

Proposed Rules

Federal Register

Vol. 65, No. 102

Thursday, May 25, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 536

RIN 3206-A188

Grade and Pay Retention

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management is issuing proposed regulations giving agencies discretionary authority to grant pay retention to certain employees moving to positions under pay systems other than the General Schedule or the Federal Wage System. This new flexibility would allow agencies to prevent eligible employees from suffering a reduction in pay that would otherwise result from a management action. The proposed regulations also provide that grade retention will no longer apply to employees moving into the General Schedule or the Federal Wage System from noncovered pay systems.

DATES: Comments must be received on or before July 24, 2000.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Administration, Workforce Compensation and Performance Service, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415-8200 (FAX: (202) 606-0824 or EMAIL: payleave@opm.gov)

FOR FURTHER INFORMATION CONTACT: Sharon Herzberg (202) 606-2858 or FAX: (202) 606-0824 or EMAIL: payleave@opm.gov.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 5361-5365, agencies may grant grade or pay retention to employees covered by the General Schedule (GS) pay system or the Federal Wage System (FWS) when a reduction in grade or pay is caused or influenced by a management action and certain other

conditions are met. While the law expressly provides that these provisions apply to movements within or between those two covered pay schedules, the Office of Personnel Management (OPM) has provided by regulation that these provisions may also be applied to certain employees who move from a noncovered pay schedule to a covered pay schedule. (See definition of *employee* in 5 CFR 536.102.) This regulatory extension of the grade and pay retention provisions is authorized by 5 U.S.C. 5365(b)(1), which allows OPM to extend the application of "all or portions" of the grade and pay retention provisions to employees under noncovered pay schedules who move to a covered pay schedule.

The Department of Justice has requested that we extend pay retention to members of the Senior Executive Service (SES) who move to immigration judge (IJ) positions. While there is no provision in statute or regulation that permits management to direct the movement of a member of the SES to an IJ position, there are circumstances that have resulted in the movement of an SES member to a non-SES position that has a lower rate of pay. Examples include an SES member who voluntarily accepts a non-SES position following receipt of a notice of position abolishment or a notice of directed geographic reassignment (if there is no mobility agreement), or other management action that causes or influences the employee to move to a lower-paid position.

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, immigration judges were covered by the GS pay system. Before the statute was enacted, the Department of Justice was able to offer pay retention to an SES member who moved to an IJ position as a result of a management action, as described above. However, section 371 of the Act removed IJs from the GS pay system and established a unique IJ pay system with a top rate set at 92 percent of the rate of basic pay for SES level ES-5. As a result of the Act, immigration judges are no longer under a "covered pay system" and therefore are no longer eligible for pay retention. Because the statutory maximum IJ pay rate is less than the rates of pay for ES-5 and ES-6, an SES member who moves to an IJ position without pay retention could

suffer a significant loss in pay. The inability to grant pay retention to employees who move between noncovered pay systems has deprived the Department of Justice of a needed degree of flexibility.

At the request of the Department of Justice, we reviewed this issue and determined that we have authority under the law to extend grade and pay retention to employees who move to or within noncovered pay schedules. Under 5 U.S.C. 5365(b)(2), OPM is authorized to apply "all or portions" of the grade and pay retention provisions to "individuals to whom such provisions do not otherwise apply." We further concluded that it would be appropriate as a matter of policy to amend our regulations to provide agencies with discretionary authority to grant pay retention to employees moving to or within noncovered pay schedules. Since these other pay schedules are generally not administered by OPM, we concluded that any use of the pay retention authority in these circumstances should be discretionary. We note that, under some circumstances, grade and pay retention benefits are already subject to an agency's discretion. (See 5 CFR 536.103(b) and 536.104(b).)

We concluded that this extension should not apply to grade retention, since that benefit was designed specifically for retention of grades under the GS and FWS pay systems. As explained above, the law allows OPM to selectively apply portions of the grade and pay retention provisions. Under current regulations, grade retention does not apply to members of the Senior Executive Service (SES) or employees in senior-level positions under 5 U.S.C. 5376 (SL/ST) even if they move to a covered pay schedule. (See 5 CFR 536.105(c).) However, the current regulations are silent regarding grade retention for administrative law judges (ALJs). Thus, it is possible for an ALJ who moves to a GS-14 position because of a management action to have GS-15 established as a retained grade. For consistency, we are proposing to amend the regulations to provide that grade retention does not apply to any employee who moves from, between, or within non-GS/FWS schedules—including the pay schedules for SES members, SL/ST positions, ALJs, and IJs.

We are proposing that the normal rules for adjusting a retained rate not be applied to employees covered by a regulatory extension of pay retention under 5 U.S.C. 5365(b) who are not in a GS or FWS position while receiving pay retention, or who are in a GS or FWS position but receiving a retained rate in excess of the maximum rate of the applicable basic pay schedule (GS or FWS). Under the normal rules, a GS or FWS employee's retained rate is adjusted by 50 percent of the dollar increase in the maximum rate for the employee's grade. However, other pay systems may not have the same type of grade-based pay structure or are subject to different annual pay adjustments.

For example, many senior-level pay schedules are linked to the Executive Schedule, which sometimes has not been adjusted on an annual basis. This can result in anomalous situations. If an SES member at the ES-2 level (currently \$107,100) moves to a GS-15 position and receives a retained rate, that retained rate subsequently could be increased to a rate above the ES-2 rate in effect at some future date. (Note: Retained rates for GS employees are capped at the rate for level V of the Executive Schedule, which limits this problem; however, agencies are required to adjust and maintain the "retained rate of record" without regard to the level V cap.) We are proposing to exercise our authority under 5 U.S.C. 5365(b) not to apply the retained rate adjustment portion of the statutory pay retention provisions for the categories of employees described above. Thus, these employees' retained rates would be frozen with no provision for any pay adjustment.

These proposed regulations would not impair any agency's independent authority to fix pay for employees under a pay schedule administered by that agency. The proposed extension of the pay retention provisions would be relevant only if the agency lacks any other authority to establish a saved rate for its employees. For example, the Department of Justice does not have authority to create a saved rate under the IJ pay system based on the former rate received by an SES member. The proposed regulations would allow the Department of Justice, at its discretion, to extend pay retention to an SES member moving to an IJ position. To be entitled to pay retention, an employee must also meet all other qualifying conditions (e.g., the pay reduction is caused or influenced by a management action, not at the employee's request or because of personal cause; there is no break in service; and there is no declination of a reasonable offer).

To effect the policy change proposed here, we propose to add a new paragraph (d) to § 536.104 to give agencies discretionary authority to provide pay retention to any otherwise eligible Federal "employee," as defined in 5 U.S.C. 2105. The definition of *employee* in § 536.102 would be broadened to include an "employee," as defined in 5 U.S.C. 2105, to whom pay retention is granted under this discretionary authority. However, we are also proposing to add a sentence to § 530.102 that expressly excludes officials in or moving from an Executive Schedule position, since we believe pay retention is not appropriate for such officials. In addition, § 536.105(c), which excludes certain employees from grade retention, would be revised to exclude any employee who moves from a position not under a statutorily covered pay schedule to a position under a statutorily covered pay schedule. Also, we propose to remove paragraph (3) under the definition of *representative rate* and paragraph (b) of § 536.203, since grade retention would no longer apply to employees moving from noncovered pay schedules.

We also propose to revise § 536.205(c) to provide that an employee who moves from a noncovered pay schedule to a statutorily covered pay schedule and who receives a retained rate in excess of the maximum rate of the statutorily covered pay schedule is not entitled to any increase in basic pay when there is an increase in the scheduled rates. In addition, to clarify and simplify the regulations, we propose to delete the language in the existing § 536.205(g), which we believe is unnecessary in view of other provisions found elsewhere in parts 531, 532 and 536.

Instead, we propose to revise § 536.205(g) to address how the rules for administering a retained rate apply to employees under an administratively covered pay schedule who were granted pay retention under § 536.104(d). Specifically, the proposed change provides that the retained rate of such an employee will be frozen and that the regular or normal rate to which the employee otherwise would be entitled (but for pay retention) must be treated as a single-rate range in applying paragraphs (b) and (d) of that section, including the provisions governing the 150 percent cap established by 5 U.S.C. 5363(b)(2).

As noted above, eligibility for grade and pay retention is subject to certain exclusions, as provided in 5 CFR 536.105. Paragraph (a)(1) of that section bars grade or pay retention for employees who move from a position that is not in an "agency" as defined in

5 U.S.C. 5102. This definition of "agency," which is located in paragraph (a) of section 5102, is used to exclude employees in certain agencies from coverage under the GS classification and pay system. Other employees are excluded from the GS system if they fall under one of the categories of employees listed in paragraph (c) of section 5102 or if they are excluded by some other provision of law.

The exclusion in § 536.105(a)(1) is not statutory, but reflects a limitation OPM imposed simultaneous with the regulatory extension of grade and pay retention eligibility to employees moving to a covered pay schedule from a noncovered pay schedule. Recently OPM approved a variation to § 536.105(a)(1) at the request of the Department of Defense (DOD). (See Notice of OPM Variation, Notice No. 99-47, November 3, 1999.) While DOD is a covered agency under 5 U.S.C. 5102, several DOD subcomponents are expressly excluded from the definition of "agency" in 5 U.S.C. 5102(a)—namely, the National Security Agency, the Defense Intelligence Agency, and the National Imagery and Mapping Agency. Therefore, employees in these subcomponents are barred by § 536.105(a)(1) from receiving grade and pay retention upon movement to a covered pay schedule. DOD requested that OPM approve a variation to 5 CFR 536.105(a)(1) to allow otherwise eligible employees who move to GS or FWS positions from positions in these DOD subcomponents to receive grade or pay retention, even though these DOD subcomponents are excluded from the definition of an "agency" in 5 U.S.C. 5102(a). OPM agreed that a variation was warranted to ensure equal treatment of DOD employees.

Upon further consideration, we believe that the provision in § 536.105(a)(1) barring grade or pay retention for employees who move from a position that is not an agency as defined in 5 U.S.C. 5102 should be removed altogether. The current rule results in inequitable treatment of employees by providing different benefits based on the specific method used to exclude an employee from coverage under the GS system. For pay retention purposes, we believe it should not matter whether an employee is excluded from the GS system under paragraph (a) or (c) of 5 U.S.C. 5102 or under some other provision of law. Therefore, we propose to remove the existing paragraph (a)(1) from § 536.105. This will extend pay retention eligibility to certain categories of non-GS employees. (Grade retention is not at issue, since we are already proposing to

bar grade retention for all employees in or moving from non-GS/FWS pay systems.)

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 536

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Janice R. Lachance,
Director.

Accordingly, OPM is proposing to amend part 536 of title 5 of the Code of Federal Regulations as follows:

PART 536—GRADE AND PAY RETENTION

1. The authority citation for part 536 continues to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 7202(f) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), 104 Stat. 1338–336; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.307 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92–502.

Subpart A—Definitions; Coverage and Applicability

2. In § 536.102, the definition of *Representative rate* is amended by adding “or” after the semicolon at the end of paragraph (1), removing the “or” at the end of paragraph (2), and replacing the semicolon with a period, and removing paragraph (3); and the definition of *employee* is revised to read as follows:

§ 536.102 Definitions.

* * * * *

Employee means an employee as defined in 5 U.S.C. 5361 and also an individual who moves from a position which is not under a statutorily covered pay schedule to a position which is under a statutorily covered pay schedule, provided that the individual’s employment immediately prior to the move was not on a temporary or term basis. *Employee* also means an employee as defined in 5 U.S.C. 2105 who is granted pay retention under § 536.104(d), subject to the limitations

set forth in this part. However, *employee* does not include an official in or moving from an Executive Schedule position.

* * * * *

3. In § 536.104, a new paragraph (d) is added to read as follows:

§ 536.104 Coverage and applicability of pay retention.

* * * * *

(d) The head of an agency may apply the pay retention provisions of this part to an individual not under a statutorily covered pay schedule (as defined in 5 U.S.C. 5361) whose rate of basic pay would otherwise be reduced as the result of a management action, provided that individual is an employee as defined in 5 U.S.C. 2105 (excluding an official in or moving from an Executive Schedule position). Coverage is subject to all other qualifying conditions and limitations established in this part.

4. In § 536.105, paragraph (a)(1) is removed, paragraphs (a)(2) through (a)(5) are redesignated as (a)(1) through (a)(4), respectively, and paragraph (c) is revised to read as follows:

§ 536.105 Exclusions.

* * * * *

(c) Grade retention under § 536.103 does not apply to an employee who—

- (1) Moves to a position not under a statutorily covered pay schedule; or
- (2) Moves from a position not under a statutorily covered pay schedule to a position under a statutorily covered pay schedule.

5. Section 536.203 is revised to read as follows:

§ 536.203 Determination of retained grade.

An employee who is in a position under a statutorily covered pay schedule immediately prior to the action that gives entitlement to grade retention shall retain the grade held immediately prior to the action.

6. In § 536.205, paragraphs (c) and (g) are revised to read as follows:

§ 536.205 Determination of rate of basic pay.

* * * * *

(c) When an increase in the scheduled rates of the grade of the employee’s position occurs while the employee is under pay retention, the employee is entitled to 50 percent of the amount of the increase in the maximum rate of basic pay payable for the grade of the employee’s current position. This paragraph does not apply to employees who move from a noncovered pay schedule to a statutorily covered pay schedule and who are receiving a retained rate in excess of the maximum

payable rate of the applicable covered pay schedule.

* * * * *

(g) Notwithstanding paragraphs (b), (c), and (d) of this section, for an employee who is not in a position under a statutorily covered pay schedule while receiving a retained rate (as allowed by § 536.104(d))—

(1) The retained rate is compared to the rate of basic pay that otherwise would apply to the employee but for the retained rate (instead of comparing it to the maximum rate of the rate range for the employee’s position) and is terminated when the retained rate falls below the employee’s otherwise applicable rate;

(2) The retained rate is capped at 150 percent of the rate of basic pay that otherwise would apply to the employee but for the retained rate (instead of 150 percent of the maximum rate of the rate range for the employee’s position); and

(3) The retained rate is frozen and may not be increased.

[FR Doc. 00–13052 Filed 5–24–00; 8:45 am]

BILLING CODE 6325–01–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1735

RIN 0572–AB56

General Policies, Types of Loans, Loan Requirements—Telecommunications Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Supplemental proposed rule.

SUMMARY: The Rural Utilities Service (RUS) is proposing to amend its regulations to update the criteria for determining “reasonably adequate service” levels for local exchange carriers and providers of specialized telecommunications service. This supplemental proposed rule is part of an ongoing RUS project to modernize agency policies in order to provide borrowers with the flexibility to continue providing reliable, modern telephone service at reasonable costs in rural areas, while maintaining the security and feasibility of the Government’s loans.

DATES: Written comments on this supplemental proposed rule must be received by RUS by or carry a postmark or equivalent of June 26, 2000.

ADDRESSES: Submit written comments on this supplemental proposed rule to Roberta D. Purcell, Assistant Administrator, Telecommunications