Rules and Regulations

Federal Register
Vol. 46, No. 230
Tuesday, December 1, 1981

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

Excepted Service

AGENCY: Office of Personnel Management

ACTION: Final regulations.

SUMMARY: This amendment provides for immediate revocation of excepted appointing authority under Schedule C when a position covered by such authority becomes vacant. Before making a new appointment under Schedule C, the agency must obtain OPM's approval for reestablishment of the excepted appointing authority.

EFFECTIVE DATE: December 1, 1981.

FOR FURTHER INFORMATION CONTACT: William Bohling, 202-632-6000.

SUPPLEMENTARY INFORMATION: Section 1103 of title 5, United States Code, assigns the Office of Personnel Management responsibility for securing accuracy, uniformity, and justice in the functions of the Office and for aiding the President to promote an efficient civil service and a systematic application of the merit system principles. As part of this responsibility, OPM must not only determine that exception of positions from the competitive service is appropriate, but also must ensure that exceptions already approved continue to be appropriate.

Current regulations in 5 CFR 213.3301b provide that Schedule C exception for any position is revoked when the position is vacant for more than 60 days, unless OPM approves an extension for an additional 60 days. The automatic revocation provision was adopted to keep Schedule C current and to permit periodic review of authorities for continued propriety. However, while the provision has kept Schedule C current, it has not ensured regular review of all positions for continued appropriateness of exception because many positions are filled within the current 60-day time limit. OPM has, therefore, determined that Schedule C exception should be reviewed and reestablished each time a position becomes vacant, even if it can be filled within 60 days. This amendment provides for revocation of Schedule C exception immediately upon a position becoming vacant.

Pursuant to sections 553(b)(B) and 553(d)(3) of title 5, United States Code, the Director finds that good cause exists for waiving the general notice of proposed rulemaking and making this amendment effective in less than 30 days. The regulation is being made effective immediately to ensure current and continued compliance with the requirement in 5 U.S.C. 1103 that OPM's use of its authority to except positions from the competitive service be fully consistent with merit principles.

E.O. 12291 Federal Regulation

OPM has determined that this is not a major rule for the purposes of E.O. 12291, Federal Regulation, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or,

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, including small business, small organizational units and small governmental jurisdictions.

Office of Personnel Management.

Donald J. Devine

Director.

PART 213—EXCEPTED SERVICE

Accordingly, OPM revises 5 CFR 213.3301b to read as follows:

§ 213.3301b Revocation of exceptions.

(a) The exception from the competitive service for each position at GS-15 and below listed in Schedule C by OPM is revoked immediately upon the position becoming vacant.

(b) An agency shall notify the Office of Personnel Management within 3 work days after a Schedule C position at GS-15 and below has been vacated. (5 U.S.C. 3301, 3302; EO 10577, 3 CFR 1954-1958 Comp., p. 218).

[FR Doc. 81-34412 Filed 11-30-81; 8:45 am]
BILLING CODE 6325-01-M

5 CFR Part 550

Pay Administration (General); Back Pay Regulations

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: These regulations revise the current back pay regulations to implement the back pay amendments of the Civil Service Reform Act of 1978, which provide for payment of reasonable attorney fees in back pay cases, and to clarify and simplify the current back pay regulations.

EFFECTIVE DATE: December 31, 1981.

FOR FURTHER INFORMATION CONTACT: Donald J. Winstead, (202)-632-4634.

SUPPLEMENTARY INFORMATION: Proposed regulations were published in the **Federal Register** on February 1, 1980 (45 FR 7263-7265), for a public comment period of 60 days. A number of editorial revisions have been made in the proposed regulations, and a few substantive changes also have been made.

Analysis of Comments

The Office of Personnel Management (OPM) received written comments from 11 agencies, 4 labor organizations, 2 private interest groups, and 1 individual. Most of the comments offered specific recommendations for clarifying or modifying specific provisions of the proposed regulations. As a result, OPM has modified the proposed regulations, as discussed below. OPM will also supplement the final regulations with guidance issued through the Federal Personnel Manual (FPM) system that

will address other concerns expressed during the public comment period.

(1) Authority To Regulate

Several comments were received concerning OPM's authority to prescribe regulations affecting the entities identified as appropriate authorities in § 550.802 of the proposed regulations. In part, this reflects confusion resulting from the inadvertent omission of subsection (c) of 5 U.S.C 5596 from House Committee Print No. 95–22, "Title 5, United States Code." This subsection was not repealed or amended by the Civil Service Reform Act of 1978 (CSRA). However, Pub. L. 96–54 of August 14, 1979, amended 5 U.S.C. 5596(c) by striking out "Civil Service Commission" and inserting in lieu thereof "Office of Personnel Management". It is clear that OPM has the authority and the obligation to prescribe regulations to carry out 5 U.S.C. 5596. (The inadvertent omission of subsection (c) was corrected with the publication of House Committee Print No. 96–9.) Therefore, to the extent that an appropriate authority bases an award of back pay on 5 U.S.C. 5596, that appropriate authority is bound by the regulations prescribed by OPM to carry out this section of law.

Nevertheless, OPM is sensitive to the fact that a large number of appropriate authorities will be applying these regulations in a wide variety of contexts and under different procedures. Therefore, OPM has limited the requirements imposed upon appropriate authorities to the maximum extent possible consistent with congressional intent in enacting 5 U.S.C. 5596, as amended. OPM has rejected a number of recommendations that would have imposed unnecessary requirements upon appropriate authorities and has attempted to impose only those requirements that are necessary to carry out 5 U.S.C. 5596. This is the rationale behind the absence of specific time frames for requesting and responding to requests for payment of reasonable attorney fees and the absence of regulatory guidance concerning what is reasonable in the payment of attorney fees. Each appropriate authority is free to establish its own procedural requirements consistent with these regulations and to be guided by available precedents concerning matters such as what is reasonable in the payment of attorney fees. For the benefit of Federal agencies acting as appropriate authorities with respect to actions involving their own employees, OPM will provide further guidance through the FPM system.

(2) Scope

To clarify the coverage and applicability of the back pay regulations, OPM has modified the proposed regulations by splitting § 550.801 of the proposed regulations into two new sections—§ 550.801, "Applicability," and § 550.802, "Coverage." Subsequent sections have been renumbered accordingly. The final regulations also reflect section 3202(e)(7) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, which provides that, effective September 26, 1980, employees of the government of the District of Columbia are not covered by 5 U.S.C. 5596. The definition of "agency" in § 550.802 of the proposed regulations has been modified accordingly and appears in § 550.803 of the final regulations.)

One agency questioned the applicability of the back pay law to an employee who is found to have been affected by an unjustified or unwarranted personnel action that resulted in the *denial* of all or part of the pay, allowances, and differentials otherwise due the employee. The applicability of the back pay law in such a case is based on 5 U.S.C. 5596(b)(3), which states that the term "personnel action" includes "the omission or failure to take an action or confer a benefit." Another agency questioned the use of the phrase "reclassification * * * to a higher grade" in the definition of "unjustified or unwarranted personnel action." OPM has deleted this provision from that definition and modified § 550.801(b) of the proposed regulations to indicate that the back pay regulations do not apply to any reclassification action. (See § 550.801(b) of the final regulations.

A labor organization requested clarification concerning whether Veterans Administration employees covered by title 38, United States Code, and National Guard technicians covered by title 32, United States Code, are covered by these regulations. In both cases, the individuals are considered to be employees of an Executive agency, as defined in 5 U.S.C. 105, and are therefore covered by these regulations.

(3) Definitions

A number of comments were received concerning the definitions included in the proposed regulations. The Federal Labor Relations Authority (FLRA) indicated that the General Counsel of the FLRA should be identified as an appropriate authority. One agency requested clarification concerning the relationships among the various appropriate authorities. OPM will provide Federal agencies with further guidance concerning this matter through the FPM system.

Two comments were received suggesting that the definitions of "pay," "allowances," and "differential" found in the current back pay regulations be retained. OPM has concluded that it is impractical and unnecessary to attempt to distinguish among these three terms. The revised definition of "pay, allowances, and differentials" as "monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function" should enable agencies to determine proper back pay entitlements. For example, coverage under the Civil Service Retirement System and benefits received under the Federal employee health benefits and group life insurance programs *prior to retirement* are employment benefits to which a covered employee is entitled by virtue of the performance of a Federal function. (Benefits received following retirement are not included because they are not received for the period covered by the corrective action. However, it may become necessary to adjust such benefits following the correction of an unjustified or unwarranted personnel action.) Similarly, the special pay provided by Pub. L. 94–123 for physicians and dentists in the Department of Medicine and Surgery of the Veterans Administration is a benefit to which such employees are entitled by virtue of the performance of a Federal function. Therefore, it is considered to be part of such employees' "pay, allowances, and differentials." Additional guidance concerning the application of this definition will be provided through the FPM system.

Two agencies requested clarification of the phrase "personnel policy established by an agency" in the definition of "unjustified or unwarranted personnel action." OPM has modified this definition to clarify its intent that, to constitute the basis for a finding that an employee has been affected by an unjustified or unwarranted personnel action, a personnel policy established by an agency or through a collective bargaining agreement must be *mandatory* (i.e., nondiscretionary) in nature. One agency objected to the absence from the proposed definition of "unjustified or unwarranted personnel action" of the parenthetical explanation that follows the phrase "act of commission" in the current definition of that term. OPM has concluded that the back pay law does not exclude a

personnel action from the category of unjustified or unwarranted personnel actions solely because it was not an action taken under authority granted to an authorized official. However, only those unjustified or unwarranted personnel actions that result in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee are subject to the back pay remedy provided in 5 U.S.C. 5596.

A labor organization objected to the use of the phrase "on the basis of substantive or procedural defects" in the definition of "unjustified or unwarranted personnel action." This phrase is not intended to limit the basis for a finding that an employee has been affected by an unjustified or unwarranted personnel action in any way not intended by the statute.

Finally, OPM has modified the definitions of "appropriate authority," "grievance," and "unfair labor practice," and added a new definition of "collective bargaining agreement" to reflect amendments to the back pay law made by the Foreign Service Act of 1980, Pub. L. 96-465. In addition, OPM has modified the definition of "grievance" to indicate that grievances processed under agency administrative grievance systems are covered by the back pay law.

(4) *Determining Entitlement to Back Pay*

Several comments were received concerning the determination of entitlement to back pay. OPM has carefully reviewed the proposed change in § 550.803(a) of the current back pay regulations and all the comments concerning the proposed change. Based on this review, OPM has concluded that it is not necessary to prescribe which party bears the burden of proof for determining whether an employee is entitled to back pay.

The back pay law is essentially mechanistic in operation. In other words, an employee is not entitled to back pay *unless* an appropriate authority determines that he or she has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. To reach such a conclusion, the appropriate authority may require that an employee provide documentation that he or she was affected by an unjustified or unwarranted personnel action *and* that the action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Depending upon the nature of the case at hand, the appropriate authority may also require the employing agency to provide documentation that the employee was not affected by an unjustified or unwarranted personnel action or that, even if an unjustified or unwarranted personnel action occurred, it did not result in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. All such considerations are part of the process by which the appropriate authority makes a final determination.

Once a final determination has been made, however, the payment of any back pay to which the employee thus becomes entitled under 5 U.S.C. 5596 requires no further determination except with regard to the amount payable. Therefore, it is inappropriate for the back pay regulations to attempt to specify which party bears the burden of proof for determining whether an employee is entitled to back pay. OPM has modified § 550.803(a) of the proposed regulations (§ 550.804(a) of the final regulations) to reflect the minimum statutory requirement for entitlement to back pay—namely, that an appropriate authority must find that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

Three comments were received concerning the requirement in § 550.803(c) of the proposed regulations for a *written* determination that an employee has been affected by an unjustified or unwarranted personnel action. This is not a new requirement. (See § 550.803(b) of the current back pay regulations.) However, OPM strongly favors a policy of encouraging settlements in appropriate cases and is sympathetic to the concern that such a regulation may inhibit efforts to reach informal settlement. Therefore, OPM will continue to consider procedures similar to those worked out between the Federal Labor Relations Council and the General Accounting Office to permit settlement of unfair labor practices without requiring an admission of wrongdoing as a part of the settlement itself to be in compliance with the back pay regulations.

(5) Back Pay Computations

One labor organization suggested that § 550.804 of the proposed regulations, relating to back pay computations, interferes with the authority of appropriate authorities to determine how back pay will be computed. However, this regulation is necessary to ensure that awards of back pay are computed in accordance with the intent of the statute—namely, for the purpose of making an employee financially whole (to the extent possible). To this end, OPM has modified (§ 550.805(a) of the proposed regulations § 550.804(a) of the final regulations) to indicate that for the purpose of computing back pay, the employee concerned is deemed to have performed service for the employing agency during the period covered by the corrective action. For the same reason, OPM has modified the proposed regulations to provide that, in computing the amount of back pay due an employee, the agency shall deduct any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action (§ 550.805(e) of the final regulations). Such payments may include lump-sum payments for accrued annual leave, severance pay, refunds of retirement contributions, and retirement annuity payments. Such deductions are necessary to achieve the make-whole purpose of the back pay statute.

The General Accounting Office recommended a change in § 550.804(a) of the proposed regulations to ensure that an employee who earns more from other Federal employment during the period covered by corrective action is entitled to retain the additional earnings. In response to this concern, OPM proposed the addition of the phrase "under section 5596 of title 5, United States Code, and this subpart" in § 550.804(a) of the proposed regulations. The prohibition found in § 550.804(a) of the proposed regulations appears in § 550.805(b) of the final regulations, and the remaining paragraphs of § 550.805 have been relettered accordingly.

Four comments were received objecting to the exclusion from the computation of back pay of periods during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury or during which an employee was unavailable for the performance of his or her duties. These provisions, which are also found in § 550.804(d) of the current back pay regulations, are necessary to carry out the intent of the back pay law and are found in § 550.805(c) of the final regulations.

Finally, OPM has added a new provision concerning the scheduling and use of excess annual leave restored to an employee as the result of an unjustified or unwarranted personnel action (§ 550.805(f) of the final regulations). This provision is based on the principle that no employee should be

required to schedule and use a total amount of annual leave greater than 20 percent of his or her scheduled tour of duty.

(6) Payment of Reasonable Attorney Fees

Numerous comments were received concerning various aspects of § 550.805 of the proposed regulations, relating to the payment of reasonable attorney fees. OPM has modified § 550.805(a) of the proposed regulations (§ 550.806(a) of the final regulations) to clarify its intent that requests for payment of reasonable attorney fees may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action unless the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency. This provision will not inhibit efforts to reach informal settlements because the appropriate authority in such a case is the employing agency. In addition, it is important to note that appropriate authorities retain the right to establish procedures consistent with these regulations for responding to a request for payment of reasonable attorney fees. This includes the right to remand such a request to the employing agency for an initial determination, when appropriate.

Three agencies expressed concern about allowing an employee's personal representative to request payment of reasonable attorney fees. This provision does not address the question of who may *receive payment for* reasonable attorney fees. Rather, it provides that an employee's personal representative may *request payment of* reasonable attorney fees on the employee's behalf.

Four comments were received objecting to § 550.805(b) of the proposed regulations on the basis that OPM has no authority to compel an appropriate authority to provide an agency with an opportunity to respond to a request for payment of reasonable attorney fees. This provision is necessary to carry out the intent of the statutory provisions for the payment of reasonable attorney fees. It is clear that Congress did not intend to provide for payment of reasonable attorney fees in all back pay cases. It is necessary, therefore, to provide each party with an opportunity to present its case concerning whether such payment is warranted in the case at hand. Moreover, in any case in which an appropriate authority determines that such payment is warranted, it is incumbent upon that authority also to determine what amount is reasonable. Such a determination must be based on all pertinent information. Therefore, under the authority given OPM by 5 U.S.C. 5596(c), the final regulations require each appropriate authority to provide the employing agency with an opportunity to respond to a request for payment of reasonable attorney fees.

OPM received one comment expressing the belief that reasonable attorney fees should be awarded in any case in which the employee is the prevailing party. The final regulations are based on the conclusion that the incorporation of the standards established under 5 U.S.C. 7701(g) in 5 U.S.C. 5596 reflects congressional intent that reasonable attorney fees may be paid only after there has been a determination that such payment is warranted in the interest of justice except in discrimination cases. If such payment were always appropriate in non-discrimination cases, there would be no purpose to the separate requirement in 5 U.S.C. 7701(g)(1) for a determination that such payment is warranted in the interest of justice. In addition, OPM has determined that to require such a determination in some cases, but not in others, would lead to unreasonable and absurd results.

Several comments were received requesting further clarification of the phrase "in the interest of justice." OPM has modified § 550.805(c) of the proposed regulations (§ 550.806(c) of the final regulations) to indicate that the appropriate authority shall determine whether the payment of reasonable attorney fees is warranted in the interest of justice "in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code." The Merit Systems Protection Board (MSPB) has issued a series of decisions in which these standards have been clarified. OPM will provide Federal agencies with further information concerning these standards through the FPM system.

Four labor organizations objected to the requirement in § 550.805(c)(2) of the proposed regulations (§ 550.806(c)(2) of final regulations) for a specific finding setting forth the reasons the payment of reasonable attorney fees is in the interest of justice. This provision is based on the requirement in 5 U.S.C. 7701(g)(1) for a determination that such payment is warranted in the interest of justice. This regulation is necessary to carry out the intent of the statutory requirement. Otherwise, it would be impossible to ascertain the basis for a determination that the payment of reasonable attorney fees is in the interest of justice.

Four agencies requested that § 550.805(c) of the proposed regulations include the requirement that, to be eligible for payment of reasonable attorney fees, an employee must actually have *incurred* such fees. OPM has not adopted this suggestion for the following reasons. First, it is not clear that the phrase "incurred by the employee" is to be considered part of the "standards established under section 7701(g)." Second, even if this is the correct interpretation of "standards established under section 7701(g)," MSPB has interpreted the phrase "incurred by the employee" more broadly to mean "incurred by or on behalf of an employee." Finally, it is not apparent that this requirement would be meaningful in practice.

Two labor organizations objected to limiting the payment of reasonable attorney fees to services rendered by members of the Bar and paralegals or law clerks assisting members of the Bar. The purpose of this provision (§ 550.806(f) of the final regulations) is to identify the class of individuals whose services may be compensable as reasonable attorney fees. To remain in substantial conformity with the regulations promulgated by the Equal Employment Opportunity Commission to permit administrative awards of attorney fees in discrimination cases, the final regulations extend this class to include law students, when assisting members of the Bar.

Two comments were received expressing concern that the proposed regulations make no specific reference to the payment of costs and other expenses incurred by an employee. In *Michael P. O'Donnell* v. *Department of the Interior* (NY075299058), MSPB determined that attorney fees paid under 5 U.S.C. 7701(g) may properly include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." OPM has concluded that such expenses also may be included in the payment of reasonable attorney fees under 5 U.S.C. 5596. Other expenses, such as witness fees and expenses, investigation expenses, deposition expenses, and the cost of charts and maps, may not be included in the payment of reasonable attorney fees under 5 U.S.C. 5596 because they are not paid to an attorney, but to a third party. Additional guidance concerning this matter will be provided through the FPM system.

Finally, several comments were received concerning § 550.805(f) of the proposed regulations, relating to the

review or appeal of attorney fees determinations. OPM has modified this provision (§ 550.806(g) of the final regulations) to clarify its intent that such determinations may be subject to review or appeal only if provided for by statute or regulation.

(7) Applicability of Reasonable Attorney Fees

OPM has received a number of inquiries concerning the effect of the "savings provision" of the CSRA on the payment of reasonable attorney fees in back pay cases. Section 902(b) of the CSRA provides the following:

> No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

This provision was enacted to ensure continuity both in the procedures under which proceedings are initiated by Federal agencies and in the remedies available to Federal employees who are affected by unjustified or unwarranted personnel actions. Consequently, OPM has added a new paragraph (h) to § 550.806 of the final regulations to provide that the provisions concerning the payment of reasonable attorney fees do not apply to any administrative proceeding that was pending on January 11, 1979, the effective date of the back pay amendments of the CSRA.

In addition, a legislative branch agency requested clarification of the effect of the prohibition found in Pub. L. 95-391 against the use of funds appropriated by that law to provide legal representation for the House of Representatives or for any employee of a legislative branch agency without the specific authorization of Congress. OPM has determined that 5 U.S.C. 5596 constitutes specific authorization by Congress for payment of reasonable attorney fees in appropriate back pay cases. Therefore, the payment of reasonable attorney fees under 5 U.S.C. 5596 is not affected by the prohibition found in Pub. L. 95-391.

E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule for the purpose of E.O. 12291, Federal Regulation, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, including small business, small organizational units and small governmental jurisdictions.

Office of Personnel Management.

Donald J. Devine,

Director.

Accordingly, the table of sections and text of Subpart H of Part 550 of Title 5, Code of Federal Regulations, are revised to read as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

* * * * *

Subpart H—Back Pay

Sec.
550.801 Applicability.
550.802 Coverage.
550.803 Definitions.
550.804 Determining entitlement to back pay.
550.805 Back pay computations.
550.806 Payment of reasonable attorney fees.
550.807 Prohibition against setting aside proper promotions.

* * * * *

Subpart H—Back Pay

Authority: 5 U.S.C. 5596(c).

§ 550.801 Applicability.

(a) This subpart contains regulations of the Office of Personnel Management to carry out section 5596 of title 5, United States Code, which authorizes the payment of back pay and reasonable attorney fees for the purpose of making an employee financially whole (to the extent possible) when, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance), the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. This subpart should be read together with this section of law.

(b) This subpart does not apply to any reclassification action.

§ 550.802 Coverage.

(a) Except as provided in paragraph (b) of this section, this subpart applies to employees, as defined in § 550.803 of this subpart.

(b) This subpart does not apply to—

(1) Employees of the government of the District of Columbia; and

(2) Employees of the Tennessee Valley Authority.

§ 550.803 Definitions.

In this subpart:

"Agency" has the meaning given that term in section 5596(a) of title 5, United States Code.

"Appropriate authority" means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court, (b) the Comptroller General of the United States, (c) the Office of Personnel Management, (d) the Merit Systems Protection Board, (e) the Equal Employment Opportunity Commission, (f) the Federal Labor Relations Authority and its General Counsel, (g) the Foreign Service Labor Relations Board, (h) the Foreign Service Grievance Board, (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

"Collective bargaining agreement" has the meaning given that term in section 7103(a)(8) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1002 of the Foreign Service Act of 1980 (22 U.S.C. 4102(4)).

"Employee" means an employee or former employee of an agency

"Grievance" has the meaning given that term in section 7103(a)(9) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1101 of the Foreign Service Act of 1980 (22 U.S.C. 4131). Such a grievance includes a grievance processed under an agency administrative grievance system established under Part 771 of this chapter.

"Pay, allowances, and differentials" means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.

"Unfair labor practice" means an unfair labor practice described in section 7116 of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980 (22 U.S.C. 4115).

"Unjustified or unwarranted personnel action" means an act of commission or an act of omission (i.e.,

failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

§ 550.804 Determining entitlement to back pay.

(a) When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(b) The requirement for a "timely appeal" is met when—

(1) An employee or an employee's personal representative initiates an appeal or grievance under an appeal or grievance system, including appeal or grievance procedures included in a collective bargaining agreement; a claim against the Government of the United States; a discrimination complaint; or an unfair labor practice charge; and

(2) An appropriate authority accepts that appeal, grievance, claim, complaint, or charge as timely filed.

(c) The requirement for an "administrative determination" is met when an appropriate authority determines, in writing, that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(d) The requirement for "correction of the personnel action" is met when an appropriate authority, consistent with law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement, after a review, corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

§ 550.805 Back pay computations.

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee—

(1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and

(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

(b) No employee shall be granted more pay, allowances, and differentials under section 5596 of title 5, United States Code, and this subpart than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred.

(c) Except as provided in paragraph (d) of this section, in computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency may not include—

(1) Any period during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury; or

(2) Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

(d) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall grant, upon request of an employee, any sick or annual leave available to the employee for a period of incapacitation if the employee can establish that the period of incapacitation was the result of illness or injury.

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct—

(1) Any amounts earned by an employee from other employment during the period covered by the corrective action; and

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. The agency shall include as other employment only employment engaged in by the employee to take the place of employment from which the employee has been separated by the unjustified or unwarranted personnel action.

(f) An agency shall credit annual leave restored to an employee as a result of the correction of an unjustified or unwarranted personnel action in excess of the maximum leave accumulation authorized by law to a separate leave account for use by the employee. The employee shall schedule and use annual leave in such a separate leave account as follows:

(1) A full-time employee shall schedule and use excess annual leave of 416 hours or less by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional 208 hours of excess annual leave or any portion thereof.

(2) A part-time employee shall schedule and use excess annual leave in an amount equal to or less than 20 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional number of hours of excess annual leave, or any portion thereof, equal to 10 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks.

§ 550.806 Payment of reasonable attorney fees.

(a) An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. However, if the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency, the employee or the employee's personal representative shall present the request to the appropriate authority from which the appeal was taken.

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

(c) Except as provided in paragraph (e) of this section, when an appropriate authority corrects or directs the

correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee, the payment of reasonable attorney fees shall be deemed to be warranted only if—

(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and

(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

(d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount determined to be reasonable by the appropriate authority. When an appropriate authority determines that such payment is not warranted, no such payment shall be required.

(e) When a determination by an appropriate authority that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee is based on a finding of discrimination prohibited under section 2302(b)(1) of title 5, United States Code, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–5(k)).

(f) The payment of reasonable attorney fees shall be allowed only for the services of members of the Bar and for the services of law clerks, paralegals, or law students, when assisting members of the Bar. However, no payment may be allowed under section 5596 of title 5, United States Code, and this subpart for the services of any employee of the Federal Government, except as provided in section 205 of title 18, United States Code, relating to the activities of officers and employees in matters affecting the Government.

(g) A determination concerning whether the payment of reasonable attorney fees is in the interest of justice and concerning the amount of any such payment shall be subject to review or appeal only if provided for by the statute or regulation.

(h) This section does not apply to any administrative proceeding that was pending on January 11, 1979.

§ 550.807 Prohibition against setting aside proper promotions.

Nothing in section 5596 of title 5, United States Code, or this subpart shall be construed as authorizing the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

[FR Doc. 81-34310 Filed 11-30-81; 8:45 am]
BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

7 CFR Part 800

Delay in Effective Date for Required Use of Diverter-Type Mechanical Samplers

AGENCY: Federal Grain Inspection Service, USDA.

ACTION: Emergency final rule.

SUMMARY: The Federal Grain Inspection Service (FGIS) is delaying the effective date of January 1, 1982, for compliance with the provisions of § 800.83(e)(3) of the regulations under the United States Grain Standards Act (7 U.S.C. 71 *et seq.*) (Act), as amended, which requires the use of diverter-type (D/T) mechanical samplers for certain official sampling, until January 1, 1983. Changing the requirement will have the effect of providing the grain industry with the option of having official inspection results on these types of carriers and movements based on samples obtained with the D/T sampler or other approved sampling methods.

EFFECTIVE DATE: December 1, 1981.

FOR FURTHER INFORMATION CONTACT: Lewis Lebakken, Jr., Regulations and Directives Management, USDA, FGIS, Room 1636, South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250, telephone (202) 447–9172.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures pursuant to Secretary's Memorandum 1512–1 and Executive Order 12291. It has been determined to be nonmajor because the action will merely delay the effective date for the required use of D/T samplers for certain official sampling and therefore does not impose any new or additional requirements on the industry or other affected parties.

Kenneth A. Gilles, Administrator, has determined that this action will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because this action does not impose any new or additional requirements upon such entities but postpones the January 1, 1982, effective date of the requirement to install D/T samplers pursuant to § 800.83(e)(3).

The Administrator has also determined that an emergency situation exists which warrants publication of this action as an emergency final rule without opportunity for a public comment period because of the need to inform, at the earliest possible date, grain elevator operators and other affected parties that the previously established effective date of January 1, 1982, is postponed until January 1, 1983. Accordingly, this action is being issued as an emergency final rule. Under the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure with respect to this action are impracticable, unnecessary, and contrary to the public interest; and good cause is found for making this action effective December 1, 1981.

Section 800.83 requires that, after the effective date set out in the section, each lot inspection for official grade, official factor, or official criteria on "In," "Out," or enroute bulk cargo shipments (river barges) of grain and bulk grain exported from the United States by rail or truck must be based on samples obtained from the grain with a D/T sampler. FGIS presently is considering changing this requirement to allow alternative approved sampling methods to be used for these types of carriers and movements. Changing the requirement will have the official inspection results on these types of carriers and movements based on samples obtained with the D/T sampler or other approved sampling methods.

In light of the above, it has been determined that it is in the public interest to amend § 800.83(e)(3) of the regulations to delay the effective date of January 1, 1982, until January 1, 1983.

PART 800—GENERAL REGULATIONS

§ 800.83 [Amended]

Accordingly, § 800.83(e)(3) of the regulations (7 CFR 800.83(e)(3)) is amended by changing "effective January 1, 1982" to read "effective January 1, 1983."

(Sec. 18, Pub. L. 94–582, 90 Stat. 2884 (7 U.S.C. 87e))

Done in Washington, D.C., on November 23, 1981.

Kenneth A. Gilles,

Administrator.

[FR Doc. 81-34449 Filed 11-30-81; 8:45 am]

BILLING CODE 3410-EN-M

Agricultural Marketing Service

7 CFR Part 907

[Naval Orange Reg. 528; Amdt. 2]

Navel Oranges Grown in Arizona and Designated Part of California; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Amendment to final rule.

SUMMARY: This action increases the quantity of California-Arizona navel oranges that may be shipped to market during the period November 20–26, 1981. Such action is needed to provide for orderly marketing of fresh navel oranges for the period specified due to the marketing situation confronting the orange industry.

EFFECTIVE DATE: November 20, 1981.

FOR FURTHER INFORMATION CONTACT: William J. Doyle, 202–447–5975.

SUPPLEMENTARY INFORMATION:

Findings

This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "non-major" rule. This amendment is issued under the marketing agreement, as amended, and Order No. 907, as amended (7 CFR Part 907), regulating the handling of navel oranges grown in Arizona and designated part of California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This action is based upon the recommendations and information submitted by the Navel Orange Administrative Committee and upon other available information. It is hereby found that this action will tend to effectuate the declared policy of the act.

This action is consistent with the marketing policy for 1981–82. The marketing policy was recommended by the committee following discussion at a public meeting. A regulatory impact analysis on the marketing policy is available from William J. Doyle, Acting Chief, Fruit Branch, F&V, AMS, USDA, Washington, D.C. 20250, telephone 202–447–5975.

The committee met again on November 24, 1981, at Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended amendment of the quantity of navel oranges deemed advisable to be handled during the specified week. The committee reports the demand for navel oranges is good.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation and amendment are based and the effective date necessary to effectuate the declared policy of the act. This amendment relieves restrictions on the handling of navel oranges. It is necessary to effectuate the declared purposes of the act to make this regulatory provision effective as specified, and handlers have been apprised of such provisions and the effective time.

Information collection requirements (reporting or recordkeeping) under this part are subject to clearance by the Office of Management and Budget and are in the process of review.

Section 907.828 Navel Orange Regulation 528 (46 FR 56775; 46 FR 57886) is amended to read as follows:

§ 907.828 Navel orange regulation 528.

* * * * *

(1) District 1: 1,056,000 cartons;
(2) District 2: Unlimited cartons;
(3) District 3: 144,000 cartons;
(4) District 4: Unlimited cartons.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: November 25, 1981.

D. S. Kuryloski,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 81-34497 Filed 11-30-81; 8:45 am]

BILLING CODE 3410-02-M

---

7 CFR Part 1030

Milk in the Chicago Regional Marketing Area; Temporary Revision of Shipping Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Temporary revision of rule.

SUMMARY: This action temporarily relaxes the shipping requirements for pool supply plants under the Chicago Regional milk order for the months of December 1981 through March 1982 to prevent uneconomic shipments of milk to the market and to maintain the pool status of producers who regularly supply the market. The revisions are made in response to requests of cooperative associations of producers supplying the market.

DATE: Effective date: December 1, 1981.

FOR FURTHER INFORMATION CONTACT: Martin J. Dunn, Marketing Specialist, Dairy Division, United States Department of Agriculture, Washington, D.C. 20250, 202–447–7311.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Proposed temporary revision of shipping percentages—Issued October 29, 1981; published November 3, 1981 (46 FR 54564).

This action has been reviewed under USDA procedures established to implement Executive Order 12291 and has been classified "not signficant" and, therefore, not a major action.

Also, it has been determined that the need for adjusting certain provisions of the order on an emergency basis precludes following certain review procedures set forth in Executive Order 12291. Such procedures would require that this document be submitted for review to the Office of Management and Budget at least 10 days prior to its publication in the **Federal Register.** However, this would not permit the completion of the procedure in time to give interested parties timely notice that supply plant shipping requirements for December 1981 would be modified. The initial request for the action was received on October 20, 1981.

William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined that this action would not have a significant economic impact on a substantial number of small entities. Such action would lessen the regulatory impact of the order on certain milk handlers and would tend to assure that the market would be adequately supplied with milk for fluid use with a smaller proportion of milk shipments from pool supply plants.

This temporary revision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the provisions of § 1030.7(b)(5) of the Chicago Regional milk order.

Notice of proposed rulemaking was published in the **Federal Register** (46 FR 54564) concerning a proposed decrease in the shipping requirements for pool supply plants for the months of December 1981 through March 1982. The public was afforded the opportunity to comment on the proposal by submitting written data, views and arguments. Two comments were received in favor of the proposed reduction. No comments in

opposition to the proposal were received.

After consideration of all relevant material, including the proposal set forth in the aforesaid notice, data, views, and arguments filed, and other available information, it is hereby found and determined that for the months of December 1981 through March 1982 the supply plant shipping percentages should be lowered as follows:

Month/year	Percentage		Point change
	Present	Temporary	
December 1981	25	20	−5
January 1982	20	15	−5
February 1982	20	15	−5
March 1982	20	15	−5

Pursuant to the provisions of § 1030.7(b)(5) the supply plant shipping percentages set forth in § 1030.7(b) may be increased or decreased by up to 10 percentage points during the months of September through March to encourage additional milk shipments to pool distributing plants or to remove the need for milk shipments to such plants merely to qualify a supply plant for pooling under the order.

The Central Milk Sales Agency, representing six cooperative associations whose members provide the majority of producer milk associated with the market, requested that the supply plant shipping percentages be decreased by 5 percentage points, to 20 percent for December 1981 and 15 percent for January, February and March 1982. The Agency estimated that producer milk receipts during the winter period would be approximately 13 percent greater than last year. The Agency also indicated that since September some milk previously associated with other markets had been pooled under the Chicago order, thereby adding to available supplies.

The Agency estimated that producer milk receipts by Agency members in December 1981 will be 530 million pounds, or 13.8 percent over December 1980 receipts. Likewise, for January, February and March 1982, the Agency estimated receipts of 554, 520, and 596 million pounds, respectively, or a 13.5, 13.3, and 13.7 percent, respectively, increase over a year earlier. The Agency estimated that the qualifying shipments for December 1981 will amount to 122 million pounds, or 23.0 percent of their receipts. For January the shipments are projected to be 118 million pounds, or 21.3 percent of receipts. The February and March shipments are projected to be 106 and 112 million pounds, respectively, or 20.4 and 18.8 percent of receipts, respectively.

The Agency stated also that the expected Class I sales will be under those of one year ago. The Agency concluded that with increased supplies and decreased sales, a reduction in the shipping percentages of supply plants is warranted to prevent uneconomic and inefficient movements of milk solely for the purpose of qualifying supply plants or units of supply plants for pooling.

Two comments were received in favor and none in opposition to the temporary revision of the supply plant shipping requirements. A proprietary handler favorably commented that the revised percentages would enable his operation to handle its milk more economically. A cooperative association stated that the current marketing conditions warranted the proposed reductions. In the cooperative's view, the temporary reduction in shipping requirements would still provide adequate supplies of Class I milk for distributing plants and would help avert disorderly marketing conditions and uneconomic movements of milk simply to meet the current pool supply plant shipping percentages. Both commentors supported the 5 percentage point reduction in the shipping percentages for each month of December 1981 through March 1982.

For September and October 1981, the producer milk receipts for the market were 10 percent greater than for the same months last year while pounds of pooled Class I milk were 2.3 percent less than for the comparable period last year. From the market data available, it is estimated that for the months of December through March 1982, producer milk will be about 9 percent greater than for the same period last year and the volume of pooled Class I milk for the market will average about 1 percent less than last year. It is concluded from these data that producer milk supplies for the market, currently and prospectively, are at a substantially higher level relative to Class I sales than previously and that consideration for lowering the supply plant shipping percentages temporarily is warranted.

On the basis of available information, it is concluded that the supply plant shipping percentages should be reduced to 20 percent for the month of December 1981 and to 15 percent for the months of January, February and March 1982. Providing the reduction for all four months at this time on the basis of current information will afford all parties adequate knowledge for adjusting operations accordingly.

The shipping percentage reductions are aimed at facilitating the delivery of milk to the market from supply plants for Class I use without requiring uneconomic shipments merely for pooling purposes. It is concluded that the supply-demand conditions in the market warrant a lowering of the shipping requirements, as set forth above, on a temporary basis.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) This temporary revision is necessary to reflect current marketing conditions and to maintain orderly marketing conditions in the marketing area for the months of December 1981 and January, February and March 1982;

(b) This temporary revision does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of the proposed temporary revision was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this temporary revision. All comments received were in favor of the proposal.

Therefore, good cause exists for making this temporary revision effective December 1, 1981.

It is therefore ordered, That the aforesaid provisions of the order are hereby revised for the months of December 1981 and January, February and March 1982.

(Secs. 1–19, 48 Stat. 31, as amended (7 U.S.C. 601–674))

Effective date: December 1, 1981.

Signed at Washington, D.C. on November 24, 1981.

H. L. Forest,

Director, Dairy Division.

[FR Doc. 81-34411 Filed 11-30-81; 8:45 am]

BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Expediting the NRC Hearing Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission has adopted amendments to its Rules of Practice to facilitate expedited conduct of its adjudicatory proceedings. These amendments permit the presiding officer to require oral answers to motions to compel responses to discovery requests and to require service of documents by express mail.

EFFECTIVE DATE: December 1, 1981.

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Esq., Office of the

General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: (202) 634-1465.

SUPPLEMENTARY INFORMATION: On June 8, 1981, the Commission published in the **Federal Register** (46 FR 30349) a notice of proposed rulemaking soliciting public comments on four proposed changes to its Rules of Practice, 10 CFR Part 2. The changes would (1) raise the threshold for the admission of contentions; (2) limit the number of interrogatories that a party could serve on another party, unless consent to file additional interrogatories is obtained from the presiding officer; (3) authorize the presiding officer to require that responses to motions to compel answers to discovery requests be made orally in a conference telephone call or at a prehearing conference, rather than in writing, and (4) permit the presiding officer to require service of documents by express mail. The Commission received sixty-one comments. After reviewing the comments, the Commission has adopted the proposals relating to oral responses to motions to compel answers to discovery requests, and service of documents by express mail. The Commission has adopted these proposals because they provide the presiding officer with additional means to expedite proceedings, where timely completion of the proceeding is important. The other two proposals will be addressed in subsequent **Federal Register** notices.

1. Oral Responses to Motions To Compel Responses to Discovery Requests

Under the Commission's current regulations, 10 CFR 2.730(c), parties may file responses to motions to compel answers to discovery requests. To expedite NRC proceedings, the Commission proposed amendments to its regulations which would provide the presiding officer with the discretion to order that the responses be made orally in a conference telephone call or other prehearing conference rather than in writing.

The nuclear industry commenters generally supported the proposal; intervenors generally opposed it. Both industry and intervenor commenters thought the proposed rule to be deficient because it did not provide that a written record of the arugment would be prepared. Some commenters suggested that the parties be permitted to provide the presiding officer with written summaries of their position following oral argument. Others suggested that a transcriber be made a party to the call. The commenters were concerned that, without a written record, opportunities to appeal the decision of the board could be prejudiced.

Some commenters suggested that the presiding officer should require oral responses only in those proceedings where plant construction is projected to be finished before the licensing process is completed. These commenters argued that use of oral responses should not be a routine procedure, but only used when time is of the essence.

Several commenters also suggested that if the proposed rule is adopted, it should be revised to provide that parties be given a minimum preparation time following the filing of a motion to compel before oral argument is held on the motion.

Commenters also asserted that the costs of conference telephone calls should be borne by the presiding officer, rather than the parties, and that all parties to the proceedings should be permitted to participate in the oral argument.

The Commission agrees with some of these comments and disagrees with others. Because of the difficulty in transcribing telephone calls in which several persons are participating, the Commission is not requiring that a court reporter transcribe arguments made in telephone conference calls or that minutes of the argument be prepared by the presiding officer and served on the parties. Instead the Commission has adopted a rule which provides that if the presiding officer requires oral responses, he or she shall issue a written order on the motion to compel. The order will summarize the views of the parties. This should create an adequate record for review. If a party disagrees with the presiding officer's summary of its views, it may file a motion with the presiding officer requesting that the order be modified so that it reflects accurately the views articulated by the party during the conference call. In adopting this approach the Commission is congnizant that it is not affording parties the right to submit written pleadings following oral argument. Such an approach would preclude a presiding officer from issuing an oral ruling during the conference call (which, though effective on issuance, would be followed by a written order as described above). However, if a presiding officer after hearing oral argument believes that written followup pleadings would be necessary to reach a sound decision on the motion, he or she may request such submissions.

The Commission also has not adopted the recommendation that the rule provide a standard minimum preparation time for the parties before oral argument. A party responding to a motion to compel covering one interrogatory would obviously need less time to prepare for argument than a party responding to a motion covering 25 interrogatories. Therefore, establishment of a minimum preparation time would deprive the boards of flexibility in establishing an appropriate schedule tailored to the circumstances. The Commission instead expects the presiding officer to set an appropriate schedule for oral argument on a case-by-case basis, taking into account the amount of work that will be required by the parties in preparing for oral argument.

The Commission agrees with the commenters that the presiding officer should bear the costs of the conference calls and that all interested parties should be permitted to participate in the call.

Finally, the Commission agrees that oral responses should not be used in the routine case. Oral responses should only be required where early completion of the proceeding is essential, such as in an operating license hearing where construction of the facility has been finished or may be finished prior to the completion of the hearing, in a hearing involving a request to expand spent fuel storage capacity where the plant is or may soon be operating without the benefit of a full core reserve storage capacity, or in a hearing on an operating license amendment involving a signficant hazards consideration where the issuance of the amendment is necessary for continued plant operation.

2. Use of Express Mail

Under the Commission's current rules, the presiding officer is not explicitly authorized to require service of documents by express mail (next day delivery). Accordingly, the rules provide five days for service. Use of express mail in limited circumstances would reduce the service time to two days.

The nuclear industry commenters generally supported adoption of the proposal. Intervenors in NRC proceedings opposed its adoption, emphasizing the cost of express mail. Intervenor commenters asserted that, if authorized, service by express mail should be required only when expedition is truly necessary.

Intervenor and industry commenters also pointed out that express mail service is not available in all cities, and therefore presiding officers could not require its use in some proceedings.

After reviewing the comments, the Commission has determined that on balance the arguments favoring adoption of the rule are more persuasive. The Commission emphasizes though that, because of the cost of express mail, it should only be

required in those proceedings where early completion is essential. Parties should be required to use express mail to serve documents only on those parties (or the presiding officer) which are required to respond to the pleading. For example, a party may be required to serve interrogatories by express mail on the party who must answer the interrogatories. However, there is no reason to have that document served by express mail on the other parties or the presiding officer. When ordering use of express mail, the presiding officer should afford the parties the alternative of using first-class mail and filing the document three days earlier than would be required if express mail were used.

Finally, before ordering service by express mail the presiding officer should ascertain whether it is available. In cities where express mail is not available, the presiding officer obviously cannot order its use.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that these rules will not have a significant economic impact on a substantial number of small entities. These rules affect the Commission's rules of practice and procedure by permitting expedition of the licensing process. The rules contain no recordkeeping or reporting requirements subject to the Paperwork Reduction Act.

Because the amendments are related only to matters of procedure, the Commission is making the amendments effective December 1, 1981.

Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10, Chapter 1, Code of Federal Regulations, Part 2, are published as a document subject to codification to be effective December 1, 1981.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161p and 181, Pub. L. 83-703, 68 Stat. 950 and 953 (42 U.S.C. 2201(p) and 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1242 (42 U.S.C. 5841); 5 U.S.C. 552; unless otherwise noted.

Sections 2.200-2.206 also issued under sec. 186, Pub. L. 83-703, 68 Stat. 955 (42 U.S.C. 2236) and sec. 206, Pub. L. 93-438, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.800-2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, as amended, Pub. L. 85-256, 71 Stat. 579, and Pub. L. 95-209, 91 Stat. 1483 (42 U.S.C. 2039).

2. Section 2.710 is revised to read as follows:

§ 2.710 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added when a document is served by express mail.

3. In § 2.712, paragraph (c) is revised to read as follows:

§ 2.712 Service of papers, methods, proof.

* * * * *

(c) *How Service may be made.* Service may be made by personal delivery, by first class, certified or registered mail including air mail, by telegraph, or as otherwise authorized by law. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer may require service by express mail upon some or all parties and the presiding officer.

* * * * *

4. In § 2.730, paragraph (h) is added to read as follows:

§ 2.730 Motions.

* * * * *

(h) Where the motion in question is a motion to compel discovery under § 2.720(h)(2) or § 2.740(f), parties may file answers to the motion pursuant to paragraph (c) of this section. The presiding officer in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone the presiding officer shall issue a written order on the motion which summarizes the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter which is effective at the time of such ruling, provided that the terms of the ruling are incorporated in the subsequent written order.

Dated at Washington, D.C. this 25th day of November 1981.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 81-34391 Filed 11-30-81; 8:45 am]

BILLING CODE 7590-01-M

---

10 CFR Parts 11, 19, 20, 21, 25, 72, 75, 95, and 170

Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation; Minor Clarifying and Conforming Amendments

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This document makes minor clarifying amendments to the final rule establishing Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation. This document also makes needed conforming amendments to other parts of the Commission's regulations. The amendments are necessary to ensure proper application of the Commission's regulations.

EFFECTIVE DATE: December 1, 1981.

FOR FURTHER INFORMATION CONTACT: Dennis W. Reisenweaver, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (Phone 301-443-5910).

SUPPLEMENTARY INFORMATION: This final rule amends 10 CFR Part 72 of the Commission's regulations as published in final form on November 12, 1980 (45 FR 74693) to conform the description of the general license to receive title to and own spent fuel without regard to quantity established in 10 CFR 72.6(b) to the description used for comparable general licenses in 10 CFR 31.9, 40.21 and 70.20 of the Commission's regulations. These general licenses do not authorize the general licensees to receive, possess, use or transfer any radioactive material and are therefore not subject to the provisions of 10 CFR Part 21. This change to § 72.6(b) will make clear that the provisions of Part 21, which relate to the reporting of defects and noncompliance and which apply, among others, to certain persons licensed to possess, use and/or transfer source, byproduct and/or special nuclear material, are not applicable to persons generally licensed under