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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213, 359, and 536

RINs 3206-AA21 and 3206-AA23

Removal From the Senior Executive Service

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations covering certain removals from the Senior Executive Service (SES). The regulations revise current regulations on removal of career appointees from the SES during the probationary period and for less than fully successful executive performance, as well as placement rights following removal. They also add provisions on removal and placement of career appointees as a result of reduction in force. In addition, the regulations cover the removal of noncareer and limited SES appointees, and reemployed annuitants holding any type of SES appointment. Note that disciplinary removals of career SES appointees who have completed the SES probationary period are covered in 5 CFR Part 752, Subpart F.

EFFECTIVE DATE: June 2, 1989.

FOR FURTHER INFORMATION CONTACT: Neal Harwood, (202) 632-4486.

SUPPLEMENTARY INFORMATION: On August 10, 1988, OPM published proposed regulations (53 FR 30061) on removal from the SES and guaranteed placement for certain employees following removal. The comment period, which was 60 days from the date of publication, ended on October 11, 1988. Comments were received from nine agencies and one executive organization. Comments are

summarized below, along with any changes in, or clarifications of, the proposed regulations.

Removal of Career Appointees During Probation (Part 359, Subpart D)

Proposed § 359.402(b) stated the basis for action to remove a probationer for unacceptable performance.

One agency requested that typical causes or situations where removal action is appropriate be included. While we do not believe it would be useful to list typical causes or situations, since those will be specific to the individual probationer, we can point out that removal can be based on either unacceptable managerial or technical performance. It should be kept in mind that the probationary period is the final step in the examining process for initial career appointment to the SES. It allows the agency an opportunity to assess the new appointee's actual performance in an executive position and to remove the appointee without due formality should circumstances warrant.

The proposed regulations stated that removal "may, but need not, be based upon a final unsatisfactory rating under the agency's SES performance appraisal system." This language has been clarified to indicate that removal may take place at any time during the probationary period and is not dependent upon a formal rating under the agency's performance appraisal system.

If removal is based on a formal rating, however, the rating must follow all the requirements of the performance appraisal system, including an opportunity for a higher level review and review and recommendation by the Performance Review Board. One agency asked whether removal could be based on a formal rating above unsatisfactory. The answer is yes. Even if a formal rating would not be a basis for removal of an individual who has completed the probationary period (e.g., a single minimally satisfactory rating), that does not prevent the removal of a probationary employee. If removal is based on a formal rating, the removal still takes place under § 359.402 and not under Subpart E of Part 359, which covers performance removal of individuals who have completed the probationary period.

Proposed § 359.404(b)(2) stated that a probationary employee had to be given

a reasonable time to reply to a notice of proposed removal based on conditions arising before appointment. An agency asked that the number of days be specified. We have not specified the number of days because the number could be dependent on how close the employee is to completing the probationary period. It should also be noted that there is no specific response time provided under § 315.805(b) for removal of probationers outside the SES for conditions arising before appointment.

As an exception to the normal moratorium on removal actions during the 120 days following the appointment of a new agency head or a new noncareer supervisor, proposed § 359.406 permitted an agency to proceed with a removal under certain emergency conditions. These conditions were similar to those provided in Part 752, Subpart F, which covers adverse actions against SES career appointees who have completed probation. The way in which the conditions were stated in § 359.406, however, differed somewhat from the way they were stated in Part 752. In the final regulations at § 359.406(c)(4), the conditions are not the same, so that a probationer can be removed when retention may pose a threat to the appointee or others, may result in loss of or damage to Government property, or may otherwise jeopardize legitimate Government interests.

Removal of Career Appointees for Less Than Fully Successful Executive Performance (Part 359, Subpart E)

Under current § 359.501(d), a career appointee must be removed from the SES after two annual summary ratings of unsatisfactory within five consecutive years or two annual summary ratings of less than fully successful (unsatisfactory or minimally satisfactory) within three consecutive years. 5 U.S.C. 4314(b)(1)(D) provides that an appraisal period "may be terminated in any case in which the agency making an appraisal determines that an adequate basis exists on which to appraise and rate the senior executive's performance." Proposed § 359.501(d) dropped the term "annual" ratings from the regulations to make clear that ratings based on a shortened appraisal period were still to be considered final ratings for removal purposes.

The executive organization stated, "If these proposed regulations are enacted allowing both ratings to be less than annual ratings, then the result could be that two periods of less than satisfactory employment covering ninety days each in a five year period would result in the removal of an employee from the SES." The organization recommended that at least one of the two ratings must be an "annual rating" and cover a one-year period.

We have retained the provision as stated in the proposed regulations. It is in accord with the law, and we believe there are advantages to both agencies and employees with this provision over the current regulations. If an agency was dissatisfied with an employee's performance and wanted to take some action before the end of the appraisal year, it might be willing to give an unsatisfactory or minimally satisfactory rating and allow the employee to stay in the SES provided that the agency could remove the employee before the end of a full year if the employee's performance did not improve. However, if the agency knew it would have to wait a full year before giving another rating that could result in removal, it might just give an unsatisfactory rating initially and remove the employee immediately without giving the employee a further chance. (Under 5 U.S.C. 4314(b)(3), a career appointee may be removed after a single unsatisfactory rating.)

It should be noted that any shortened appraisal period must meet the minimum appraisal period established in the agency's SES performance appraisal plan. The rating must also meet all other requirements of law and regulation, including opportunity for review by a higher-level executive and review and recommendation by the Performance Review Board. Further, if an employee receives a less than fully successful rating, the agency is required under 5 CFR 430.304(h) to assist the employee in improving performance before the next rating of record is given. We believe these provisions provide adequate safeguards for affected employees, and we will note them in the Federal Personnel Manual instructions.

One agency asked that OPM clarify in § 359.502(b) the role of the Merit Systems Protection Board in holding informal hearings following performance removals. This is not appropriate for these regulations, since MSPB has its own regulations on informal hearings (see 5 CFR 1201.141 and 1201.142). We will provide in the Federal Personnel Manual, however, further information on the hearing process.

Proposed § 359.503 covered the 120-day moratorium on the removal of a

career SES member for performance following the appointment of a new agency head or the member's most immediate supervisor who was a noncareer appointee and had the authority to remove the member. One agency recommended that the definition of a "noncareer appointee" in § 359.503(b) be revised to include an appointee who is traditionally changed upon a change in Administration or a change in the agency head. We have not adopted this recommendation since such an appointee in most instances will be one of the noncareer appointees already listed in the section (e.g., a Presidential appointee or a noncareer SES appointee), but could be an SES or other career appointee, who would not be subject to the statutory moratorium in any event.

One agency recommended that proposed § 359.504 be revised to incorporate from § 359.505(b) of the current regulations the statement that an employee may submit a complaint to the Special Counsel of the Merit Systems Protection Board if an agency violates the 120-day moratorium on performance removals following the appointment of a new agency head or noncareer supervisor. An employee has such a right under 5 U.S.C. 1206 since any allegation of a prohibited personnel practice may be submitted to the Special Counsel. We deleted the provision from the regulations because we do not want to give the impression that an individual has a right to submit a complaint to the Special Counsel only when the right is specifically stated in the regulations.

Note that the 120-day moratorium applies to all performance removal actions unless the removal is based on an unsatisfactory performance rating issued before the appointment of the new agency head or noncareer supervisor.

Removal of Career Appointees as a Result of Reduction in Force (Part 359, Subpart F)

The executive organization recommended that probationary employees should be given a separate, lower retention standing than employees who have completed the probationary period during RIF competition and that employees who have completed the probationary period and have a fully successful rating or higher should be placed first in available positions if they are affected by a RIF. The organization stated, "The whole purpose of a RIF is to retain the most experienced, highly qualified within government."

Under 5 U.S.C. 3595(a), the competitive procedures in a RIF in the SES must be based primarily on

performance, not on length of experience. Therefore, we do not believe the regulations should require that agencies give all probationary employees a lower retention standing than employees who have completed the probationary period, irrespective of the performance of the employees. We have revised § 359.602(a), however, to provide that if a probationary employee and an employee who has completed the probationary period have the same retention standing, the employee who has completed the probationary period must be retained over the probationary employee. For example, if employees were placed on the retention register based on their last SES performance rating of record and both a probationary employee and an employee who has completed the probationary period had an outstanding rating, the latter employee would be retained over the probationary employee.

We will also indicate in the Federal Personnel Manual that although they are not required to do so, agencies in their RIF plans may place all employees who have completed the probationary period, and who have a rating of fully successful or above, higher on the retention register than probationary employees.

As far as placement is concerned, under 5 U.S.C. 3595(b)(3)(A), if an employee has completed the probationary period and is affected by a RIF, the agency must place the employee in any vacant SES position for which the employee is qualified. There is no such requirement for a probationary employee affected by a RIF, although the agency may place the employee elsewhere in the SES if a vacant position is available. In accordance with the recommendation of the executive organization, we have revised the regulations to state that if both a probationary employee and an employee who has completed the probationary period are affected by a RIF and are qualified for a vacant SES position, the employee who has completed the probationary period must be placed in the position since that employee has a statutory entitlement to the position while the placement of the probationary employee is optional with the agency.

Guaranteed Placement and Saved Pay (Part 213, Section 3202; Part 359, Subpart G; Part 538, Subpart A)

Guaranteed placement, with saved pay, at GS-15 or higher is provided under Subpart G of Part 359 for certain career employees who are removed during their probationary period,

removed for performance reasons following the probationary period, or removed as the result of a reduction in force (RIF).

The proposed regulations provided that a career appointee removed from the SES as the result of RIF was entitled to SES pay retention under Part 359, section 359.705, and was not covered by the general pay retention provisions in Part 536. The regulations continued to permit agencies to exercise their discretionary authority in § 536.104(b), however, to grant pay retention in RIF situations when the individual was not entitled to pay retention under § 359.705. An agency asked for examples of when § 536.104(b) might be applicable. These include when an individual voluntarily accepts a GS-15 position following receipt of a general RIF notice or a notice of position abolishment, or accepts a position below GS-15 following a RIF.

An agency stated that pay savings under § 359.705, rather than Part 536, should be applicable if an employee voluntarily returns to the GS-15 level after receiving notice that his or her position is being abolished, even though there is no formal RIF. The statute is clear that position abolishment alone does not entitle an individual to guaranteed placement at GS-15 and pay savings under 5 U.S.C. 3594, but that the individual must be removed from the SES in a RIF action under 5 U.S.C. 3595(b) (4) or (5). (See 5 U.S.C. 3594(b)(2).) It may well be that there are other SES positions to which the individual could be assigned, and it would not be appropriate to require that the agency provide pay savings under 5 U.S.C. 3594 if the individual voluntarily decided to take a GS-15 position in lieu of accepting reassignment within the SES.

If an agency has no vacant position currently available at GS-15 or above for which the individual qualifies and cannot make a placement in another agency, the introductory material to the proposed regulations stated that the agency still must create a position to permit the fallback and should then continue its efforts to find an appropriate position for the individual either internally or in another agency. An agency stated that OPM "should establish some expressed limit on this continuing effort to avoid adverse impact as an agency seeks to recover the equilibrium lost after a RIF in its executive ranks."

As was pointed out when the proposed regulations were issued, if it does not prove possible to find the individual another position following fallback, an agency can conduct a

further RIF under Part 351 RIF procedures; but this action may not be taken within three months of the removal from the SES. It was also pointed out that this is the same period provided in Part 351 (5 CFR 351.701(a)) as the minimum length of time a position must last when an employee is assigned to another position under RIF procedures outside the SES.

The executive organization argued that the three-month period did not provide sufficient protection to a former SES member. It was concerned that an agency might abolish a GS-15 position in which the individual was placed and conduct a RIF as soon as the period had ended, and it recommended that the agency be required to retain the individual in the position until another GS-15 or SES position could be found. It is not the intent of the law, however, that a former SES member be granted indefinite tenure at the GS-15 level. There may be legitimate situations where because of budgetary or other reasons an agency finds it necessary to conduct a RIF under Part 351 procedures at the GS-15 level, and it is not possible to find the former SES appointee another GS-15 position. Therefore, the final regulations do not require continued placement at GS-15 should a RIF be necessary at that level after the three months.

Proposed § 213.3202 established a new Schedule B appointing authority for those instances in which an individual entitled to guaranteed placement does not have reinstatement rights in the competitive service and cannot be placed under another excepted appointing authority. An agency recommended that a time limit be placed on how long the individual may stay under the Schedule B appointment and permit an agency to convert the employee noncompetitively to a career or career-conditional appointment in the same manner that PAC employees can now be converted. In order to provide for noncompetitive conversion to the competitive service for employees who do not have reinstatement eligibility, there must be an Executive Order, as was done for PAC employees, or legislative action. We will explore these possibilities, but in the meantime the final regulations contain the governmentwide Schedule B authority without time limitation.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under Section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will only affect Government employees who are members of the Senior Executive Service.

List of Subjects

5 CFR Part 213

Government employees.

5 CFR Part 359

Government employees.

5 CFR Part 536

Administrative practice and procedure, Government employees, Wages.

U.S. Office of Personnel Management,
Constance Horner,
Director.

Accordingly, OPM is amending 5 CFR Part 213, 5 CFR Part 359, and 5 CFR Part 536 as follows:

PART 213—EXCEPTED SERVICE

1. The authority for Part 213 continues to read as follows:

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954-1958 Comp. p. 218; § 213.101 also issued under 5 U.S.C. 2103; § 213.102 also issued under 5 U.S.C. 1104, Pub. L. 94-454, sec. 3(5); § 213.3102 also issued under 5 U.S.C. 3301, 3302 (E.O. 12364, 47 FR 22931), 3307, 8337(h), and 8457.

2. Section 213.3202(m) is added to read as follows:

§ 213.3202 Entire executive civil service.

* * * * *

(m) Positions when filled under any of the following conditions:

(1) Appointment at grades GS-15 and above, or equivalent, in the same or a different agency without a break in service from a career appointment in the Senior Executive Service (SES) of an individual who:

(i) Has completed the SES probationary period;

(ii) Has been removed from the SES because of less than fully successful executive performance or a reduction in force; and

(iii) Is entitled to be placed in another civil service position under 5 U.S.C. 3594(b).

(2) Appointment in a different agency without a break in service of an individual originally appointed under paragraph (m)(1).

(3) Reassignment, promotion, or demotion within the same agency of an individual appointed under this authority.

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

3. The authority citation for Part 359 is revised to read as follows:

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

4. Subpart A is removed and reserved, Subpart C is reserved, Subpart B and D through G are revised, and Subpart I is added, to read as follows:

Subpart A—[Reserved]

Subpart B—General Provisions

Sec.

359.201 Regulatory requirements.

359.202 Definitions.

Subpart C—[Reserved]

Subpart D—Removal of Career Appointees During Probation

359.401 General exclusions.

359.402 Removal: Unacceptable performance.

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359.404 Removal: Conditions arising before appointment.

359.405 Removal: Reduction in force.

359.406 Restrictions.

359.407 Appeals.

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359.502 Procedures.

359.503 Restrictions.

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359.602 Agency reductions in force.

359.603 OPM priority placement.

359.604 Removal from the SES and placement rights outside the SES.

359.605 Notice requirements.

359.606 Appeals.

359.607 Records.

359.608 Transfer of function.

Subpart G—Guaranteed Placement

359.701 Coverage.

359.702 Placement rights.

359.703 Responsibility for placement.

359.704 Restrictions.

359.705 Pay.

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Subpart I—Removal of Noncareer and Limited Appointees and Reemployed Annuitants

359.901 Coverage.

359.902 Conditions of removal.

Subpart A—[Reserved]

Subpart B—General Provisions

§ 359.201 Regulatory requirements.

This part contains the regulations of the Office of Personnel Management (OPM) that implement subchapter V of chapter 35 of title 5, United States Code, on the Senior Executive Service (SES).

§ 359.202 Definitions.

"Agency," "Senior Executive Service position," "senior executive," "career appointee," "limited emergency appointee," "limited term appointee," and "noncareer appointee," are defined in 5 U.S.C. 3132(a).

"Probation" and "probationary period" mean the 1-year probation required by 5 U.S.C. 3393(d) upon initial career appointment to the SES.

"Reemployed annuitant" means an individual who is receiving an annuity under the Civil Service Retirement System or the Federal Employees' Retirement System on the basis of his or her former Federal service. A reemployed annuitant serves at the pleasure of the appointing authority.

Subpart C—[Reserved]

Subpart D—Removal of Career Appointees During Probation

§ 359.401 General exclusions.

This subpart does not apply to the removal of a career appointee during probation when—

(a) The action is initiated under 5 U.S.C. 1206(g) or 5 U.S.C. 7542; or

(b) The appointee is a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

§ 359.402 Removal: Unacceptable performance.

(a) *Coverage.* This section covers the removal of a career appointee from the SES during the probationary period for unacceptable performance.

(b) *Basis for action.* A removal under this section need not be based upon a final rating under the agency's SES performance appraisal system established under Subpart C of Part 430 of this chapter. Even if a removal is based on such a rating, the removal action is taken under this section.

(c) *Procedures.* The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum—

(1) State the agency's conclusions as to the inadequacies of the appointee's performance;

(2) State whether the appointee has placement rights under § 359.701 and, if

so, identify the position to which the appointee will be assigned; and

(3) Show the effective date of the action.

§ 359.403 Removal: Conduct.

(a) *Coverage.* (1) This section covers the removal of a career appointee from the SES during the probationary period for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(2) This section does not apply, however, when the appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of Part 752, Subpart F, of this chapter.

(b) *Procedures.* The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum—

(1) State the basis for the removal action (including the act(s) of misconduct, neglect of duty, or malfeasance if those factors are involved); and

(2) Show the effective date of the action.

§ 359.404 Removal: Conditions arising before appointment.

(a) *Coverage.* (1) This section covers the removal of a career appointee from the SES during the probationary period when the action is based in whole or in part on conditions arising before the appointment.

(2) This section does not apply, however, when the career appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of Part 752, Subpart F, of this chapter.

(b) *Procedures.* (1) The agency shall give the appointee an advance written notice stating the specific reasons for the proposed removal.

(2) The appointee shall be given a reasonable time to reply.

(3) The agency shall give the appointee a written decision showing the reasons for the action and the effective date. The decision shall be given to the appointee at or before the time the action will be made effective.

§ 359.405 Removal: Reduction in force.

(a) *Coverage.* This section covers the removal of a career appointee from the SES during the probationary period under a reduction in force.

(b) *Basis for Action.* The appointee must have been identified for removal from the SES under competitive

procedures established by the agency in accordance with the requirements of 5 U.S.C. 3595(a). Removal action shall be taken under 5 U.S.C. 3592(a).

(c) *Procedures.* The agency shall notify the appointee in writing before the effective date of the action. The notice shall state, as a minimum—

(1) Whether the appointee has placement rights under § 359.701 to a position outside the SES and, if so, the position to which the appointee will be assigned;

(2) The effective date of the action;

(3) The appointee's appeal rights, including the time limit for appeal and the location of the Merit System Protection Board office to which an appeal should be sent; and

(4) Such other information as may be required by OPM.

§ 359.406 Restrictions.

(a) Removal from the SES under §§ 359.402 through 359.404 may not be made effective within 120 days after—

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate supervisor who—

(i) Is a noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C or noncareer executive assignment, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

(c) The restrictions in paragraph (a) of this section do not apply—

(1) When the career appointee has received a final rating of unsatisfactory under the performance appraisal system established by the agency under subchapter II of chapter 43 of title 5, United States Code, before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee;

(2) To a disciplinary action initiated before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee;

(3) To a disciplinary action when there is a reasonable cause to believe that the career appointee has committed a crime for which a sentence of imprisonment can be imposed; or

(4) To a disciplinary action when the circumstances are such that retention of the career appointee—

(i) May pose a threat to the appointee or others;

(ii) May result in loss of or damage to Government property; or

(iii) May otherwise jeopardize legitimate Government interests.

(d) The following procedures must be observed when an agency invokes an exception to the 120-day restriction under paragraphs (c)(3) or (c)(4) of this section:

(1) The agency shall include in the notice the reasons for invoking the exception.

(2) The appointee shall be given a reasonable time, but no less than 7 days, to respond regarding the propriety of the use of the exception.

(3) The agency shall give the appointee a notice of decision on the propriety of the use of the exception at or before the time the action will be effective.

(4) When circumstances require immediate action, the agency may place the appointee in a nonduty status with pay for such time as necessary to effect the action.

(e) The imposition of the 120-day moratorium does not extend the probationary period.

§ 359.407 Appeals.

(a) Removal under § 359.402, 359.403, or 359.404 is not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

(b) Removal under § 359.405 is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701 as to whether the reduction in force complies with the competitive procedures required under 5 U.S.C. 3595(a).

Subpart E—Removal of Career Appointees for Less Than Fully Successful Executive Performance

§ 359.501 General.

(a) *Coverage.* (1) This subpart covers—

(i) A career appointee who has completed the probationary period in the SES; and

(ii) A career appointee who is not required to serve a probationary period in the SES.

(2) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See Subpart I of this part for removal of a reemployed annuitant.

(b) *Definitions.* (1) "Final rating" means the rating of record made by an appointing authority under the SES

performance appraisal system in accordance with the requirements of 5 U.S.C. 4314(c)(3) and Part 430, Subpart C, of this chapter.

(2) A "less than fully successful" final rating means a rating of unsatisfactory or minimally satisfactory.

(c) *Optional removal from the SES.*

The agency may remove a career appointee from the SES after the appointee has been given one final rating of unsatisfactory.

(d) *Mandatory removal from the SES.* The agency must remove a career appointee from the SES after—

(1) The appointee has been given two final ratings of unsatisfactory within 5 consecutive years; or

(2) The appointee has been given two final ratings of less than fully successful within 3 consecutive years.

§ 359.502 Procedures.

(a) *Notice.* The agency shall notify the career appointee in writing at least 30 calendar days before the effective date of the action. The notice shall advise the appointee of—

(1) The basis for the action;

(2) The appointee's placement rights under Subpart G of this part—the position to which the appointee will be assigned shall be identified either in this advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action;

(3) The appointee's right to request an informal hearing from the Merit Systems Protection Board;

(4) The effective date of the removal action; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

(b) *Informal hearing.* (1) A career appointee being removed from the SES under this section shall, at least 15 days before the effective date of the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board. The appointee shall submit the request for an informal hearing to the Board. This request may be made at any time after the appointee has received the notice described in paragraph (a) of this section, but no later than 15 days before the effective date of action. The informal hearing shall be conducted in accordance with the regulations and procedures established by the Board. See 5 CFR 1201.141, Right to hearing, and 5 CFR 1201.142, Hearing procedures; referral of the record.

(2) Neither the granting nor the conduct of an informal hearing shall provide a basis for appeal to the Merit

Systems Protection Board under 5 U.S.C. 7701. The removal action need not be delayed because of the granting of an informal hearing.

§ 359.503 Restrictions.

(a) Removal from the SES under this subpart may not be made effective within 120 days after—

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate supervisor who—

- (i) Is a noncareer appointee; and
- (ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C or noncareer executive assignment, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

(c) This restriction does not apply when the career appointee has received a final rating of unsatisfactory under the performance appraisal system established by the agency under subchapter II of chapter 43 of title 5, United States Code, before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee.

§ 359.504 Appeals.

An action taken under § 359.501 is not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

Subpart F—Removal of Career Appointees as a Result of Reduction in Force

§ 359.601 General.

(a) *Coverage.* (1) This subpart covers the removal of a career appointee from the SES as a result of a reduction in force.

(2) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See Subpart I of this part for removal of a reemployed annuitant.

(b) *Definitions.* (1) "Probationary period" is defined in § 359.202 of this part.

(2) "Reduction in force" is defined in 5 U.S.C. 3595(d) as including "the elimination or modification of a position due to a reorganization, due to a lack of funds or curtailment of work, or due to any other factor."

(c) *Agency procedures.* An agency must have issued written procedures

before conducting a reduction in force. A copy of the procedures shall be provided OPM upon issuance.

§ 359.602 Agency reductions in force.

(a) *Competitive procedures.* (1) This paragraph applies to all SES career appointees in the agency, including appointees serving a probationary period.

(2) An agency shall establish competitive procedures in writing to determine who will be removed from the SES in any reduction in force of career appointees within the agency. Such competitive procedures shall be based primarily on performance.

(3) An appointee who has completed the probationary period must be retained over an appointee who has not completed the probationary period if they both have the same retention standing.

(b) *Placement within the agency.* (1) This paragraph applies to any SES career appointee who has completed the probationary period, or was not required to serve a probationary period, and who has been identified for reduction in force under paragraph (a) of this section.

(2) The appointee is entitled to be offered any vacant SES position in the agency for which the appointee meets the qualifications requirements. If there is more than one vacancy, the agency has the option of which position to offer the appointee.

(3) An appointee covered by this paragraph is entitled to be placed in a vacant SES position over an appointee who is still serving a probationary period.

§ 359.603 OPM priority placement.

(a) *Agency certification.* (1) If there is no vacant SES position within the agency for which an appointee covered by § 359.602(b) is qualified, the agency head, or the acting agency head in the absence of the agency head, shall certify to OPM in writing that no such position is available. This certification may not be delegated below the agency head level.

(2) The 45-day period during which OPM will attempt to place the appointee begins on the day the certification is acknowledged by OPM.

(3) It is the continuing responsibility of an agency that has a surplus career appointee to place the appointee in any vacant SES position in the agency for which the appointee is qualified, even after the appointee is certified to OPM.

(b) *OPM authority.* As provided by § U.S.C. 3595(b)(3), OPM may require an agency to take any action that OPM considers necessary to carry out a placement.

(c) *OPM referrals.* (1) OPM may formally refer a career appointee to an agency for a specific SES vacancy or general priority consideration. Such a referral may not become a part of the regular competitive staffing process. The appointee must be considered by the agency for a noncompetitive SES appointment.

(2) Any objection by the agency to the qualifications of the appointee must be based on the professional/technical qualifications in the standard for the position. An agency may not rely solely on lack of agency-specific experience for an objection based on lack of professional/technical qualifications if the appointee is otherwise qualified.

(d) *Agency response.* (1) In order to expedite placement of surplus career appointees, an agency shall respond to an OPM referral within the time period prescribed by OPM.

(2) If an agency fails to place a referred career appointee in an SES position because of objection to the appointee's qualifications or because of any other reason, the agency response must be in writing and must be signed by the agency head, or the acting agency head in the absence of the agency head. The response may not be delegated below the agency head level.

(e) *Corrective action.* If an agency fails to provide bona fide priority consideration, OPM may order appropriate corrective action.

(f) *Declination by employee.* A career appointee who declines a reasonable offer of placement may be removed from the SES.

§ 359.604 Removal from the SES and placement rights outside the SES.

(a) If a probationary appointee is identified for reduction in force under § 359.602(a), removal action is taken under § 359.405. Placement rights outside the SES are covered under subpart G of this part.

(b) If a career appointee who has completed the probationary period, or who did not have to serve one, is identified for reduction in force under § 359.602(a) and is not placed elsewhere in the SES under § 359.602(b) or § 359.603, or declines a placement offer under § 359.603, removal action is taken under § 359.604(b). Placement rights outside the SES are covered under subpart G of this part.

§ 359.605 Notice requirements.

(a) Each career appointee subject to removal under § 359.604(b) is entitled to a specific, written notice at least 45 calendar days before the effective date of the removal.

(b) The notice shall state, as a minimum—

- (1) The action to be taken and its prospective effective date;
- (2) The place where the appointee may inspect the regulations and records pertinent to the action;
- (3) Placement right within the agency and through OPM;
- (4) The appointee's appeal rights, including the time limit for appeal and the location of the Merit Systems Protection Board office to which an appeal should be sent; and
- (5) Such other information as may be required by OPM.

§ 359.606 Appeals.

A career appointee may appeal to the Merit Systems Protection Board whether the reduction in force complies with the competitive procedures in § 359.602(a).

§ 359.607 Records.

Each agency shall maintain current records needed to determine the retention standing of its competing appointees. The agency shall allow the inspection of its retention registers and related records by an appointee to the extent that they have a bearing on the appointee's situation. The agency shall preserve intact all registers and records relating to a reduction-in-force action for at least 2 years from the effective date of the action.

§ 359.608 Transfer of function.

(a) "Transfer of function" means the transfer of the performance of a continuing function from one agency to one or more other agencies.

(b) A career appointee is entitled to accompany his or her function to the new agency without any change in tenure if the alternative is removal from the SES in the current agency under reduction in force.

Subpart G—Guaranteed Placement

§ 359.701 Coverage.

This subpart covers career appointees, other than reemployed annuitants, who are removed from the SES under any of the following conditions:

(a) Removal during the probationary period under Subpart D of this part for other than misconduct, neglect of duty, malfeasance, or other disciplinary reasons under § 359.403, § 359.404, or Part 752, Subpart F, of this chapter, if at the time of appointment to the SES the individual held a career or career-conditional appointment or an appointment of equivalent tenure, as determined by OPM. An appointment of equivalent tenure is considered to be an

appointment in the excepted service other than an appointment—

- (1) To a Schedule C position established under Part 213 of this chapter;
 - (2) To a position authorized to be filled by noncareer executive assignment under Part 305 of this chapter;
 - (3) To a position that meets the same criteria as a Schedule C position or a position authorized to be filled by noncareer executive assignment; or
 - (4) To a position where the incumbent is traditionally changed upon a change in Presidential Administrations.
- (b) Removal for less than fully successful executive performance under Subpart E of this part if the appointee has completed the required probationary period under the SES or was not required to serve a probationary period.
- (c) Removal as the result of a reduction in force under Subpart F of this part if the appointee has completed the required probationary period under the SES or was not required to serve a probationary period.

§ 359.702 Placement rights.

(a) An appointee covered by this subpart is entitled to be placed in a vacant civil service position (other than an SES position) in any agency that is—

- (1) A continuing position at GS-15 or above, or equivalent, that will last at least three months; and
- (2) A position for which the appointee meets the qualifications requirements.

(b) A probationary appointee, or a nonprobationary appointee who at the time of appointment to the SES held a career or career-conditional appointment (or an appointment of equivalent tenure, as defined in § 359.701(a)), is entitled to be placed in a position of tenure equivalent to that of the appointment held at the time of appointment to the SES. This tenure requirement does not apply—

- (1) If the agency taking the removal action does not have a position of equivalent tenure for which the appointee meets the qualifications requirements; or
- (2) If the appointee is willing to accept a position having a different tenure.

§ 359.703 Responsibility for placement.

The agency taking the removal action is responsible for placing the appointee in an appropriate position within the agency, or for arranging a transfer to an appropriate position in another agency. Any transfer must be mutually acceptable to the appointee and the gaining agency.

§ 359.704 Restrictions.

Placement of an appointee under this subpart shall not cause the separation or reduction in grade of any other employee.

§ 359.705 Pay.

(a) An appointee placed under this subpart is entitled to receive basic pay at the highest of—

- (1) The rate of basic pay in effect for the position in which the appointee is being placed;
- (2) The rate of basic pay currently in effect for the position that the appointee held in the civil service immediately before being appointed to the SES; or
- (3) The rate of basic pay in effect for the appointee immediately before removal from the SES.

(b) An employee receiving basic pay under paragraph (a)(2) or (a)(3) of this section shall have future pay adjusted in accordance with 5 U.S.C. 3594(c)(2).

Subpart I—Removal of Noncareer and Limited Appointees and Reemployed Annuitants

§ 359.901 Coverage.

(a) This subpart covers the removal from the SES of—

- (1) A noncareer appointee;
 - (2) A limited emergency or a limited term appointee; and
 - (3) A reemployed annuitant holding any type of appointment under the SES.
- (b) Coverage does not include, however, a limited emergency or a limited term appointee who is being removed for disciplinary reasons and who is covered by 5 CFR 752.601(c)(2).

§ 359.902 Conditions of removal.

(a) *Authority.* The agency may remove an appointee subject to this subpart at any time.

(b) *Notice.* The agency shall notify the appointee in writing before the effective date of the removal.

(c) *Placement rights.* An appointee covered by this subpart is not entitled to the placement rights provided for career appointees under Subpart G of this part.

(d) *Appeals.* Actions taken under this subpart are not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

PART 536—GRADE AND PAY RETENTION

5. The authority citation for Part 536 is revised to read as follows, and the authority citation following § 536.307 is removed:

Authority: 5 U.S.C. 5361–5366; section 536.307 is also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92–502.

6. Section 536.105 is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 536.105 Exclusions.

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

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

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

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

(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; or

(5) Is entitled to receive basic pay under 5 U.S.C. 3594(c) because of removal from the Senior Executive Service and placement in a civil service position (other than a Senior Executive Service position) under 5 U.S.C. 3594(b)(2).

(c) Grade retention under § 536.103 (a)(1) or (b) shall not apply to a member of the Senior Executive Service who is placed in a position in a covered pay schedule.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 29

[TB-88-105]

Tobacco Inspection; Fees and Charges for Inspection and Testing of Imported Tobacco

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Dairy and Tobacco Adjustment Act of 1983, as amended (7 U.S.C. 511r) prohibits the importation of flue-cured and burley tobacco which contains prohibited pesticide residue(s) and establishes related certification and testing requirements. This final rule would increase the user fees charged to importers. The increased user fees are necessary in order to recover the Department's costs of providing services under the Act.

EFFECTIVE DATE: July 1, 1989.

FOR FURTHER INFORMATION CONTACT: Ernest Price, Director, Tobacco Division, Agricultural Marketing Service, United

States Department of Agriculture, Room 502 Annex Building, P.O. Box 96456, Washington, DC 20090-6456.

SUPPLEMENTARY INFORMATION: Notice was given (54 FR 05494, February 3, 1989), that the Department proposes to amend the regulations governing the inspection and grading of imported flue-cured and burley tobacco to increase the fees collected for testing of imported tobacco. The fees would as nearly as possible cover the costs of providing services, including administrative and supervisory costs. The authority for these regulations is contained in the Dairy and Tobacco Adjustment Act of 1983, as amended (7 U.S.C. 511r).

User fees are assessed on imported flue-cured and burley tobacco to cover the cost of sampling and testing under current regulations. The fee for sampling and testing imported flue-cured and burley tobacco in accordance with these regulations is being raised from \$.001 per pound to \$.0035 per pound. The additional fee for sampling and testing imported flue-cured and burley tobacco not accompanied by a certification that it is free of prohibited pesticide residues is being raised from \$.003 per pound to \$.0035 per pound. A minimum fee of \$162.00 is established for each lot.

Interested parties were given an opportunity to comment on the proposed rule. Seven comments were received. Three of the comments, from individuals, supported the increase in the fee. Four of the comments, from tobacco importers and a representative of manufacturers, suggested that the Department's costs, and thus the necessary level of the fee, could be reduced by reducing the frequency of sampling and testing. They also suggested that this would reduce delays in obtaining test results. However, the Department believes that current sampling and testing procedures are appropriate and necessary. In regard to delays in obtaining test results, a backlog of samples to be tested developed because of equipment failures at the laboratory. These problems have been corrected and the backlog has been eliminated. The Department will continue to monitor the situation and take further corrective action if necessary.

The revised fees were determined after a thorough review of the procedures currently being used, the average volume sampled and tested and the number of staff hours necessary to provide and supervise the testing service. The costs actually incurred by this relatively new program have been closely monitored. Based on this review and analysis, it has been determined

that the cost of testing tobacco samples has risen by 35 percent since the program was instituted. It has been found that, for small lots, the fees per pound do not cover the cost of testing a sample. Accordingly, this final rule increases the per pound fees and establishes a minimum fee per lot.

This final rule has been reviewed under USDA procedures established to implement Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be "nonmajor" because it does not meet any of the criteria established for major rules under the Executive order.

Additionally, in conformance with the provisions of Pub. L. 96-354, the Regulatory Flexibility Act, full consideration has been given to the potential economic impact on small business. Few, if any, of the firms which would be affected by these proposed regulations meet the definition of small business because of their individual size. The Administrator, Agricultural Marketing Service, has determined that these actions would have no significant economic impact upon any entity, small or large, and would not substantially affect the normal movement of the commodity in the marketplace. Compliance with this revision would not impose substantial direct economic costs, recordkeeping, or personnel workload changes on small entities, and it would not alter the market share or competitive positions of small entities relative to large entities. Furthermore, the Department is required by law to fix and collect fees and charges to cover the Department's cost in operating the tobacco inspection program.

Therefore, the regulations in 7 CFR Part 29, Subpart B, are amended as follows:

PART 29—[AMENDED]

1. The authority citation for Part 29, Subpart B, continues to read as follows:

Authority: 7 U.S.C. 511m and 511r.

Subpart B—Regulations

2. In § 29.500, paragraph (b) is revised to read as follows:

§ 29.500 Fees and charges for inspection and testing of imported tobacco.

(b) The fee for sampling, testing and certification of imported flue-cured and burley tobacco for prohibited pesticide residues is \$.0035 per pound, and shall be paid by the importer. The fee for testing imported flue-cured and burley tobacco not accompanied by a certification that it is free of prohibited