Remove the period at the end of paragraph (a)(3)(iii) and insert a semicolon; and
■ d. Add paragraphs (a)(3)(iv) and (a)(3)(v).

The revision and additions read as follows:

§ 531.212 Superior qualifications and special needs pay-setting authority.

(a) * * *

(3) * * *

(i) Employment under a time-limited appointment in the competitive or excepted service;

* * * * *

(iv) Employment under a non-permanent appointment (excluding a Schedule C appointment under 5 CFR part 213) in the competitive or excepted service; or

(v) Employment under the Student Career Experience Program under 5 CFR 213.3202(b).

* * * * *

■ 14. In § 531.213, remove the parenthetical clause "(or rate)" and add in its place "(or relative position in range for a GM employee)".

■ 15. In § 531.215, revise the last sentence in paragraph (d) to read as follows:

§ 531.215 Setting pay upon demotion.

* * * * *

(d) * * * However, nothing in this paragraph prohibits an agency from taking action against an employee serving under a probationary period under 5 U.S.C. 3321(a)(2) for cause unrelated to supervisory or managerial performance and setting pay in accordance with such action.

* * * * *

■ 16. In § 531.221—

- a. Revise the first sentence in paragraph (a)(1);
■ b. Revise paragraph (a)(4); and
■ c. Add a new paragraph (a)(5).

The revisions and addition read as follows:

§ 531.221 Maximum payable rate rule.

(a) General. (1) An agency may apply the maximum payable rate rule as described in this section to determine an employee's payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon reemployment, transfer, reassignment, promotion, demotion, change in type of

appointment, termination of a critical position pay authority under 5 CFR part 535, movement from a non-GS pay system, or termination of grade or pay retention under 5 CFR part 536. * * *

* * * * *

(4) In applying this section, an agency must treat a critical position pay rate under 5 CFR part 535 as if it were a rate under a non-GS pay system, as described in paragraph (d) of this section.

(5) In applying this section, an agency must treat an adjusted GS rate that includes market pay under 38 U.S.C. 7431(c) as if it were a rate under a non-GS pay system, as described in paragraph (d) of this section.

* * * * *

■ 17. In § 531.223—

■ a. Remove “or” at the end of paragraph (g);

■ b. Remove the period at the end of paragraph (h) and insert a semicolon; and

■ c. Add new paragraphs (i) and (j) to read as follows:

§ 531.223 Rates of basic pay that may not be used as the highest previous rate.

* * * * *

(i) A rate received as a member of the uniformed services; or

(j) A retained rate under 5 U.S.C. 5363 or a similar rate under another legal authority.

§ 531.244 [Amended]

■ 18. In § 531.244, remove “rate of basic pay” in each place it appears and add “GS rate” in each place, and remove “GM rate” in paragraph (a)(2) and add “GS rate” in its place.

■ 19. Revise § 531.246 to read as follows:

§ 531.246 Within-grade increases for GM employees.

GM employees are entitled to within-grade increases as provided under subpart D of this part. A within-grade increase may not cause a GM employee’s GS rate to exceed the maximum GS rate of his or her grade. GM employees may receive quality step increases as provided in subpart E of this part.

■ 20. In § 531.247, revise the table in paragraph (c)(2) as follows:

§ 531.247 Maximum payable rate rule for GM employees.

* * * * *

(c) * * *
(2) * * *

- Step A Find the difference between the employee’s highest previous rate and the minimum rate for the GS rate range (for the employee’s current grade) in effect at the time the highest previous rate was earned.
- Step B Find the difference between the maximum rate and the minimum GS rate for the rate range identified in step A. (If the GS maximum rate was not payable because of the EX level V pay limitation, use the uncapped maximum rate.)
- Step C Divide the result from step A by the result from step B. Carry this result to the seventh decimal place and truncate, rather than round, the result. This decimal factor represents the employee’s relative position in the rate range.
- Step D Using the current GS rate range (for the employee’s current grade), find the difference between the maximum rate and the minimum rate. (If the maximum GS rate was not payable because of the EX level V pay limitation, use the uncapped maximum GS rate.)
- Step E Multiply the result from step D by the factor derived under step C.
- Step F Add the result from step E to the minimum rate for the employee’s current GS rate range and round to the next higher whole dollar. This rate is the maximum payable GS rate the agency may pay the employee (subject to the EX level V pay limitation).

* * * * *

Subpart D—Within-Grade Increases

§ 531.406 [Amended]

- 21. In § 531.406, remove the last sentence of paragraph (b)(2).
- 22. In § 531.407, revise paragraphs (a)(2)(i) and (ii) and paragraph (b) to read as follows:

§ 531.407 Equivalent increase determinations.

- (a) * * *
- (2) * * *

(i) A temporary promotion if, at the end of the that temporary promotion, the employee is returned to the grade from which promoted; or

(ii) A promotion to a higher-graded supervisory or managerial position when the employee does not satisfactorily complete a probationary period established under 5 U.S.C. 3321(a)(2) and is returned to a position at the lower grade held before promotion;

* * * * *

(b) *Non-GS employees who move to the GS pay system.* When an employee performs service under a non-GS pay system for Federal employees and that service is potentially creditable towards

a GS within-grade increase waiting period, an equivalent increase is considered to occur at the time of any of the following personnel actions in the non-GS pay system:

(1) A promotion to a higher grade or work level within the non-GS pay system (unless the promotion is cancelled and the employee’s rate of basic pay is redetermined as if the promotion had not occurred); or

(2) An opportunity to receive a within-level or within-range increase that results in forward movement in the applicable range of rates of basic pay (including an increase granted immediately upon movement to the non-GS pay system from another pay system—e.g., to account for the value of accrued within-grade increases under the former pay system or to provide a promotion-equivalent increase), where “forward movement in the applicable range” means any kind of increase in the employee’s rate of basic pay other than an increase that is directly and exclusively linked to—

(i) A general structural increase in the employee’s basic pay schedule or rate range (including the adjustment of a range minimum or maximum); or

(ii) The employee’s placement under a new basic pay schedule within the same pay system, when such placement results in a nondiscretionary basic pay increase to account for occupational pay differences.

* * * * *

Subpart F—Locality-Based Comparability Payments

■ 23. In § 531.602, revise the definitions of *position of record* and *special rate supplement* to read as follows:

§ 531.602 Definitions.

* * * * *

Position of record means an employee’s official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee’s most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the

employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Special rate supplement means the portion of a special rate paid above an employee's scheduled annual rate of pay. However, for a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, the special rate supplement equals the portion of the special rate paid above the officer's LEO special base rate. When a special rate schedule covers both LEO positions and other positions, the value of the special rate supplement will be less for law enforcement officers receiving an LEO special base rate (since that rate is higher than the corresponding GS rate). The payable amount of a special rate supplement is subject to the Executive Schedule level IV limitation on special rates, as provided in 5 CFR 530.304(a).

* * * * *

- 24. Revise § 531.605 to read as follows:

§ 531.605 Determining an employee's official worksite.

(a)(1) Except as otherwise provided in this section, the official worksite is the location of an employee's position of record where the employee regularly performs his or her duties.

(2) If the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work.

(3) An agency must document an employee's official worksite on an employee's Notification of Personnel Action (Standard Form 50 or equivalent).

(b) For an employee who is relocated and authorized to receive relocation expenses under 5 U.S.C. chapter 57, subchapter II (or similar authority), the official worksite is the established worksite for the position in the area to which the employee has been relocated. For an employee authorized to receive relocation expenses under 5 U.S.C. 5737 in connection with an extended assignment resulting in a temporary change of station, the worksite associated with the extended assignment is the official worksite. (See 41 CFR 302-1.1.)

(c) For an employee whose assignment to a new worksite is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location, the official worksite in effect immediately before the assignment remains the official worksite through the date of separation.

(d) For an employee covered by a telework agreement, the following rules apply:

(1) If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite. However, in the case of such an employee whose work location varies on a recurring basis, the employee need not work at least twice each biweekly pay period at the regular official worksite (where the employee's work activities are based) as long as the employee is regularly performing work within the locality pay area for that worksite.

(2) An authorized agency official may make an exception to the twice-in-a-pay-period standard in paragraph (d)(1) of this section in appropriate situations of a temporary nature, such as the following:

- (i) An employee is recovering from an injury or medical condition;
- (ii) An employee is affected by an emergency situation, which temporarily prevents the employee from commuting to his or her regular official worksite;
- (iii) An employee has an extended approved absence from work (e.g., paid leave);
- (iv) An employee is in temporary duty travel status away from the official worksite; or
- (v) An employee is temporarily detailed to work at a location other than a location covered by a telework agreement.

(3) If an employee covered by a telework agreement does not meet the requirements of paragraphs (d)(1) or (d)(2) of this section, the employee's official worksite is the location of the employee's telework site.

(4) An agency must determine a telework employee's official worksite on a case-by-case basis. A determination made under this paragraph (d) is within the sole and exclusive discretion of the authorized agency official, subject only to OPM review and oversight.

(e) In applying paragraph (d) of this section for the purpose of other location-based pay entitlements under other regulations that refer to this

section, the reference to a *locality pay area* is deemed to be a reference to the applicable geographic area associated with the given pay entitlement. For example, for the purpose of special rates under 5 CFR part 530, subpart C, the reference to a *locality pay area* is deemed to be a reference to the geographic area covered by a special rate schedule.

- 25. In § 531.610—
 - a. Revise the introductory text;
 - b. Revise paragraph (f);
 - c. Redesignate paragraphs (g) through (n) as (h) through (o), respectively; and
 - d. Add a new paragraph (g).

The revisions and addition read as follows:

§ 531.610 Treatment of locality rate as basic pay.

A locality rate is considered to be an employee's rate of basic pay only for the purpose of computing or applying—

* * * * *

(f) Post differentials under 5 U.S.C. 5925(a) and danger pay allowances under 5 U.S.C. 5928 for an employee temporarily working in a foreign area when the employee's official worksite is located in a locality pay area;

(g) Post differentials under 5 U.S.C. 5941 and 5 CFR part 591, subpart B, for an employee temporarily working in a nonforeign area when the employee's official worksite is located in a locality pay area;

* * * * *

- 26. In § 531.611, revise paragraph (d) to read as follows:

§ 531.611 Miscellaneous provisions.

* * * * *

(d) Consistent with § 531.610, a reduction or termination of a locality rate under § 531.609 is not an adverse action for the purpose of 5 CFR part 752, subpart D, or an action under 5 CFR 930.211.

PART 536—GRADE AND PAY RETENTION

- 27. The authority citation for part 536 is revised to read as follows:

Authority: 5 U.S.C. 5361-5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103-89), 107 Stat. 981; § 536.301(b) also issued under 5 U.S.C. 5334(b); § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411), 118 Stat. 2305; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92-502.

Subpart A—General Provisions

- 28. In § 536.103—

- a. Revise the definition of *position of record*;
- b. Amend the definition of *representative rate* by removing “representative rate” in each place it appears and adding in its place “comparison rate”; and
- c. Revise the definition of *reduced in grade or pay for personal cause*.

The revisions read as follows:

§ 536.103 Definitions.

* * * * *

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Reduced in grade or pay for personal cause means a reduction in grade or rate of basic pay based on the conduct, character, or unacceptable performance of an employee. In situations in which an employee is reduced in grade or pay for inability to perform the duties of his or her position because of a medical or physical condition beyond the employee's control, the reduction in grade or pay is not considered to be for personal cause.

* * * * *

§ 536.105 [Amended]

- 29. In § 536.105, amend paragraph (a) by removing “representative rates” and inserting “comparison rates”; and amend paragraph (b) by removing “representative rate” and inserting “comparison rate”.

Subpart B—Grade Retention

§ 536.201 [Amended]

- 30. In § 536.201, remove paragraph (e).

§ 536.202 [Amended]

- 31. In § 536.202, remove paragraph (d).

§ 536.206 [Amended]

- 32. In § 536.206, amend paragraph (b) by removing “(or rate)” and adding in its place “(or relative position in range for a GM employee)”.

- 33. In § 536.207, revise paragraph (a)(2) by removing “representative rates” and inserting “comparison rates”; and amend paragraph (c) by revising the second sentence to read as follows:

§ 536.207 Loss of eligibility for grade retention.

* * * * *

(c) * * * An employee is not eligible for pay retention under subpart C of this part based on an action that provided eligibility for grade retention if the employee elects to terminate eligibility for grade retention under paragraph (a)(5) or (b) of this section.

- 34. In § 536.208, revise paragraphs (c) and (d) to read as follows:

§ 536.208 Termination of grade retention.

* * * * *

(c) Termination of grade retention benefits takes effect—

(1) At the end of the day before separation from service if termination is the result of a break in service;

(2) At the end of the day before placement if the termination is the result of the employee's placement in another position; or

(3) At the end of the last day of the pay period in which the employee—

- (i) Declines a reasonable offer;
- (ii) Elects to terminate grade retention benefits (except that, if an employee's election specifically provides that the termination will take effect at the end of a later pay period, the election is considered to be made effective on the last day of that later pay period for the purpose of applying this paragraph); or
- (iii) Fails to enroll in, or comply with reasonable written requirements established to assure full consideration under, a program providing priority consideration for placement.

(d) If an employee's entitlement to grade retention terminates under this section, the employee's rate of basic pay must be set in accordance with the pay-setting rules and pay rates applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). An employee is not entitled to pay retention under subpart C of this part based on a reduction in basic pay resulting from waiver of the employee's grade retention entitlement under paragraph (a)(5) or (b) of § 536.207.

Subpart C—Pay Retention

- 35. In § 536.301—

- a. Revise the introductory text of paragraph (a);

- b. Add “or” at the end of paragraph (a)(5);
- c. Remove paragraphs (a)(6) and (a)(7);
- d. Redesignate paragraph (a)(8) as paragraph (a)(6);
- e. Redesignate paragraphs (b) through (d) as paragraphs (c) through (e), respectively; and
- f. Add a new paragraph (b).

The revision and addition read as follows:

§ 536.301 Mandatory pay retention.

(a) Subject to the requirements in § 536.102 and this section, an agency must provide pay retention to an employee who moves between positions under a covered pay system or from a position not under a covered pay system to a position under a covered pay system and whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as a result of—

* * * * *

(b) An agency must establish a retained rate when application of a promotion increase rule for General Schedule or prevailing rate employees results in a payable rate of basic pay that exceeds the maximum rate of the highest applicable rate range for the employee's new position. (See the promotion increase rules in 5 U.S.C. 5334(b) and 5 CFR 531.214 for GS employees and in 5 CFR 532.407 for prevailing rate employees—in particular, the special provisions in these promotion increase rules on establishing a retained rate equal to an employee's existing rate when that existing rate exceeds the applicable range maximum.) Once established, such a retained rate is governed by the provisions of this subpart.

* * * * *

- 36. In § 536.303, revise the second sentence after the heading of paragraph (a) as follows:

§ 536.303 Geographic conversion.

(a) *Geographic conversion at the time of action that may provide initial entitlement to pay retention.* * * * The agency must identify the highest applicable rate range that would apply to the employee's position of record before the pay action as if that position were stationed at the new official worksite and determine the employee's converted payable rate of basic pay based on the step (or relative position in range for a GM employee) in that range that corresponds to the employee's step (or relative position in range for a GM employee) before the pay action. * * *

* * * * *

■ 37. In § 536.304, revise paragraphs (c)(3) and (c)(4) to read as follows:

§ 536.304 Determining an employee's pay retention entitlement.

* * * * *

(c) * * *

(3) If the employee's pay system is not changing but the employee is being promoted to a higher-graded position, the agency must apply the applicable promotion rules to determine the employee's payable rate of basic pay (e.g., the rules in 5 CFR 531.214(d)(5) for GS positions and 5 CFR 532.407 for Federal Wage System positions). If the promotion action results in a terminating condition as described in § 536.308 (e.g., the resulting rate is equal to or greater than the existing retained rate), pay retention ceases to apply. Otherwise, the employee's existing retained rate continues.

(4) If the employee is moving to a position under a different covered pay system whose grade has a higher comparison rate, the agency must apply the applicable pay administration rules to determine the employee's payable rate of basic pay (e.g., part 531, subpart B, for GS positions and part 532 for Federal Wage System provisions). If the promotion action results in a terminating condition as described in § 536.308 (e.g., the resulting rate is equal to or greater than the existing retained rate), pay retention ceases to apply. Otherwise, the employee's existing retained rate continues.

* * * * *

■ 38. In § 536.307—

■ a. Redesignate paragraphs (a)(10) and (a)(11) as paragraphs (a)(11) and (a)(12), respectively;

■ b. Amend paragraph (a)(11), as redesignated, by removing "OPM"; and

■ c. Add a new paragraph (a)(10).

The addition reads as follows:

§ 536.307 Treatment of a retained rate as basic pay for other purposes.

(a) * * *

(10) Adverse action provisions in 5 CFR part 752;

* * * * *

■ 39. In § 536.308—

■ a. Amend paragraph (a)(4) by removing "representative rates" and adding in its place "comparison rates"; and

■ b. Revise paragraphs (a)(2) and (c). The revisions read as follows:

§ 536.308 Loss of eligibility for or termination of pay retention.

(a) * * *

(2) The employee is entitled to a rate of basic pay under a covered pay system which is equal to or greater than the

employee's retained rate (after applying any applicable geographic conversion under paragraph (b) of this section), except that entitlement to a retained rate will not be terminated based on entitlement to an equal or higher rate of basic pay during a temporary promotion or temporary reassignment but will be held in abeyance during that temporary period.

* * * * *

(c) Termination of pay retention benefits takes effect—

(1) At the end of the day before separation from service if termination is the result of a break in service;

(2) At the end of the day before the employee becomes entitled to an equal or greater rate as described in paragraph (a)(2) of this section;

(3) At the end of the day before placement or movement if the termination is the result of the employee's placement in or movement to another position; or

(4) At the end of the last day of the pay period in which the employee declines a reasonable offer.

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart B—Advances in Pay

■ 40. The authority citation for subpart B of part 550 continues to read as follows:

Authority: 5 U.S.C. 5524a, 5545a(h)(2)(B); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

■ 41. In § 550.202, amend the definition of rate of basic pay by adding the word "supplement" after "special rate" in paragraph (1) of the definition.

Subpart G—Severance Pay

■ 42. The authority citation for subpart G of part 550 continues to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964–1965 Comp., p. 357.

■ 43. In § 550.703—

■ A. Add a definition of comparison rate in alphabetical order;

■ B. Amend the definition of nonqualifying appointment by removing paragraph (f)(2) and redesignating paragraphs (f)(3) through (f)(6) as paragraphs (f)(2) through (f)(5), respectively;

■ C. Amend the definition of rate of basic pay by adding the word "supplement" after "special rate" in paragraph (1) of the definition;

■ D. Amend the definition of reasonable offer by removing "representative rate" in both places in paragraph (c)(4) and by

adding in its place "comparison rate"; and

■ E. Remove the definition of representative rate.

The addition reads as follows:

§ 550.703 Definitions.

* * * * *

Comparison rate has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grades or levels of work for all situations not covered by paragraph (1) of that definition.

* * * * *

PART 831—RETIREMENT

■ 44. The authority citation for part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C.

8336(d)(2), and section 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C.

7701(b)(2); Sec. 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also issued under section 7(b) and (e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec.

831.205 also issued under section 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.301 also issued under section 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and section 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337; Sec. 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp. p. 317; Sec.

831.663 also issued under sections 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under section 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under section 636 of Appendix C to Pub. L. 106–554, 114 Stat. 2763A–164; subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

Subpart E—Eligibility for Retirement

■ 45. In § 831.503, revise paragraph (b)(3)(iv) to read as follows:

§ 831.503 Involuntary retirement.

* * * * *

(b) * * *

(3) * * *

(iv) Not lower than the equivalent of two grades or pay levels below the

employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the comparison rate of the grade or pay level that is two grades below that of the current position will be compared with the comparison rate of the grade or pay level of the offered position. For this purpose, "comparison rate" has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grade or levels of work in making reasonable offer determinations in all situations not covered by paragraph (1) of that definition.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

■ 46. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and section 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under section 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under section 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under section 4005 of Pub. L. 101–239, 103 Stat. 2106 and section 7001 of Pub. L. 101–508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under section 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under section 226(c)(2) of Public Law 108–176, 117 Stat. 2529.

Subpart B—Eligibility

■ 47. In § 842.206, revise paragraph (c)(3)(iv) to read as follows:

§ 842.206 Involuntary retirement.

* * * * *

(c) * * *

(3) * * *

(iv) Not lower than the equivalent of two grades or pay levels below the employee's current grade or pay level, without consideration of the employee's eligibility to retain his or her current grade or pay under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the comparison rate of the grade or pay level that is two grades below that of the current position will be compared with the comparison rate of the grade or pay level of the offered position. For this purpose, "comparison rate" has the meaning given that term in § 536.103 of this chapter, except paragraph (2) of that definition should be used for the purpose of comparing grades or levels of work in making reasonable offer determinations in all situations not covered by paragraph (1) of that definition.

* * * * *

[FR Doc. E8–26562 Filed 11–6–08; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 300

RIN 3206–AL18

Time-in-Grade Rule Eliminated

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is eliminating the time-in-grade restriction on advancement to competitive service positions in the General Schedule. The rule eliminates the 52-week time-in-grade requirement for promotions. Employees must continue to meet occupational qualification standard requirements and any additional job-related qualification requirements established for the position.

DATES: The rule is effective March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Warren by telephone (202) 606–0960; by FAX (202) 606–2329; by TTY (202) 418–3134; or by e-mail janice.warren@opm.gov.

SUPPLEMENTARY INFORMATION: On February 6, 2008, OPM published in the *Federal Register* at 73 FR 6857 a proposal to eliminate the time-in-grade (TIG) restriction found in 5 CFR part 300, subpart F. The restriction applies to Federal employees in competitive service General Schedule positions at

grades 5 and above. These employees qualify for promotions to higher grades if they have: (1) At least one year of specialized experience equivalent in difficulty to the next lower grade level or (in some cases) the equivalent education; and (2) service of at least 52 weeks at their current grade (known as "time in grade").

The public comment period for the proposed regulation ended on April 7, 2008. We received comments from seven agencies, five unions, one national employee organization, and 33 individuals. We also received 61 form letters from individuals. We carefully considered the comments; as a result, we have decided to eliminate the time-in-grade restriction. The final regulation will become effective 120 days after the publication date of this notice in order to give agencies time to amend policies and communicate changes to their human resources staff and employees. Below is a discussion of the comments OPM received.

Comment Extension

The national employee organization and almost half of the form letter commenters suggested extending the comment period because the supplementary information accompanying the proposed rule provided incorrect dates for OPM's prior proposals to eliminate the time-in-grade restrictions. The February 6, 2008, proposal stated that OPM published its prior proposals on June 14, 1995, and January 10, 1996. In fact, they were published on June 15, 1994, and January 10, 1995. However, the February 6, 2008 proposal provided correct citations to the *Federal Register* notices for the prior proposals at 59 FR 30717 and 60 FR 2546, respectively.

We are not extending the comment period. OPM provided the dates and citations for its previously-published proposals as background information only. Potential commenters could adequately evaluate the February 6, 2008 proposal without reviewing the prior proposals. Moreover, the February 6, 2008 proposal supplied correct *Federal Register* citations for both of the previously-published proposals, thereby adequately facilitating their review by potential commenters.

Potential for Abuse and Favoritism

Many commenters stated that abolishing the time-in-grade requirement would lead to abuse of a manager's promotion authority, primarily because it would allow managers to promote their favorite employees. These commenters believe that eliminating the time-in-grade