reemployment priority list unless he or she has declined assignment under Subpart G of this part to a position that:

(1) Is full-time;

(2) Is competitive;

(3) Is nontemporary; and

(4) Has a representative rate no lower than that of the position from which the employee was separated.

(b) An other-than-full-time group I or group II employee is entered on the reemployment priority list unless he or she has declined assignment under Subpart G of this part to an other-than-full-time position that:

(1) Is of the same type work schedule (i.e., part-time, intermittent, or seasonal) as the position from which the employee was separated;

(2) Is competitive;

(3) Is nontemporary;

(4) Has a representative rate no lower than that of the position from which the employee was separated; and

(5) Has a regularly scheduled administrative workweek no lower than that or the position from which the employee was separated.

§ 351.1004 Duration of eligibility.

(a) The name of a group I employee remains on the reemployment priority list for 2 years, and a group II employee's name for 1 year, from the date he or she was separated.

(b) An employee's name is deleted from the reemployment priority list when the employee submits a written request to the agency asking that his or her name be deleted.

(c) A full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a non-temporary, full-time, competitive position; or

(2) Declines under this subpart a full-time, nontemporary, competitive position with a representative rate the same as, or higher than, that of the position from which he or she was separated under this part.

(d) An other-than-full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a nontemporary competitive position; or

(2) Declines under this subpart a nontemporary, competitive position with a representative rate, and regularly scheduled administrative workweek, the same as or higher than that of the position from which the employee was separated under this part.

§ 351.1005 Operation of the list in Alaska and overseas.

(a) The name of each group I or group II employee who receives a notice of separation under this part from a competitive position in Alsaka or overseas is entered on the reemployment priority list for the area in which the position from which separated is located, except when:

(1) The employee leaves that area; or

(2) The agency has a general program for rotating employees between overseas areas and the United States and the employee's immediately preceding overseas services or residence, combined with prospective overseas service under available appointments, exceeds the maximum duration of an overseas duty tour in the agency's rotation program.

(b) Upon his or her written request, the name of an employee who leaves the area is entered on the agency's reemployment priority list for:

(1) The commuting area from which he or she was employed for Alaskan or overseas service; or

(2) Another area, except in Alaska or overseas, that is mutually acceptable to the employee and the agency.

(c) In addition to any of the reasons, as appropriate, in § 351.1004(b), (c), or (d), for deleting an employee's name from the reemployment priority list, the name of an employee is deleted from an Alaskan or overseas reemployment priority list when the employee:

(1) Leaves the area covered by that list; or

(2) Becomes disqualified for overseas appointment because of his or her previous service or residence.

(5 U.S.C. 1902, 3315)

[FR Doc. 80-40492 Filed 12-29-80; 8:45 am]

BILLING CODE 6325-01-M

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5 CFR Part 536

Grade and Pay Retention

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement the grade and pay retention provisions of the Civil Service Reform Act of 1978.

EFFECTIVE DATE: January 29, 1981.

FOR FURTHER INFORMATION CONTACT: Larry Holman, 202-632-6127, or Jan Karicher, 202-632-4634.

SUPPLEMENTARY INFORMATION: Interim regulations, effective on the first day of the first applicable pay period beginning on or after January 11, 1979, were published in the **Federal Register** on March 2, 1979 (44 FR 117741). OPM proposed final regulations in this area which were published in the **Federal Register** for a 60-day comment period on June 17, 1980 (45 FR 40990). Based on comments received from Federal agencies, several labor organization representatives and individuals, OPM has made several revisions to the proposed regulations.

Subpart A

With only two exceptions, the intent of the proposed regulations to redelegate authority to agency heads to determine circumstances under which grade or pay retention should be extended was acceptable to the respondents. Those opposed felt the redelegation was too vague and open to inconsistent application. We have clarified the language pertinent to the redelegation. The term, "management-initiated action," has been dropped from § 536.102, 536.103, and 536.206. With regard to grade retention, the language was simplified to show that management's authority is limited to downgrades during reorganizations and reclassifications. The term, "reorganization," has been defined to further identify the bounds of the redelegation. More important, the redelegation still better recognizes the necessity for agency heads to decide what circumstances, outside those prescribed by the law, warrant grade or pay retention in order to promote the efficiency of their operations.

In response to several separate comments, § 536.104 has been extended to include several specific circumstances warranting pay retention. The first calls for pay retention when an employee is downgraded in a reduction in force or reclassification but does not meet the eligibility requirements for grade retention. This extension was included in the interim rgulations. The second extends pay retention to an employee whose basic pay is a special rate moved by management to a lesser special rate position or to a non-special rate position. This circumstance was covered in the interim regulations under § 536.212(a)(2), "* * * reassignment to a position in a different pay schedule."

Some concern was expressed with the term "placement" in the extension of pay retention. The concern was that any movement by an employee in the specified circumstances would warrant coverage. In fact, in any potential entitlement to grade or pay retention, the limitations of the exclusions in § 536.105, especially, "is reduced in grade or pay . . . at the employee's request," means that the placement must be caused or influenced by management. This implies that the movement is beyond the employee's control and/or to further the mission of the agency.

Similarly an individual commented that OPM should not extend pay retention to prevailing rate employees who move from a high to lower wage area. This extension, like the others, is generally for an action which is caused or influenced by management and is not strictly "at the employee's request." Furthermore, it recognizes the needs of management to sometimes move employees to promote an efficient organziation without adversely affecting employees. The extension is, therefore, still included.

Several changes or additions have been made to § 536.102 other than the addition of "reorganization." "Rate of basic pay" has been amended to show that the night and environmental differentials for prevailing rate employees are not included in basic pay protected by grade or pay retention. "Representative rate" now includes the representative rate for a Senior Executive Service employee. "Rate schedule" has been added here and where appropriate throughout Part 536 for use in situations where the movement is not between pay schedules but between rates within a schedule, e.g., special rate movement.

"Temporary reassignment" in both § 536.102 and 536.105 was questioned by a commenter as unnecessary because reassignment implies no promotion or demotion. While this is generally correct, these reassignments can result in pay adjustments, e.g., reassignment to a special rate position or to a higher or lower wage area. The result could be a pay discrepancy which might raise questions of entitlement and, therefore, create the necessity for its use. A suggestion to define "covered pay system" was not adopted because the term was not used in these regulations.

In § 536.105, the most significant change was the altering of the exclusion of non-appropriated fund employees. The only non-appropriated fund employees now excluded are those covered under § 2105(c) of title 5, United States Code, i.e., those in Department of Defense and Coast Guard nonprevailing rate positions. Non-appropriated fund employees, other than those in DOD and the Coast Guard, are covered for most benefit purposes. It is, therefore, consistent to cover them for grade and pay retention.

Several comments suggested we increase the scope of coverage beyond reorganizations and reclassifications for grade retention and to change eligibility requirements from the position being classified for 1 year to the employee being in the position for 1 year. OPM has not adopted these because our ability to regulate this benefit does not allow us to change the intent of the law. We have also not included a restatement of the law or of sections 5337 and 5345 of title 5, which were repealed, because we feel the soon to be released Federal Personnel Manual guidance on grade and pay retention will provide the necessary background. This guidance should also provide information on movements between agencies creating grade retention entitlements and further explain the 52-week/1 year eligibility requirements, both of which raised questions.

A significant question was raised regarding potential entitlement to pay retention when an employee waives grade retention or when an employee requests a demotion for ill health or similar circumstances. In the former case, OPM's position is that once an employee waives grade retention, the employee removes management's influence over the particular action against the employee. Any ensuing loss of pay would be as a result of an employee request and no pay retention could be granted even under the agency's authority. In the latter case these demotions are also at the employee's request unless the agency has already informed the employee that action to downgrade will be taken for non-disciplinary reasons of ill health and the agency offers another position. The agency could then grant pay retention under its authority.

Subpart B

Section 536.202(a) of the proposed regulations has been made a separate section, § 536.201. This reflects the fact that this method of comparing grades and rates is necessary not only for determining grade retention entitlement but also whether the 52-week/1 year at a higher grade requirement has been met, whether a demotion has occurred, or whether an employee has declined an offer at, or been placed in, a grade equal to or greater than the retained grade. This change required renumbering the sections of the entire subpart.

Several changes were made to the section on determining the rate of basic pay. The language of the section was clarified to show what rate of basic pay, including a special rate under 5 U.S.C. 5303, is used to determine pay retention entitlement. The language change also reflects the fact that we will issue regulations shortly as Part 532 for setting pay in the Federal Wage System, when grade and pay retention entitlement terminates.

A paragraph has been added to show that any employee on pay retention receives only 50 percent of the annual comparability increase. This paragraph also demonstrates that this rule only applied to employees on pay retention and only affects increases in the scheduled rates of a position.

Section 536.204(c) of the proposed regulations has been changed as the result of several comments to place an employee who is on pay retention at the maximum rate of the range of the new position when, after receiving only 50 percent of increases in scheduled rates, the employee's pay can be found within the rate range of the new position. This was the rule of the interim regulations. This 50 percent rule is designed only to move the employee into the rate range of the new position and not to adversely affect the employee any more than is necessary.

Several changes have been made to the section describing the criteria for a reasonable offer. The employee must now be informed of his or her right to appeal to OPM the reasonableness of the offer. This provision is similar to other regulations which require an agency to inform employees of their appeal rights. The language has also been changed to show that the offered position must be at least equal in tenure to the position the grade or pay of which is being protected. This change protects the employee who moves during a period of grade or pay retention but is not offered a position whose tenure is equal to or higher than the position which created the entitlement.

OPM has removed the necessity that the employee meets the qualification requirements of the offered position. This is in keeping with regulations regarding reductions in force which allow agencies to waive qualifications in order to place employees. Staffing guidance in the Federal Personnel Manual will reflect the fact that qualifications may be waived when grade or pay retention is involved.

"Commuting area" was not defined because we believe that the current language allows the affected employee the maximum possible protection in an appeal. Designating a specific radius does not fully take into account other transportation circumstances which may affect the reasonableness of an offer.

Several issues were raised concerning the factors for terminating eligibility and/or entitlement to grade and pay retention. Specifically at issue was the extent of the priority placement program provision in grade retention situations. The provision has been extended to include an employee who does not fully comply with written agency requirements of a priority placement program. These requirements can range from formally placing one's name in the program to actively participating in the

program, e.g., filing SF–171's. This ensures maximum effort by the employee to return as quickly as possible to a proper grade or pay level position. This balances management's requirement under § 536.301 to establish placement and classification plans. This prompt return to the proper level recognizes the intent of the law. A similar provision was not added to pay retention situations because of OPM's lack of authority in this area, e.g., restrictions imposed by the statutory construction of section 5363 of title 5, U.S. Code. These restrictions also prevent significant changes in the cessation factors imposed by the law.

These cessation factors for grade retention have also been amended to show that an employee is not declining a reasonable offer when the employee requests a lower graded position than the reduction-in-force position rather than displace another employee. This change avoids harmful and widespread displacement and is in keeping with the intent of the delegation of this authority to agency heads.

Subpart C

The section reserved for grade and pay retention under the merit pay system was determined unnecessary because merit pay employees will be treated the same as General Schedule employees for grade and pay retention purposes. In its place is a section establishing a legal basis for OPM requiring agencies with affected employees to have classification and placement plans. Again, these plans promote the intent of the law, i.e., to return the employee to the proper grade or pay level as quickly as possible.

OPM has adjusted the time period for filing an appeal of the termination of benefits because of the employee's declination of a reasonable offer. It will now be 20 calendar days to conform to the appeal period used by the Merit Systems Protection Board. We decided not to include under this appeal right the termination of benefits due to an employee's failure to fully participate in a priority placement program. These disputes will be based on detailed agency policy and can be better settled within the affected agency through the internal agency grievance procedures or procedures negotiated in labor contracts.

Throughout the regulations several small nonsubstantive changes were made in language to clarify issues and alleviate confusion raised in the comments. Several comments were not accepted for changes in the regulations themselves because we feel the guidance soon to be issued in the Federal Personnel Manual will take these comments into account and clarify issues in this area.

OPM has determined that these are significant regulations for the purposes of E.O. 12044.

Office of Personnel Management.

JoAnn B. Platter,

Assistant Issuance System Manager.

Accordingly, the Office of Personnel Management is revising Part 536 of Title 5, Code of Federal Regulations, to read as follows:

PART 536—GRADE AND PAY RETENTION

Subpart A—Definitions, Coverage and Applicability

Sec.

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

Subpart C—Miscellaneous Provisions

Authority: 5 U.S.C. 5361–5366, Pub. L. 95–454.

Subpart A—Definitions; Coverage and Applicability

§ 536.101 General.

(a) Title VIII of Pub. L. 95–454 (The Civil Service Reform Act of 1978) provides that an employee who is placed in a lower grade as a result of reduction-in-force procedures, or whose position is reduced in grade as a result of reclassification of the position, is entitled to retain for a period of 2 years the grade held immediately before that placement or reduction. It also provides the authority for granting an employee indefinite pay retention. In addition to specifying criteria and conditions for the application of the grade and pay retention provisions, the law authorizes the Office of Personnel Management to extend the application of these provisions to other individuals and situations to which they would not otherwise apply.

(b) This part contains the regulations—including extensions, conditions, criteria, and procedures—which the Office of Personnel Management has prescribed for the administration of grade and pay retention. This part supplements and implements the provisions of 5 U.S.C. 5361–5366, and section 801(b) of Pub. L. 95–454, and must be read together with those sections of law.

§ 536.102 Definitions.

For the purposes of this part:

"Demotion at an employee's request" means a reduction in grade:

(1) Which is initiated by the employee for his or her benefit, convenience or personal advantage, including consent to a demotion in lieu of one for personal cause, and

(2) Which is not caused or influenced by a management action.

"Demotion for personal cause" means a reduction in grade based on the conduct, character, or unacceptable performance of an employee.

"Employee" means an employee as defined in 5 U.S.C. 5361 and also an individual who is moved from a position which is not under a covered pay schedule to a position which is under a covered pay schedule provided that the individual's employment immediately prior to the move was on other than a temporary or term basis.

"Employment on a temporary or term basis" means employment under an appointment having a definite time limitation or designated as temporary or term.

"Rate of basic pay" means, for any pay system, the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay or any kind such as night or environmental differentials in the case of a prevailing rate employee.

"Rate schedule" means a specific set of rates within a pay schedule.

"Reorganization" means the planned elimination, addition or redistribution of functions or duties either wholly within an agency or between agencies.

"Representative rate" means:

(1) The fourth rate of the grade in the case of a position under the General Schedule including the fourth rate of the corresponding grade of the General

Schedule in the case of a position under the merit pay system established by chapter 54 of title 5, United States Code, the single rate of GS–18; or the individual's rate under the Senior Executive Service;

(2) The second rate of the grade of a position under a regular prevailing rate schedule established under subchapter IV of chapter 53 of title 5, United States Code, or in the case of a position with a single rate, the single rate of that position; or

(3) The rate designated as representative of the position by the agency responsible for establishing and adjusting the schedule in the case of a position under a schedule different from those covered in paragraph (1) or (2) of this section.

"Temporary promotion" means a promotion with a definite time limitation, and one which the individual is informed in advance is temporary and would normally require that the individual return to his or her permanent position at the expiration of that promotion.

"Temporary reassignment" means a reassignment with a definite time limitation, and one which the individual is informed in advance is temporary and would normally require that the individual return to his or her permanent position at the expiration of that reassignment.

§ 536.103 Coverage and applicability of grade retention.

(a) Grade retention shall apply to an employee who moves to a position in a covered pay schedule which is lower graded than the position held immediately prior to the demotion in the following circumstances:

(1) As a result of reduction-in-force procedures; or

(2) As a result of a reclassification process.

(b) Except as otherwise covered in paragraph (a) of this section, the head of the agency may offer grade retention to eligible employees who are or might be reduced in grade as the result of a reorganization or reclassification decision announced by management in writing. When an employee is offered a position with grade retention in anticipation of a reduction in grade, the agency shall inform the employee in writing that acceptance of the position is not required and that declination of the offer has no effect on the employee's entitlement to grade retention under paragraph (a) of this section if he or she is actually moved to a lower graded position.

(c)(1) An employee who, immediately prior to being placed in a lower graded position as a result of reduction-in-force procedures, is in a position under a covered pay schedule, is eligible for grade retention only if the employee has served for 52 consecutive weeks or more in position(s) under a covered pay schedule at a grade(s) higher than the position in which the employee is placed.

(2) An employee is eligible for grade retention when his or her position has been reclassified at a lower grade only if the position which is being reduced had been classified at a higher grade(s) for a continuous period of at least 1 year immediately before the reduction.

(3) In situations other than those covered in paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more provided that the service was in an agency as defined in 5 U.S.C. 5102 at a grade(s) higher than the position in which the employee is placed.

§ 536.104 Coverage and applicability of pay retention.

(a) Pay retention shall apply to any employee whose rate of basic pay would otherwise be reduced:

(1) As the result of the expiration of the 2-year period of grade retention; or

(2) As a result of reduction-in-force or reclassification when the employee does not meet the eligibility requirement for grade retention; or

(3) As a result of the reduction or elimination of scheduled rates, except those reflecting a decrease in the level of prevailing rates as determined by a wage survey, or as a result of the reduction or elimination of special schedules or special rates; or

(4) As a result of the placement of an employee into a non-special rate position or into a lower special rate position from a special rate position; or

(5) As a result of the placement of an employee in a position in a lower wage area or in a position in a different pay schedule; or

(6) As a result of the placement of the employee in a formal employee development program generally utilized Governmentwide: Upward Mobility, Apprenticeship, and Career Intern Programs.

(b) Except as otherwise covered in paragraph (a) of this section, the head of the agency may provide pay retention to eligible employees whose rates of basic pay would otherwise be reduced as the result of a management action.

§ 536.105 Exclusions

(a) Grade and pay retention shall not apply to an employee who:

(1) Moves from a position which is not in an agency as defined in 5 U.S.C. 5102; or

(2) Is identified under 5 U.S.C. 2105(c) except prevailing rate employees included under 5 U.S.C. 5361; or

(3) Is reduced in grade or pay for personal cause or at the employee's request; or

(4) Does not satisfactorily complete the probationary period prescribed by 5 U.S.C. 3321(a)(2), and, as a result, is removed from a supervisory or managerial position.

(b) An employee's entitlement to grade or pay retention is not affected by a temporary promotion or temporary reassignment. However, an employee serving under a temporary promotion or temporary reassignment may not retain a grade or rate of basic pay held during the temporary promotion or temporary reassignment.

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

§ 536.201 Comparison of grades in different pay schedules or pay systems.

For the purpose of determining whether the grade of a position is equal to, higher than, or lower than the grade of another position in movements between pay schedules or pay systems, the representative rates of the positions will be compared.

§ 536.202 Period of grade retention.

(a) An employee entitled to grade retention is entitled to retain that grade for 2 years beginning on the date the employee is placed in the lower graded position.

(b) If, during a 2-year period of grade retention, an employee is further reduced in grade under circumstances also entitling the employee to grade retention, the employee shall continue to retain the previous retained grade for the remainder of the previous 2-year retention period. At the end of that period, the employee shall be entitled to retain the grade of the position from which the further reduction in grade was made, until 2 years have passed from the date of the further reduction in grade.

§ 536.203 Determination of retained graded.

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

(b) An employee who is in a position not under a covered pay schedule immediatley prior to the action which gives entitlement to grade retention shall retain:

(1) The lowest grade of the covered pay schedule in which placed which has a representative rate equal to or higher than the representative rate of the grade held immediately prior to that placement; or

(2) The highest grade of the covered pay schedule in which placed, if there is no grade in the covered pay schedule with a representative rate equal to or higher than the representative rate held immediately prior to that placement.

§ 536.204 Determination of applicable rate schedule.

(a) When an employee entitled to grade retention is placed in a position in a different geographical area, the rate schedule which applies to the employee is the rate schedule in the new geographical area.

(b) When an employee entitled to grade retention is placed in a position in, or his or her position is changed to, a different occupational series, the rate schedule which applies to the individual is the rate schedule for the new occupational series.

§ 536.205 Determination of rate of basic pay.

(a) When an employee becomes entitled to grade retention, or moves to another position during a period of grade retention under conditions which permit continuation of the grade retention entitlement, the employee is entitled to the greatest of:

(1) His or her rate of basic pay before the movement, or

(2) The rate of basic pay from the applicable rate schedule for the grade and step (or relative position within a range of rates under the merit pay system) held by the employee before the movement, or

(3) The lowest rate of basic pay from the applicable rate schedule for the retained grade which equals or exceeds the employee's rate of basic pay before the movement.

(b)(1) When an employee becomes entitled to pay retention, or moves to another position while receiving pay retention, the employee's rate of basic pay immediately prior to eligibility or movement shall be compared with the range of rates of basic pay for the position to be occupied by the employee upon this eligibility or movement.

(2) The employee is entitled to the lowest rate of basic pay in the position to be occupied upon the eligibility or movement which equals or exceeds his or her rate of basic pay immediately prior to the eligibility or movement. If the rate of basic pay can be accommodated in the rate range of the latter position, pay retention does not apply.

(3) If the employee's rate of basic pay immediately prior to the pay retention exceeds the maximum rate of the position to be occupied when he or she becomes entitled to pay retention, the employee is entitled to the lower of:

(i) The rate of basic pay payable to the employee immediately before the reduction in pay; or

(ii) 150 percent of the maximum rate of basic pay payable for the new grade.

(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.

(d) When, as a result of an increase in the scheduled rate(s) of the grade of the employee's position, an employee's retained rate of basic pay becomes equal to or lower than the maximum rate of that grade, the employee is entitled to the maximum rate of that grade and pay retention ceases.

(e) An employee who is serving on a temporary promotion at the time he or she becomes eligible for pay retention is entitled to retain the rate of basic pay which he or she would have been receiving at that time had the temporary promotion not occurred.

(f) When an employee's entitlement to grade or pay retention terminates, the employee's rate of basic pay shall be set in accordance with the provisions of Parts 531 and 532 of this title unless:

(1) Grade retention is being terminated as a result of the expiration of the 2-year retention period; or

(2) The employee is moved to a grade equal to or greater than the retained grade; or

(3) The employee is entitled to a higher rate of basic pay under paragraphs (b) or (d) of this section.

§ 536.206 Criteria for a "reasonable offer".

For the purposes of this part, an offer of a position, in order to be considered a reasonable one, must fulfill the following conditions:

(1) The offer must be in writing, and must include an official position description of the offered position; and

(2) The offer must inform the employee that an entitlement to grade or pay retention will be terminated if the offer is declined and that the employee may appeal the reasonableness of the offer as provided in § 536.302; and

(3) The offered position must be of tenure equal to or greater than that of the position creating the grade or pay retention entitlement; and

(4) The offered position must be in an agency, as defined in 5 U.S.C. 5102, although not necessarily in the same agency in which the employee is serving at the time of the offer; and

(5) The offered position must be full-time, unless the employee's position immediately before the change creating entitlement to grade or pay retention was less than full-time, in which case the offered position must have a work schedule of no less time than that of the position held before the change; and

(6) The offered position must be in the same commuting area as the employee's position immediately before the offer, unless the employee is subject to a mobility agreement or a published agency policy which requires employee mobility.

§ 536.207 Loss of eligibility for grade retention.

(a) Eligibility for grade retention as a result of entitlement under § 536.103(a) of this part ceases if any of the following conditions occurs at any time after the employee receives written notice of the reduction in grade action, but before the commencement of the 2-year period of grade retention:

(1) The employee has a break in service of 1 workday or more; or

(2) The employee is demoted for personal cause or at the employee's request; or

(3) The employee is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher than the retained grade; or

(4) The employee elects in writing to terminate the benefits of grade retention.

(b) Eligibility for grade retention as a result of entitlement under § 536.103(b) of this part ceases if any of the following conditions occurs at any time after the employee is informed by management of an impending reorganization or reclassification which will or could result in reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) Any of the conditions listed in paragraph (a) of this section except that an employee's request for placement in a lower graded position, in lieu of displacing an employee at his or her grade under reduction-in-force procedures, is not a declination of a reasonable offer for grade retention purposes; or

(2) The employee fails to enroll in, or to comply with reasonable written requirements established to assure full

consideration under, a program providing priority consideration for placement.

§ 536.208 Termination of grade retention.

(a) Grade retention terminates if any of the conditions listed in § 536.207(a) occurs after commencement of the 2-year period of grade retention.

(b) Grade retention as provided by § 536.103(b) also terminates if any of the conditions listed in § 536.207(b) occur after the commencement of the 2-year period of grade retention.

(c) The effective date of termination of grade retention benefits is:

(1) The day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of the last day of the pay period which the employee:

(i) Declines a reasonable offer; or

(ii) Elects to waive grade retention benefits; 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.

§ 536.209 Loss of eligibility for, or termination of, pay retention.

(a) Eligibility for pay retention, or actual retention of pay, ceases if any of the following conditions occurs at any time after the employee had received written notification that his or her pay is to be reduced:

(1) The employee has a break in service of 1 workday or more; or

(2) The employee is entitled to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under pay retention; or

(3) The employee is demoted for personal cause or at the employee's request.

(b) The effective date of termination of pay retention benefits is:

(1) The day before placement if the termination is the result of the employee's placement in another position; or

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

Subpart C—Miscellaneous Provisions

§ 536.301 Placement and classification plans.

(a) Agencies which employ individuals subject to this part are required to establish in writing placement and classification plans.

(b) The placement and classification plans must commit the agency to:

(1) Identify and correct classification errors; and

(2) Correct position management problems; and

(3) Carry out specific planned efforts to place employees subject to this part; and

(4) Pursue placement efforts that do not adversely affect affirmative action goals.

§ 536.302 Appeal of termination of benefits because of reasonable offer.

(a) Except as provided for in paragraph (e) of this section, an employee whose grade or pay retention benefits are terminated on the grounds the employee declined a reasonable offer of a position the grade or pay of which is equal to or greater than his or her retained grade or pay may appeal the termination to the Office of Personnel Management.

(b) An employee who appeals under this section shall file the appeal in writing with the Office of Personnel Management not later than 20 calendar days after being notified that his or her grade of pay retention benefits have been terminated, and shall state in the appeal the reasons why the employee believes the offer of a position was not a reasonable offer.

(c) The Office of Personnel Management may conduct any investigation or hearing it determines necessary to ascertain the facts of the case.

(d) If a decision by the Office of Personnel Management on an appeal under this section requires corrective action by an agency, including the retroactive or prospective restoration of grade or pay retention benefits, the agency shall take that corrective action.

(e) Termination of benefits based on a declination of a reasonable offer by an employee in an exclusively recognized bargaining unit may be reviewed under negotiated grievance and arbitration procedures in accordance with chapter 71 of title 5, United States Code, and the terms of any applicable collective bargaining agreement. An employee in an exclusively recognized bargaining unit may not appeal a termination of benefits to the Office of Personnel Management if the grievance procedure of the agreement by which he or she is covered provides for this review.

(f) Decisions issued by the Office of Personnel Management shall be considered final decisions. OPM may, at its discretion, reconsider an original appellate decision when new and material information is presented, in writing, by the employee or the agency, which establishes a reasonable doubt as to the appropriateness of the original decision. The request must show that the information was not readily available when the decision was issued. A request for reconsideration of an original appeal decision must be submitted to OPM within 30 calendar days of the date of the original decision.

§ 536.303 Documentation.

The application of the provisions of this part shall be documented in writing as a permanent part of the employee's Official Personnel Folder. As a minimum this documentation will include a copy of the letter described in § 536.304.

§ 536.304 Issuance of employee letters.

When an employee is entitled to grade and/or pay retention, the employing agency shall give to the employee, with a copy of the Notification of Personnel Action (SF–50) documenting entitlement to grade and/or pay retention, a letter describing the circumstances warranting grade and/or pay retention, and the nature of that entitlement.

§ 536.305 Effect of grade retention on quota spaces.

To determine the number of positions at GS–16, –17 and –18, or the equivalent, including positions in the Senior Executive Service, authorized by an Act of Congress, the grades (or SES levels) of the positions occupied, rather than the retained grades, are to be used.

§ 536.306 Retroactive entitlement.

Employees who are eligible for grade retention as provided by § 536.103(a) except that the reduction in grade took place on or after January 1, 1977, and before the first day of the first pay period beginning on or after January 11, 1979, shall be entitled to pay and benefits as provided in section 801(b) of the Civil Service Reform Act of 1978 under procedures and instructions issued by the Office of Personnel Management.

[FR Doc. 80-40504 Filed 12-29-80; 8:45 am]
BILLING CODE 6325-01-M

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5 CFR Part 551

Federal Pay Administration Under the Fair Labor Standards Act

AGENCY: Office of Personnel Management.

ACTION: Final rule

SUMMARY: The Fair Labor Standards Act was amended by the Fair Labor Standards Amendments of 1974 to include Federal employees under its coverage effective May 1, 1974. The

legislation authorized the Office of Personnel Management to administer the provisions of the Act for Federal employees. This document contains regulations that supplement and implement the Act.

EFFECTIVE DATE: January 29, 1981.

FOR FURTHER INFORMATION CONTACT: Dwight W. Brown, [202] 632–4634.

SUPPLEMENTARY INFORMATION: The Fair Labor Standards Act of 1938, as amended, provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Section 4(f) of the Act authorizes the Office of Personnel Management to administer the provisions of the Act for all employees of the United States, except for those who are employed by the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority; such employees are specifically covered by the Department of Labor's administration of the Act. In addition to this authority, the legislative history of Pub. L. 93–259 further authorizes the Office of Personnel Management to resolve conflicts between the Act and other statutory provisions entitling employees to overtime pay (120 Cong. Rec. 7335).

These regulations establish the rules and guidelines by which Federal administration of the Act is to be effected. In addition to specifying OPM's authority and agencies' responsibilities, they provide definitions, rules, and guidelines by which determinations are to be made as to what time constitutes "hours or work," and, therefore, as to what time is compensable. Futhermore, they provide the methodology by which precise overtime pay entitlements under the Act shall be computed. Finally, they provide special overtime provisions for employees engaged in fire protection activities or law enforcement activities.

On July 25, 1980, OPM published proposed regulations [45 FR 49580] for its administration of the Act in the Federal sector and invited written comments from the public. Comments were received from 24 Federal agencies and four labor organizations representing Federal employees. These comments, and OPM's action on these comments, are summarized as follows:

General

Numerous comments cited the need for supplemental guidance or examples to further clarify the regulations in this part. Numerous other comments referred to the more complete instructions contained in FPM letters in the 551 series and asked what effect the regulations had on this material.

The regulations in this part create rights in or impose obligations upon employees or agencies for compliance with the Act. The more comprehensive instructions and examples contained in FPM letters in the 551 series provide supplemental instructions and continue in effect, with the exception of FPM Letter 551–3. OPM is issuing an FMP letter which rescinds FPM Letter 551–3 and provides instructions for the treatment of time spent in training as modified in § 551.423 of ths part. The instructions in this new letter are effective on the effective date of these regulations.

In addition, OPM is completing a new book 551 to FPM Supplement 990–2. It will incorporate the instructions and examples contained in existing FPM letters. When completed, Book 551 will supplement and augment the requirements of the Act and this part. Until that time, the instructions and guidelines contained in FPM letters in the 551 series (with the exception of FPM Letter 551–3) are still appropriate.

Suffered or Permitted Work

Two agencies recommended transferring the definition of suffered or permitted work from subpart D, Hours of Work, to the definitions section in subpart A. This recommendation was adopted.

In addition, at the recommendation of several agencies, this definition has been modified to emphasize that the employee's supervisor (1) must have knowledge of such work and (2) must have an opportunity to prevent such work from being performed. It follows that if the supervisor did not know the work was being performed, he or she had no opportunity to prevent the work, and, therefore, the supervisor did not suffer or permit the work. Of course, once the supervisor knows work is being performed and does nothing to prevent it, he or she has suffered or permitted the work.

Trainees

With the change in OPM position concerning time spent in training under the Act, it was necessary to define the term "trainee" in § 551.102 and to exclude those persons meeting this definition from coverage under OPM's administration of the Act in § 551.103. Trainees who are assigned or attached to a Federal activity primarily for training are not employees of the Government of the United States for purposes of the Act. These include persons employed by a state or local government under a CETA or WIN Program, persons employed by a college or university under a College Work Study Program, student-employees assigned or attached to a government hospital primarily for training (5 CFR Part 534), and any other person who attends a training program that meets the six conditions outlined in § 551.102.

Volunteers

Numerous comments were received recommending that persons who perform volunteer services for a Federal activity be excluded specifically from coverage under the Act. We have included a new definition of "volunteer" in § 551.102.

In addition, in § 551.103 we have excluded persons whose appointment authority specifically states that they are to be employed without compensation, and persons who meet the definition of volunteer in § 551.102. These include student volunteers (5 CFR Part 308), VISTA and Peace Corps volunteers, and persons who perform personal services primarily for their own benefit or for the benefit of other persons—e.g., volunteers in a Federal hospital who write letters for patients or perform other personal amenities for patients. The one group that does not meet the definition of volunteer in § 551.102 and, therefore, is not excluded from coverage by § 551.103, is that made up of individuals who perform services of economic benefit for a Federal agency. Persons in this group meet the "economic realities" test for employment. For example, they may perform services for a Federal activity to free Federal employees for other duties. If they did not perform such services, Federal employees would have to. Therefore, their services are of economic benefit to the Federal activity. However, acceptance of such services is subject to the restriction in section 665(b) of title 31, United States Code (the Anti-Deficiency Act), against accepting voluntary services.

Subminimum Wage

One labor organization recommended that the criteria for compliance with the subminimum wage authority be spelled out. OPM is issuing a separate FPM letter on this subject at this time. While the subminimum wage authority of the Act permits the employment of students, learners, apprentices, and handicapped workers, OPM has determined that use of this authority by Federal agencies will be limited to handicapped patients who are receiving treatment or care in a Federal hospital or institution and who are permitted to perform work of a

consequential economic benefit for the hospital or institution.

Records Keeping

Numerous comments addressed the proposed OPM requirement to keep records for a period of six years. The Office of Financial Management, GAO, advised that the present records retention schedule of three years at the agency level and 56 years at the National Personnel Records Center is sufficient for its use to settle pay claims. Therefore, we have removed the reference to six years. Agencies will continue to follow the GAO schedule.

Rest Periods and Meal Periods.

In numerous comments it was requested that OPM specify how many rest periods are allowed in a workday. Agencies are responsible for scheduling the work of their employees. This includes scheduling authorized rest periods during the workday. We have modified the language in § 551.411 to clarify that any authorized rest period is worktime.

One agency had a problem with the term "bona fide meal periods." We do not specify a specific scheduled meal period, nor do we authorize a deduction from hours worked when an employee works and does not take an authorized meal period. This term simply means that, when an employee has an authorized meal period and does, in fact, take the meal period off, the employee is off duty during this period and is not paid for it.

Time Spent Traveling

Numerous comments questioned the specific rules for compensable travel time under the Act. These rules are presently contained in FPM Letters 551–10 and 11. The letters also include in depth instructions, with examples, on how the rules are to be applied under the Act. The rules are consistent with the rulings, interpretations, and opinions of the Department of Labor and the courts in the private sector. We recognize that the rules for compensable travel time under title 5, United States Code, differ considerably from those under FLSA. This area is one of the most difficult in premium pay administration because of the dual administrations of title 5 and the FLSA. The rules for compensable travel time must be applied separately under each law, title 5 and FLSA, and nonexempt employees are to be paid under whichever law provides them the greater overtime pay benefit.

Time Spent in Training

Numerous comments recommended that we retain the prohibition currently contained in FPM Letter 551–3 on the payment of overtime pay for a period of training under the Act. The change in OPM determination concerning time spent in training was brought about by (1) a better understanding of the differences between title 5, United States Code, and the FLSA, and (2) other relevant decisions by OPM in its experience in resolving conflicts between the two laws. It has been OPM's position, endorsed by GAO, that the two laws are to be administered separately and independently, with nonexempt employees being paid under whichever law provides them the greater overtime pay benefit. Consistent with this position, we have modified our original determination to provide that time spent in training outside regular working hours is compensable as hours of work under the FLSA if certain specific criteria are met. This change will bring OPM's administration of the FLSA into line with that of the Department of Labor in the private sector and will produce consistency in OPM's administration of the Act.

We have modified the language in § 551.423, and have prepared an FPM letter to provide supplemental instructions in response to the myriad of comments received on this section. The new FPM letter rescinds FPM Letter 551–3 and is to be effective on the effective date of the regulations. Together the regulations in § 551.423 and the supplemental instructions in the FPM letter clearly outline those situations when time spent in training is hours of work and those situations when time spent in training is not hours of work. A summary of the changes in language in § 551.423 and the instructions contained in the FPM letter follows:

A paragraph was added in this section to clarify further the phrases, "directed to participate," and "to improve the employee's performance * * * of his or her current position." The FPM letter provides specific instructions on what training meets these criteria.

A paragraph was added in this section to address preparatory time for attendance at training. The FPM letter provides additional instructions on how an agency may determine the appropriate allowance for preparatory time and when such preparatory time is hours of work.

A special provision was added in this section to address employees engaged in an apprenticeship program or other entry level training programs, employees engaged in an internship program or other career related work study programs, and employees appointed under the Veterans Readjustment Act (5 CFR Part 307). The FPM letter contains special instructions for the treatment of training time for employees in these programs. Furthermore, OPM will issue Federal Personnel Manual guidance reflecting this change in its chapter 410 on training.

Time Spent Adjusting Grievances or Performing Representational Functions

Numerous comments expressed a need to distinguish clearly between time spent by a grievant adjusting his or her grievance and "official time" spent by an employee representative performing representational functions. The language in § 551.424 has been revised to clarify (1) that any time spent by a grievant in the settlement of his or her grievance while the grievant is required to be on the agency's premises is worktime, and (2) that any "offficial time" granted by an agency and used by an employee representative in the performance of representational functions is worktime.

One agency expressed concern over the meaning of the phrase, "while otherwise in a duty status." The key to whether time spent performing representational functions outside regular working hours is overtime work is that the employee representative must already have been in an overtime duty status at the direction of the agency at the time an event arises which calls for the performance of representational functions. The employee representative cannot extend his or her duty hours (including overtime hours) solely for the purpose of extending representational functions into overtime hours.

Time Spent Receiving Medical Attention

Three agencies recommended that the time spent receiving medical attention should be limited to job-related illnesses or injuries, and another agency recommended that such time be limited to one hour. It must be emphasized that § 551.425 addresses only a situation where an employee has already reported to work and subsequently becomes ill or injured, and, further, it only applies to that specific workday. This provision cannot be limited to a job-related illness or injury, and it cannot be limited to a specific period of time. However, it is limited to situations when an employee is receiving medical attention at the direction and under the control of the agency. When these criteria are met, the employee is on duty during the time he or she receives medical attention.

Two agencies recommended that this section be expanded to include time spent by an employee taking a physical examination that is required for continued employment with the agency. This recommendation was adopted.

Time Spent in Charitable Activities

The comments of a few agencies expressed some confusion concerning the treatment of time spent by volunteers in charitable activities. It must be emphasized that the rules for the treatment of such time contained in § 551.426 apply only to employees of an agency. Volunteers, as defined in § 551.102, are not employees under the Act, and, therefore, this section is not applicable to such individuals.

Time Spent on Standby Duty or in an On-Call Status

Two agencies recommended that § 551.431 be revised to distinguish clearly between (1) standby duty and (2) time spent in an on-call status. This recommendation was adopted.

In addition, one labor organization recommended that time spent in on-call status be compensable. Under the Act, an employee is either on duty or off duty. There is no provision for a semi-duty status such as standby duty or on-call status. Therefore, OPM was faced with the task of determining whether standby duty and time spent in an on-call status are properly worktime under the Act. OPM determined that the severe restrictions placed on an employee's whereabouts and time to qualify for standby duty pay under title 5, United States Code, make such duty worktime under the Act. However, the Department of Labor and the courts have not seen fit to consider time spent in an on-call status a severe enough limitation on an employee's off duty time to require compensation for such status. Therefore, we determined that time spent in an on-call status is not worktime. This policy determination was promulgated in FPM Letter 551–14, dated May 15, 1978. The feasibility of a premium or a differential to ensure an employee's availability during a period of on-call status is currently being reviewed by the Compensation Program Development Division, OPM.

Maximum Earnings Limitation

One agency recommended the inclusion of a statement that the maximum limitation on an employee's aggregate pay (basic pay and premium pay) under title 5, United States Code, does not apply to overtime pay under the Act. This recommendation was adopted.

Fractional Hours of Work

Numerous agencies questioned the requirements to pay for irregular, unscheduled overtime work in fractions of a quarter of an hour or less, and to pay for every minute of regularly scheduled overtime work. They indicated that it would be administratively burdensome to comply with these requirements. The requirements contained in § 551.521 are not a change in policy, but merely express in regulatory language the procedures currently prescribed in FPM Letter 551–6, dated June 12, 1975.

Recently, the Comptroller General concurred in an OPM proposal to provide for rounding of odd minutes of irregular, unscheduled overtime work under title 5, United States Code. For example, if an agency is paying for such overtime work in increments of 15 minutes, seven minutes or less may be rounded down to zero and eight minutes or more may be rounded up to 15 minutes. OPM is currently amending 5 CFR Part 550 to provide for the rounding of odd minutes under title 5. This section has been revised to provide for the rounding of odd minutes of irregular, unscheduled overtime work on the same basis. The revision will provide agencies four possible administrative procedures for the treatment of irregular, unscheduled overtime work: (1) Restrict the performance of overtime work to the full fraction used to account for overtime work, (2) pay for every minute of irregular, unscheduled overtime work, (3) round odd minutes of irregular, unscheduled overtime work on a daily basis, or (4) accumulate odd minutes of irregular, unscheduled overtime work and round on a workweek basis. Agencies are encouraged to adopt the same administrative procedure under both title 5 and the FLSA.

Compensatory Time Off

Two agencies and one labor organization commented on the seemingly limited use of compensatory time off under this part—i.e., that compensatory time off may be taken only in the same workweek. The rules contained in § 551.531, which are consistent with instructions contained in FPM Letter 551–6, dated June 12, 1975, allow for the use of compensatory time off in subsequent workweeks, provided the employee's overtime pay entitlement under title 5, United States Code, is equal to or greater than his or her overtime pay entitlement under the FLSA, and the employee makes a written requests for such compensatory time off.

We acknowledge the position expressed by the Wage and Hour Division, Department of Labor, that an employee is entitled to overtime pay for overtime work and that overtime payments must be made within the regular pay periods. This is the basis for the Wage and Hour Division's position that an employer may not credit an employee with compensatory time off for overtime work to be used in subsequent pay periods. The Wage and Hour Divisions, at the same time, expressed its awareness of the statutory conflict between the FLSA and title 5. OPM has addressed this conflict by administering both laws concurrently and requiring compensation under whichever law provides the greater overtime pay benefit. When an employee's entitlement to overtime pay under title 5 is equal to or greater than his or her entitlement to overtime pay under the FLSA, the employee may excercise his or her statutory entitlement to request compensatory time off in lieu of overtime pay under title 5.

OPM has determined that this is a significant regulation for the purposes of E.O. 12044.

Office of Personnel Management.

JoAnn B. Platter,

Assistant Issuance System Manager.

Accordingly, OPM is adding Subparts A, C, D, and E to 5 CFR Part 551, to read as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Subpart A—General Provisions

Sec.

* * * * *

Subpart C—Minimum Wage Provisions

Basic Provision

Subminimum Wage

Subpart D—Hours of Work

General Provisions

Application of Principles in Relation to Normal Workday

Application of Principles in Relation to Other Activities

Authority: Pub. L. 93-259; 29 U.S.C. 204f.

Subpart A—General Provisions

§ 551.101 General.

(a) Section 3(e)(2) of the Fair Labor Standards Act of 1938, as amended, authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section. Section 4(f) of the Act authorizes the Office of Personnel Management to administer the provisions of the Act for all such employees, except for those who are employed by the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority; the named groups of employees are specifically excluded from the Office of Personnel Management's administration.

(b) The Act provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions. It prescribes penalties for the commission of specifically prohibited acts.

(c) This part contains the regulations, criteria, and conditions that the Office of Personnel Management has prescribed for the administration of the Act. This part supplements and implements the Act, and must be read in conjunction with it.

§ 551.102 Definitions.

In this part:

(a) "Act" means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.);

(b) "Agency", for purposes of the Office of Personnel Management's administration of the Act, means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act; but does not include:

(1) The Library of Congress;

(2) The United States Postal Service;

(3) The Postal Rate Commission; or

(4) The Tennessee Valley Authority;

all of which are subject to the administration of the Act by the Department of Labor, under Title 29, Code of Federal Regulations.

(c) "Employ" means to engage a person in an activity that is for the benefit of an agency, as defined for this part, and includes any hours of work that are suffered or permitted.

(d) "Employee" means a person who is employed:

(1) In an executive agency;

(2) As a civilian in a military department;

(3) In a nonappropriated fund instrumentality of an executive agency or a military department; or

(4) In a unit of the legislative or judicial branch of the Government that has positions in the competitive service.

(e) "Suffered or permitted" work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

(f) "Trainee" means a person who does not meet the definition of "employee" in (d), above, and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a "trainee" and, therefore, is not an "employee" of the Government of the United States for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but, rather, is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

(g) "Volunteer" means a person who does not meet the definition of "employee" in (d), above, and who volunteers or donates his or her service the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

§ 551.103 Coverage.

(a) Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is:

(1) Defined as an employee under section 2105 of title 5, United States Code;

(2) Appointed under other appropriate authority; or

(3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) The following persons are not covered under the Act:

(1) A person appointed under appropriate authority without compensation;

(2) A trainee as defined in § 551.102(f); or

(3) A volunteer as defined in § 551.102(g).

§ 551.104 Administrative authority.

The Office of Personnel Management is the administrator of the provisions of the Act with respect to any person employed by an agency, except for the equal pay provisions contained in section 6(d) of the Act, which are administered by the Equal Employment Opportunity Commission.

* * * * *

Subpart C—Minimum Wage Provisions

Basic Provision

§ 551.301 Minimum wage.

(a) Except as provided in § 551.311, an agency shall pay each of its employees wages at rates not less than the minimum wage specified in section 6(a)(1) of the Act for all hours of work as defined in subpart D of this part.

(b) An employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay, as defined in § 551.511(a) of this part, for the workweek is equal to or in excess of the rate specified in section 6(a)(1) of the Act.

Subminimum Wage

§ 551.311 Subminimum wage.

An agency may, if it meets certain criteria published by the Office of Personnel Management, employ certain groups of less than fully productive employees (e.g., handicapped patient workers) at rates less than the minimum wage specified in section 6(a)(1) of the Act.

Subpart D—Hours of Work

General Provisions

§551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

(b) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the proposes of this part.

(c) Time that is considered hours of work under this part shall be used only to determine an employee's entitlement to minimum wages or overtime pay under the Act, and shall not be used to determine hours of work for pay administration under title 5, United States Code, or any other authority.

551.402 Agency responsibility.

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.

(b) An agency shall keep complete and accurate records of all hours worked by its employees.

Application of Principles in Relation to Normal Workday

§ 551.411 Workday.

(a) For the purposes of this part, "workday" means the period between the commencement of the principal activity(s) that an employee is engaged to perform on a given day, and the cessation of the principal activity(s) for that day. All time spent by an employee in the performance of such activity(s) is hours of work. The workday is not limited to a calendar day or any other 24-hour period.

(b) Any rest period authorized by an agency that does not exeed 20 minutes and that is within the workday shall be considered hours of work.

(c) *Bona fide* meal periods shall not be considered hours of work.

§ 551.412 Preparatory or concluding activities.

(a) A preparatory or concluding activity that is closely related to the principal activity, and is indispensable to its performance, is an integral part of the principal activity and is, therefore, a part of the workday and shall be considered hours of work.

(b) A preparatory or concluding activity that is not an integral part of the performance of the principal activity is not a part of the workday. Such an activity is a preliminary or postliminary activity and is not considered hours of work.

Application of Principles in Relation to Other Activities

§ 551.421 Regular working hours.

(a) Under the Act there is no requirement that a Federal employee have a regularly scheduled administrative workweek. However, under title 5 United States Code, and Part 610 of this chapter, the head of an agency is required to establish work schedules for his or her employees. In determining what activities constitute hours of work under the Act, there is generally a distinction based on whether the activity is performed by an employee during regular working hours or outside regular working hours. For purposes of this part, "regular working hours" means the hours and days during which an employee is normally scheduled to be on duty.

§ 551.422 Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

(c) An employee who is offered one mode of transportation, and who is permitted to use an alternative mode of transportation, or an employee who travels at a time other than that selected by the agency, shall be credited with the lesser of:

(1) The actual travel time which is hours of work under this section; or

(2) The estimated travel time which would have been considered hours of work under this section had the employee used the mode of transportation offered by the agency, or traveled at the time selected by the agency.

§ 551.423 Time spent on training or attending a lecture, meeting, or conference.

(a) Time spent in training, whether or not it is under the purview of Part 410 of this chapter, shall be administered as follows:

(1) Time spent in training during regular working hours shall be considered hours of work.

(2) Time spent in training outside regular working hours shall be considered hours of work if:

(i) The employee is directed to participate in the training by his or her employing agency; and

(ii) The purpose of the training is to improve the employee's performance of the duties and responsibilities of his or her current position.

(3) Time spent in apprenticeship or other entry level training, or internship or other career related work study training, or training under the Veterans Readjustment Act (5 CFR Part 307) outside regular working hours shall not be considered hours of work, provided no productive work is performed during such periods.

(4) Time spent by an employee performing work for the agency during a period of training shall be considered hours of work.

(b) The following phrases contained in (a), above, are further clarified:

(1) "Directed to participate" means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by nonenrollment in such training.

(2) Training "to improve the employee's performance . . . of his or her current position" is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

(c) Time spent by an employee within an agency's allowance of preparatory time for attendance at training shall be considered hours of work if such preparatory time is:

(1) During an employee's regular working hours; or

(2) Outside the employee's regular working hours, and the purpose of the training meets the requirements of (a)(2), above.

(d) Time spent attending a lecture, meeting, or conference shall be considered hours of work if attendance is:

(1) During an employee's regular working hours; or

(2) Outside an employee's regular working hours, and

(i) The employee is directed by an agency to attend such an event; or

(ii) The employee performs work for the benefit of the agency during such attendance.

§ 551.424 Time spent adjusting grievances or performing representational functions.

(a) Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such functions during regular working hours (including regularly scheduled overtime hours), or during a period of irregular, unscheduled overtime work, provided an event arises incident to representational functions that must be dealt with during the irregular, unscheduled overtime period.

§ 551.425 Time spent receiving medical attention.

(a) Time spent waiting for and receiving medical attention for illness or injury shall be considered hours of work if:

(1) The medical attention is required on a workday an employee reported for duty and subsequently became ill or was injured;

(2) The time spent receiving medical attention occurs during the employee's regular working hours; and

(3) The employee receives the medical attention on the agency's premises, or at the direction of the agency at a medical facility away from the agency's premises.

(b) Time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work.

§ 551.426 Time spent in charitable activities.

Time spent working for public or charitable purposes at an agency's request, or under an agency's direction or control, shall be considered hours of work. However, time spent voluntarily in such activities outside an employee's regular working hours is not hours of work.

Special Situations

§ 551.431 Time spent on standby duty or in an on-call status.

(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:

(1) The employee is restricted to an agency's premises, or so close thereto that the employee cannot use the time effectively for his or her own purposes; or

(2) The employee, although not restricted to the agency's premises:

(i) Is restricted to his or her living quarters or designated post of duty;

(ii) Has his or her activities substantially limited; and

(iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

§ 551.432 Sleep time.

(a) Except as provided in paragraph (b) of this section, *bona fide* sleep time that fulfills the following conditions shall not be considered hours of work if:

(1) The tour of duty is *24 hours or more;*

(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and

(3) There are at least 5 hours available for such time during the sleep period.

(b) For employees engaged in fire protection activities or law enforcement activities, the exclusion of sleep time is appropriate for tours of duty *of more than 24 hours* only. However, paragraphs (a)(2) and (a)(3) of this section still apply to employees in these activities.

(c) Not more than 8 hours in a 24-hour period shall be considered sleep time.

(d) If sleep time is interrupted by a call to duty, the time spent on duty is considered hours of work.

Subpart E—Overtime Pay Provisions

Basic Provisions

§ 551.501 Overtime pay.

(a) Except as otherwise provided in this subpart, an agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay.

(b) An employee's "workweek" is a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to Part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in § 610.102 of this chapter.

(c) The maximum limitation on an employee's aggregate rate of pay under § 550.105 of this chapter does not apply to overtime pay due the employee under this subpart.

Overtime Pay Computations

§ 551.511 Hourly regular rate of pay.

(a) An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

(b) "Total remuneration" includes all remuneration for employment paid to, or on behalf of, an employee except:

(1) Payments as rewards for service the amount of which is not measured by

or dependent on hours of work, production, or efficiency (e.g., a cash award for a suggestion made by an employee and adopted by an agency);

(2) Payments for periods during which no work is performed (e.g., leave, holidays, or excused absences), or reimbursements for travel expenses, or other similar expenses, incurred by an employee in furtherance of an agency's interest, which are not related to hours of work;

(3) Payments made in recognition of services performed during a given period, if both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the agency (e.g., incentive awards for outstandingly high-quality work);

(4) Contributions by an agency to a fund for retirement, insurance, or similar benefits;

(5) Extra compensation provided by a premium rate paid for hours of work performed by an employee in excess of eight in a day, or in excess of the normal workweek applicable to the employee;

(6) Extra compensation provided by a premium rate paid for hours of work performed by an employee on a Sunday or a holiday where such premium rate is at least one and one-half times the employee's rate of pay for work performed in nonovertime hours on other days; or

(7) Extra compensation provided by a premium rate paid for hours of work performed by an employee outside his or her regular working hours, where such premium rate is at least one and one-half times the employee's rate of pay for work performed in nonovertime hours.

§ 551.512 Overtime pay entitlement.

(a) An employee's overtime entitlement under this subpart includes:

(1) The straight time rate of pay times all overtime hours worked; plus

(2) One-half times the employee's hourly regular rate of pay times all overtime hours worked.

(b) An employee's "straight time rate of pay" is equal to the employee's rate of pay for his or her position (exclusive of any premiums or differentials) except for an employee who is authorized annual premium pay under §§ 550.141 or 550.151 of this chapter. For an employee who is authorized annual premium pay, straight time rate of pay is equal to basic pay plus annual premium pay divided by the hours for which the basic pay plus annual premium pay are intended.

(c) An employee has been paid in compliance with the overtime pay provisions of this subpart only if the employee has received pay at a rate at least equal to the employee's straight time rate of pay for all nonovertime hours of work in the workweek.

§ 551.513 Payment of greater overtime pay entitlement.

An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter, or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.

Fractional Hours of Work

§551.521 Fractional hours of work.

(a) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular, unscheduled overtime work under this subpart. Odd minutes or irregular, unscheduled overtime work shall be rounded up or rounded down to the nearest full fraction of an hour being used to account for overtime work.

(b) An employee shall be compensated for every minute of regularly scheduled overtime work.

Compensatory Time Off

§ 551.531 Compensatory time off.

(a) An agency may grant an employee compensatory time off in lieu of overtime pay under appropriate statutory authority, to be taken during the same workweek in which the overtime work was performed.

(b) An employee who earns an overtime pay entitlement under this subpart may be granted compensatory time off in a subsequent workweek provided:

(1) The employee earns overtime entitlement under § 550.113 of this chapter that is equal to or greater than the employee's overtime entitlement under this subpart; and

(2) The employee makes a written request to substitute compensatory time off for overtime payment.

Special Overtime Pay Provisions

§ 551.541 Employees engaged in fire protection activities or law enforcement activities.

(a) An employee engaged in fire protection activities or law enforcement activities shall be paid at a rate equal to one and one-half times the employee's hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act.

(b) The "tour of duty" of an employee engaged in these activities shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in § 551.432 of this part.

(c) Each agency shall establish the "work period" to be used for application of section 7(k) of the Act. The work period shall be at least seven days and not more than 28 days.

[FR Doc. 80-40493 Filed 12-29-80; 8:45 am]

BILLING CODE 6325-01-M

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5 CFR Part 581

Processing Garnishment Orders for Child Support and/or Alimony

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: This document revises and updates the entire appendix to the garnishment regulations which lists agents who are designated to accept legal process for garnishment for child support and/or alimony.

EFFECTIVE DATE: December 30, 1980.

FOR FURTHER INFORMATION CONTACT: Murray Meeker, Office of the General Counsel, (202) 632-5524.

SUPPLEMENTARY INFORMATION: Appendix A was originally published in the **Federal Register** on July 22, 1980 (45 FR 48853-48864). On July 22, 1980, OPM published final garnishment regulations for the executive branch. The regulations were in compliance with Executive Order 12105 which expressly directed OPM to promulgate such regulations. Included with the regulations was an appendix which listed designated agents to accept service of process in garnishment actions.

On September 3, 1980, OPM issued FPM Bulletin 581-3 which requested additional agents from agencies which had not responded previously. FPM Bulletin 581-3 was directly responsible for the majority of the new designations published herein. The entire Appendix is reprinted below as a service to the reader.

OPM has determined that this is a nonsignificant regulation for the purposes of E.O. 12044.

Office of Personnel Management.

JoAnn B. Platter,

Assistant Issuance System Manager.

Accordingly, OPM is revising Part 581 to read as follows: