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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 531, 536, 772, 831, 841, 842, 846, 870, and 890

RIN 3206-AE16

Interim Relief

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is publishing final regulations at 5 CFR parts 531, 536, 772, 831, 841, 842, 846, 870, and 890 to provide agencies with the authorities necessary to take personnel actions providing interim relief under the *Whistleblower Protection Act of 1989*, Public Law 101-12, codified at 5 U.S.C. 7701(b)(2)(A). These regulations address the areas of: (1) Taking personnel actions to effect interim relief, (2) pay and benefits administration, and (3) the effect of interim relief on entitlement to retirement, health, and life insurance benefits for the period of time an employee, former employee, or applicant for employment remains in an interim relief status.

EFFECTIVE DATE: March 2, 1992.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

OPM published for comment proposed regulations on this subject in the *Federal Register* on February 5, 1991, on pages 4562-4567. Comments and suggestions were received from eight agencies and one union. These comments and suggestions, along with the rationale for

and explanation of changes to various parts of the Code of Federal Regulations, are discussed below.

The *Whistleblower Protection Act of 1989* (WPA) provided that prevailing parties in an appeal to the Merit Systems Protection Board (MSPB) "... shall be granted the relief provided in the decision, and remaining in effect pending the outcome of any petition for review. . . ." The final regulations authorize agencies to take interim personnel actions to provide a prevailing applicant or employee the interim relief ordered in an MSPB initial decision. Interim personnel actions include, but are not limited to, interim appointments, interim promotions after demotions, and interim within-grade increases.

1. Part 772—When Interim Relief Is Appropriate and When It Is Effective

Two commenters suggested that the regulations address the question of whether or not interim relief is only appropriate when an appellant alleges that an appealed action was taken in reprisal for whistleblowing. In response, OPM has amended § 772.101 to clarify that the interim relief provisions of the WPA apply to MSPB appeals involving employees and applicants for employment—as opposed to, for example, applicants for retirement—whether or not whistleblowing issues are involved.

Two commenters suggested that the circumstances should be defined under which an agency determines that it would be "unduly disruptive to the work environment" under the WPA for the appellant to be returned or to be present at the place of employment. OPM believes that the WPA authorized agencies to make this determination as the agency sees fit on a case-by-case basis and that it would be inappropriate for OPM to restrict an agency's exercise of this authority. The regulations note that, when such an "unduly disruptive" determination is made, the individual affected is placed in a paid, non-duty status with all of the compensation and benefits he or she would receive had the individual been placed in a paid, duty status on interim relief.

Several commenters raised questions about whether interim relief is required in all instances, whether interim relief is required when the appellant rather than the agency files a petition for review,

and whether time limits for effecting interim relief should be set. With respect to the first issue, OPM notes that interim relief is never appropriate unless an MSPB initial decision orders such relief. A typical situation where interim relief would not be ordered might involve a 30-day suspension which had been served and the employee was returned to duty by the time the MSPB issued an initial decision. Even where interim relief has been ordered, OPM believes, after further review of the WPA, that interim relief is only appropriate if a petition for review is filed (or will be filed) with the full Board. In this regard, OPM notes that the current MSPB practice of advising agencies to implement interim relief "if a petition for review is filed" appears to be consistent with this position.

With respect to the second issue of whether interim relief is required when the petitioner is an appellant, OPM notes that the WPA requires interim relief "pending the outcome of any petition for review" (emphasis supplied) without noting the identity of the petitioner. As a result, OPM believes that interim relief is required, whether the petitioner is the agency or the appellant. If the petitioner is the appellant (e.g., when a removal is mitigated to a demotion by the initial decision and only the appellant challenges the decision), interim relief would still be appropriate because the appeal has not yet reached finality (the matter is still under adjudication and could result in the initial decision being overturned and the agency's action completely sustained). OPM also notes that the current MSPB practice of ordering interim relief as noted above appears to be consistent with this position.

Finally, with respect to the third issue about time limits, OPM believes that such limits are unnecessary. In this regard, the WPA only requires that the effective date of interim relief be the same date as the MSPB decision ordering relief. No additional constraints are provided by law. In view of the position stated above that interim relief is only appropriate if there is (or will be) a petition for review, OPM has concluded that an agency must initiate interim relief by the time a petition for review is filed by the agency and, when a petition is filed by the appellant, must initiate interim relief within a

reasonable time after it becomes aware of the appellant's petition for review. Again, and in any circumstance, the effective date of the interim relief must be the date of the MSPB initial decision.

Accordingly, OPM is amending § 772.102 to clarify the conditions under which a grant of interim relief is appropriate and to describe the timing of an agency's actions to initiate interim relief.

2. Part 772—Ending of Relief Provided by an Interim Personnel Action

The relief provided by an interim personnel action ends upon the issuance of a final Board order under 5 U.S.C. 7701(b)(2)(A) or when a party withdraws a petition for review such that no petition remains pending at the full Board. The ending of relief provided by an interim personnel action in such circumstances is not subject to adverse action procedures and is neither appealable nor grievable. In this regard, one commenter noted that, even though interim relief may be ended by a final Board order sustaining the agency's action and the ending of relief is not appealable or grievable, the applicant or employee could still continue to challenge the agency's original action by seeking review by the Court of Appeals for the Federal Circuit. OPM agrees.

An interim personnel action may be ended sooner in certain other circumstances. These include the reaching of a settlement agreement which involves cancelling the interim personnel action, the requesting by the applicant or employee that the interim personnel action be cancelled after he or she secures other employment, leaves the agency or retires, or the removing under adverse action procedures of an employee from an interim appointment for cause such as misconduct during the interim relief period.

3. Part 772—Employee Entitlements While in an Interim Relief Status

Several commenters questioned whether an employee or former employee who is a prevailing party and is granted interim relief must be returned to the exact position the employee occupied prior to the agency's action, e.g., the position occupied before the employee was removed, demoted, etc. OPM believes that since the WPA does not require "cancellation" of the action appealed, placement in the same position would not be necessary in order for the agency to provide all of the benefits of interim relief envisioned by the WPA.

OPM believes, however, that if the employee is not returned to the same

position, he or she must be returned to a similar position of the same grade and pay and which would provide for the same benefits (e.g., basic pay, overtime, differential pay, locality pay, within-grade increases, gain-sharing, merit increases granted under the Performance Management and Recognition System, OWCP benefits, life insurance, health insurance, retirement coverage, leave accrual, status, tenure, retention level, and, as appropriate, participation in the Thrift Savings Plan) in order to be in compliance with the intent of the WPA. In addition, it is noted that employees in an interim relief status are subject to the same rules affecting other employees, e.g., 5 CFR Part 752, Adverse Actions; 5 CFR Part 432, Performance Based Reduction in Grade and Removal Actions; 5 CFR Part 351, Reduction in Force; etc. Any disputes as to whether a similar position provided the same benefits as the former position would be an appropriate subject for review by MSPB.

Accordingly, OPM is amending § 772.102 by clarifying that interim relief requires that an employee be placed in the same or similar position occupied prior to the agency's action.

With regard to participation in the Thrift Savings Plan, one commenter suggested that the Federal Retirement Thrift Investment Board be informed about the possible impact of interim relief on its activities. OPM agrees with this suggestion and will provide information about the interim relief program to the Thrift Board. OPM will consult with the Board concerning benefits questions that may be brought to OPM's attention.

With regard to RIF actions that might affect an employee on interim relief, one commenter suggested that the final regulations address matters such as bump and retreat rights that might be affected by interim appointments. OPM has declined to elaborate in regulation on this subject but notes that the guiding principle to be followed is that employees serving under interim appointments should be treated for RIF purposes as if the disputed or appealed actions had not occurred (and whether or not the employees were returned to their original positions or to the same or similar positions).

Two commenters suggested that the period of time between the date of an action taken (e.g., removal) and the effective date of interim relief should not be creditable for qualifications, time in grade, or other staffing purposes except to the extent normally permitted. OPM agrees. The final regulations should not be construed to entitle an employee on

interim relief to credit for that period of time for these purposes.

Another commenter also suggested that time spent in an interim relief status (i.e., the time between the effective date and the ending date of interim relief) should not be counted toward completion of an employee's probationary period. OPM disagrees. OPM believes that interim relief service should be counted toward completion of the probationary period because the employee is in a pay status (contrary to the time period between a separation and the beginning of interim relief noted in the paragraph above where no pay is provided).

Additional staffing guidance concerning interim relief appointments will be issued after these regulations are published.

4. Part 772—Back Pay and Attorney Fees

Interim relief does not entitle the applicant or employee to awards of back pay or attorney fees. Decisions concerning these awards will be made after a decision is issued by the full Board, or after an initial decision becomes final pursuant to 5 U.S.C. 7701(e)(1)(A).

One commenter questioned whether interim relief ordered in the case of appealed enforced leave would require the agency to restore the leave at issue. OPM believes that such restoration during interim relief would effectively constitute back pay and thus not be permissible under the WPA.

5. Part 531—Interim Within-Grade Increases

Under OPM's current regulations at part 531, if an agency properly grants a within-grade increase, there is no mechanism for specifically terminating the employee's entitlement to the within-grade increase. However, when the personnel action being appealed is the withholding of a within-grade increase, the only possible interim relief is the interim granting of the within-grade increase. Should the full Board ultimately sustain the agency's withholding of the within-grade increase, the agency needs a mechanism for terminating the interim relief, i.e., terminating the employee's entitlement to the within-grade increase, which no longer has a legal basis. OPM is amending part 531 to permit agencies to grant interim within-grade increases, which may be terminated or made permanent, as appropriate, after the Board's final action.

The break in service immediately

preceding an interim appointment is not creditable service for within-grade increase purposes. If the Board's final action overturns a removal and the employee has received a within-grade increase during the interim appointment, the break in service is cancelled and the agency must recompute the effective date of the within-grade increase to reflect the additional period of creditable service.

One commenter questioned whether the effective date of an interim within-grade increase should be on any date other than the effective date of the interim relief. In this regard, OPM believes that the WPA did not intend for interim relief personnel actions to supersede the normal requirements of title 5 of the United States Code. Section 5335 of that title sets several conditions for the granting of within-grade increases including one that such an increase is made effective as of the "beginning of the next pay period" following completion of the required waiting period and one that an acceptable level of competence determination has been made at the end of the waiting period. With respect to the second condition, an MSPB initial decision ordering interim relief is the practical equivalent of a competence determination.

Two commenters asked whether agencies can recover the payment of an interim within-grade increase after a final determination by the Board upholding the agency's denial of the appellant's within-grade increase. OPM notes that the interim relief provision of the law itself is the authority for the payment of the interim increase and there is no basis for recovering the increase if the agency prevails before the full Board. The termination of such interim relief when the agency prevails does not negate the legitimacy of the interim relief and therefore does not create an indebtedness to the United States for the monies paid to the appellant during the interim relief period. Similarly, and contrary to the suggestion of another commenter, making the effective date of the termination of an interim within-grade increase at the end of the pay period in which the Board's decision becomes final does not result in an overpayment to the employee for monies received during the period of interim relief.

One commenter observed that the purpose of interim relief was the return of a withdrawn benefit to an employee who prevails in an MSPB initial decision. The commenter noted that, in the case of within-grade increases, the benefit is not withdrawn and thus the

employee could not have restored to him or her a benefit the employee never had. OPM notes, however, that the interim relief in such situations is a determination that the employee is performing at an acceptable level of competence. The lack of such a determination itself is a bar to granting of the within-grade increases, and it is the negative determination, rather than its consequences, that gives rise to an appeal right. The WPA protects an employee by giving the employee the relief he or she would have received if the appealed action had not occurred. In the case of within-grade increases, the appealed action is the negative determination of the employee's competence, not the withholding of the within-grade increase. Once the employee receives the interim relief, i.e., a determination that the employee is performing at an acceptable level of competence, there is no further bar to granting the interim within-grade increase.

6. Part 531—Highest Previous Rate

OPM believes that the use of a rate of pay as an employee's highest previous rate under part 531 when that rate of pay was received solely during a period of interim relief should not be permitted. If the legal basis for the interim rate of pay is removed, e.g., the agency's action is ultimately sustained by the full Board, OPM does not believe it would be appropriate to fix an employee's pay based on the rate of pay received solely during the period of interim relief. Accordingly, OPM is amending part 531 to reflect this position.

7. Part 536—Grade and Retention

Under existing regulations, a break in service of 1 workday or more normally terminates an employee's entitlement to grade or pay retention. (The *Supplementary Information* portion of the proposed regulations erroneously referred to a 3-day break.) Since in virtually all cases of interim relief involving removal actions, more than 1 workday will elapse between the effective date of the removal and the effective date of the interim personnel action, OPM is amending part 536 so that entitlement to grade and pay retention may be continued during a period of interim relief and not be lost because of the break in service of more than 1 workday. This permits employees to keep retained grade and pay benefits as if no personnel action, e.g., removal, had taken place.

8. Part 831—Retirement, Part 841—Federal Employees Retirement System—General Administration, and Part 842—Federal Employees Retirement System—Basic Annuity

OPM is amending the current regulations to make clear that an employee with an interim appointment under the interim relief provisions in 5 U.S.C. 7701(b)(2)(A) may be covered under the Civil Service Retirement System or the Federal Employees Retirement System, as appropriate.

Agencies are required to notify OPM when they appoint on an interim basis an individual who had previously retired so that OPM can suspend the annuity payments until final disposition of the appeal case before the MSPB or until the interim appointment is otherwise ended. If the MSPB decision requiring interim relief is reversed by the full Board and the employee's separation is sustained or the employee agrees to terminate the interim appointment, the employee's annuity will be resumed effective the day after the interim appointment terminates. The annuitant will be deemed to have been a reemployed annuitant during the interim appointment for the limited purpose of applying for any benefits for which he or she qualifies under the provisions of 5 U.S.C. 8344 or 8468. If the initial MSPB decision canceling the agency's separation action (and thereby retroactively reinstating or restoring the employee) is not appealed and becomes the MSPB's final action, if a final MSPB decision cancels the separation, or if the agency agrees to cancel the separation, the employing agency must notify OPM. The agency's notice to OPM should include a request that OPM specify the amount of any erroneous payment—including recurring annuity payments or refunded retirement deductions—to be recovered by the employing agency from any back pay to which the employee may be entitled.

These regulations provide that waiver consideration under 5 U.S.C. 8346(b) or 5 U.S.C. 8470(b) will not be given to any part of an erroneous payment collected from the individual's back pay adjustment. While this provision is contrary to the court's final decision in the case of *Day v. OPM*, 633 F.2d 1580 (Fed. Cir. 1987), it is consistent with Congressional intent expressed in the legislative history of section 1221(j) of the *Whistleblower Protection Act of 1989*. In this regard, the Joint Explanatory Statement at S 2784 of the *Congressional Record* on March 16, 1989, states that "[t]he waiver provisions under sections 8346(b) and 8470(b) of

title 5 should not be applicable." Thus, part of the impact of section 1221(j) is to negate the holding of the Federal Circuit in *Day* that OPM is required to grant equitable waiver consideration under 5 U.S.C. 8346(b) to a successful appellant before recovering through offset against a back pay award. However, an individual may request a waiver of the unrecovered portion of the erroneous retirement benefit when there is no back pay or the back pay is insufficient to cover the entire erroneous payment.

In adopting these regulations in final form as revised, OPM has taken into consideration a number of comments made on the proposed regulations as discussed below.

One commenter asked whether an employee who had CSRS coverage when separated will be coded as CSRS when the employee receives an interim appointment under § 772.102, without regard to the length of the break in service and whether the reference in § 831.201(b)(6) to CSRS is a generic term and applies equally if the employee had CSRS offset coverage at separation. The answer to both questions is "yes."

A commenter suggested that § 831.305(d) be amended to include a specific reference to the alternative form of annuity (AFA) lump sum, if it must be returned upon cancellation of the employee's removal. Even though "retirement benefits" as used includes both annuity payments and refunded retirement deductions including the AFA lump sum, for the sake of clarity, OPM has revised the language of this section so that it refers to overpaid annuity and lump sum retirement deductions. OPM has also amended § 841.506 to reflect this same intent.

One commenter suggested that the reference to lump sum payment in § 831.2011 concerning the effect of Part 772 on CSRS lump sum payments be changed to "refund of retirement contributions." OPM did not adopt this suggestion since lump sum payment as used in this section refers to a one-time payment of the employee's retirement contributions in contrast to the monthly payment of an annuity. OPM believes that it is clear what is intended if the section is considered in the context of Subpart T of the regulations and the discussion of the comment above about the AFA lump sum.

At the suggestion of another commenter, OPM added language to §§ 831.805(e) and 841.506(e) to indicate that annuity suspended because of an interim appointment will be increased by the Cost of Living Allowances (COLA) and other adjustments provided by law during the period that the annuity is suspended.

One commenter recommended that the reference in § 841.507 to lump sum payment be changed to "refund of retirement contributions." As with the comment above on § 831.2011, lump sum payment refers to a one-time payment of the employee's retirement contributions in contrast to the monthly payment of an annuity. OPM understands that "refund" is commonly used to refer to a lump sum payment of retirement contributions. However, OPM prefers to use the term "lump sum" that is embodied in the definition of lump sum credit provided in law at section 8331(8) of title 5, United States Code.

A commenter requested that OPM make a clear statement about the waiver of overpayments if the agency's action is upheld by the full Board. In this regard, the agency's success on the original removal issue would not cancel out the interim appointment and therefore should not create any overpayments. The only overpayments that OPM can foresee would be the occasional instance where there is a delay between the date of the interim appointment and the notification to OPM to suspend the annuity. OPM does not believe that there is any reason to authorize waiver of such overpayments. OPM intends to collect any payments that occur under the normal overpayment procedures. Also, the fact that OPM is suspending payment of an annuity during the period of an interim relief appointment and will only resume payment prospectively should eliminate any situations where there would be a dual payment of salary and annuity benefits. If there is an actual overpayment, OPM does not know of any authority that would permit authorization of a waiver or nonrecovery of the overpayment as a policy. Where an overpayment occurs, the agency must continue to deal with each case as it comes up under the appropriate waiver authority it has for dealing with the particular overpayment involved. If an overpayment of annuity is involved, such waiver requests must be referred to the Retirement and Insurance Group at OPM for consideration as provided in the current FPM guidance.

Another commenter asked for a clarification of the situation where the agency is ordered by MSPB to provide interim appointment after the employee has been separated for more than 365 days. OPM believes that the intent of the WPA is that the employee is placed in the same or similar position he or she was in prior to removal. Therefore, the employee should be restored to the same benefits coverage he or she had at the time of removal.

A commenter asked that additional language be added to the regulation to address the impact on annuity payments or eligibility for refunds where the interim appointments last for less than 1 year, for 1 year to less than 5 years, and for 5 years or more. OPM does not intend to include such a discussion in the regulations, but, instead, will provide additional guidance to agencies later on this topic. In this regard, OPM does note that at the end of the interim appointment, if the individual does not qualify for a supplemental or redetermined annuity, he or she may only receive a refund of the retirement deductions taken during the interim appointment. If the individual has one or more but less than 5 years of service in the interim appointment, he or she may qualify for a supplemental annuity if all other conditions for entitlement are met. If the individual has 5 or more years of service, he or she may qualify for a redetermined annuity. There is no difference in the effect of the individual's length of service under an interim appointment than there would be for any other reemployed annuitant.

OPM rejected a suggestion that the regulations be revised to cover situations when an employee becomes disabled while employed under an interim appointment. The current regulations provide the result OPM believes should apply here, i.e., employees on interim relief appointments could apply for benefits. Additional information on this topic will be provided in future guidance.

OPM also rejected a suggestion that the regulations be made more clear as to whether an annuitant in an interim appointment is treated as a reemployed annuitant. The regulations as proposed already specify that the individual is not subject to the provisions for reemployed annuitants. Additional discussion of indicator codes, salary reduction, etc., will be provided in FPM guidance.

9. Part 846—Federal Employees Retirement System—Electing Coverage

OPM is amending § 846.201(b) in the current regulations governing an employee's opportunities to elect FERS coverage. Because the order of interim relief is based on an initial finding that cancellation of a separation is appropriate, giving an employee an interim appointment under 5 U.S.C. 7701(b)(2)(A) will not convey a new opportunity for the employee to elect FERS coverage even though under normal circumstances a break in service would give rise to an election right.

A commenter suggested that an individual serving under an interim

appointment be allowed to elect FERS coverage to be consistent with the provisions allowing the employee a new health benefits enrollment opportunity and an opportunity to increase the level of coverage for life insurance when the period of separation exceeds 180 days. OPM does not adopt this suggestion for the reason noted in the above paragraph. It is appropriate not to allow a FERS election based on a break in service followed by interim relief which is premised on the likelihood of the individual's prevailing in his or her attempt to cancel the break in service. The health and life insurance programs, on the other hand, provide specific opportunities for enrollees to change enrollments based on their changed circumstances and needs for current coverage. This insurance program concept—unlike the retirement program, which is intended to provide benefits at the end of an employee's career—is the basis for the opportunity to make insurance changes upon an interim appointment.

10. Part 870—Basic Life Insurance and Part 890—Federal Employees Health Benefits Program

OPM amends the current regulations on health benefits and life insurance to allow coverage of an employee given an interim appointment under § 772.102 of this chapter.

Like any other employees with a break in service exceeding 3 days, employees who are given interim appointments generally may enroll in any health benefits plan or option for which they are otherwise eligible. However, if the individual is an annuitant and the annuity is suspended, the health insurance held as an annuitant is transferred to the employing agency.

For employees on interim appointments, the life insurance they had when they last separated from service is reinstated; however, if there is a break in service of at least 180 days, they may increase their level of coverage. If they are annuitants, the life insurance coverage they have as annuitants does not affect their coverage when they are reemployed.

If the final outcome of the appeal is to reverse the separation and award back pay, the regular rules governing cancellation of an erroneous separation apply.

One commenter asked what happens if an individual elects FEHB coverage during the interim appointment or increases FEGLI coverage (if there was a break in service of more than 180 days) and then is retroactively restored to his or her previous position and there

is no break in service between the interim appointment and the restoration. The back pay guidance in FPM Supplement 990-2, Book 550, S8-9b assumes that the individual is not Federally employed when he or she is retroactively restored. In extension of the current guidance, an individual with an interim appointment and FEHB coverage could choose either to have the FEHB restored, or simply to continue the insurance held during the interim appointment. Since there is no break in service, there is no opportunity to newly enroll or change enrollment. If the individual had a break in service exceeding 180 days and, upon receiving the interim appointment, chooses to increase his or her life insurance coverage, he or she keeps the new coverage when the restoration occurs. Additional guidance on this topic will be issued by OPM in the future.

One commenter asked what would happen to an individual's TCC coverage during the interim appointment and whether the individual would get a new TCC right if MSPB affirms the agency's removal of the individual. In this instance, like anyone else who acquires regular FEHB coverage, the TCC coverage would stop when the regular coverage becomes effective. Also, like anyone else removed (for a reason other than gross misconduct), the individual would have a new right to TCC.

One commenter asked if an individual who has been separated more than 180 days and elects a higher level of life insurance coverage can carry the higher level coverage into retirement. In this regard, retiring employees can continue options (including levels of additional insurance) if they have had the option (or level) for at least 5 years before retirement.

One commenter asked if an individual has conversion rights under health and life insurance upon separation from an interim appointment. OPM has determined that the individual would have such rights.

11. Part 772—Processing Interim Personnel Actions

Guidance on preparing official documentation to effect an interim personnel action is located in FPM Supplement 296-33. When an interim action is effected, the agency must retain in the individual's Official Personnel Folder (OPF) the Notification of Personnel Action (SF 50) documenting the action that gave rise to the appeal. If the initial decision granting interim relief is later overturned or the interim personnel action is otherwise cancelled, the SF 50 documenting the interim action must be removed from the OPF when

the cancellation is effected. When a final Board order is issued, the agency must follow the instructions in FPM chapter 296 and FPM Supplement 296-33 to document the actions required by the decision.

12. Miscellaneous Comments/Suggestions

One commenter stated that an alleged violation of the WPA and these regulations concerning interim relief should be grievable under 5 U.S.C. 7103(a)(9). With regard to interim relief, OPM notes WPA and these regulations do not apply to arbitration awards reversing agency actions. Under the adjudicatory scheme established by Congress, matters covered by chapters 43 and 75 of title 5 of the U.S.C. may be raised under either an applicable negotiated grievance procedure (NGP) or under the appellate procedures described in chapter 77 of that title (i.e., appeals to MSPB), but not both. An employee choosing to seek review under an NGP is not covered by the interim relief provisions which are associated with chapter 77 MSPB appeals. In addition, unlike MSPB initial decisions, arbitration awards (whether concerning matters under Chapters 43 and 75 or other matters) are "final" and thus equivalent to final Board decisions or initial MSPB decisions which have become final under statute. Relief ordered by arbitration awards must be effected by agencies on a "noninterim" or permanent basis. Finally, since Congress only provided for MSPB to order interim relief, OPM believes that only MSPB has authority (through its compliance/enforcement procedures) to insure that an agency has properly complied with that order. To allow grievances on such matters would be inconsistent with the carefully crafted and integrated scheme of administrative and judicial review established by Congress through the *Civil Service Reform Act of 1978* as modified by the WPA.

One commenter wondered why part 300 or other parts of the CFR concerning employment were not referenced in connection with interim relief. OPM did not refer to the "normal" employment parts of the regulations because it believes interim relief is a unique action associated only with the appellate process.

E.O. 12291, Federal Regulation

OPM has 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 applies only to Federal employees.

List of Subjects in 5 CFR Parts 531, 536, 772, 831, 841, 842, 846, 870, 890

Administrative practice and procedure; Government employees; retirement; health benefits; life insurance.

U.S. Office of Personnel Management.
Constance Berry Newman,
Director.

Accordingly, OPM amends parts 531, 536, 772, 831, 841, 842, 846, 870, and 890 of title 5 of the Code of Federal Regulations as follows:

PART 531—PAY UNDER THE GENERAL SCHEDULE

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

Authority: 5 U.S.C. 5115, 5338, and chapter 54; E.O. 12748; subpart A issued under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), 104 Stat. 1462, and E.O. 12736; subpart B also issued under 5 U.S.C. 5333, 5402, and 7701(b)(2); subpart D also issued under 5 U.S.C. 7701(b)(2); subpart E also issued under 5 U.S.C. 5336.

2. Section 531.203 is amended by removing the word "or" at the end of paragraph (d)(2)(v); redesignating paragraph (d)(2)(vi) as (d)(2)(vii); and adding a new paragraph (d)(2)(vi), to read as follows:

§ 531.203 General provisions.

(d) * * *

(2) * * *

(vi) A rate received solely during a period of interim relief under the interim relief provisions of 5 U.S.C. 7701(b)(2)(A); or

3. In § 531.406, the second sentence of paragraph (a) is revised to read as follows:

§ 531.406 Creditable service.

(a) *General.* * * * Service credit is given during this employment for periods of annual, sick, and other leave with pay; advanced annual and sick leave; service under a temporary or term appointment; and service under an interim appointment made under § 772.102 of this chapter. * * *

4. In § 531.407, paragraph (c) is amended by removing the word "and" at the end of paragraph (c)(5); removing

the period and adding a semicolon and the word "and" at the end of paragraph (c)(6); and adding a new paragraph (c)(7), to read as follows:

§ 531.407 Equivalent increase determinations.

(c) * * *

(7) An interim within-grade increase terminated under § 531.414(c) of this part.

5. A new § 531.414 is added to subpart D, to read as follows:

§ 531.414 Interim within-grade increase.

(a) An interim within-grade increase shall be granted to an employee who has:

(1) Appealed a negative within-grade increase determination to the Merit Systems Protection Board under 5 U.S.C. 5335(c); and

(2) Been granted a favorable within-grade increase determination under the interim relief provisions of 5 U.S.C. 7701(b)(2).

(b) An interim within-grade increase granted under paragraph (a) of this section shall become effective on the first day of the first pay period beginning on or after the date of the favorable within-grade increase determination.

(c) If the final decision of the Merit Systems Protection Board upholds the negative within-grade increase determination, an interim within-grade increase granted under this section shall be terminated at the end of the pay period in which the Board's decision becomes final.

(d) If the final decision of the Merit Systems Protection Board overturns the negative within-grade increase determination, an interim within-grade increase granted under this section shall be made permanent and shall be granted retroactively to the first day of the first pay period beginning on or after completion of the applicable waiting period.

(e) An employee may not appeal the termination of an interim within-grade increase under paragraph (c) of this section.

PART 536—GRADE AND PAY RETENTION

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

Authority: 5 U.S.C. 5361-5366 and 7701(b)(2); § 536.307 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502.

7. In § 536.202, a new paragraph (c) is added, to read as follows:

§ 536.202 Period of grade retention.

(c) Notwithstanding § 536.207(a)(1) of this part, grade retention shall continue to apply to an employee serving under an interim appointment made under § 772.102 of this chapter for the duration of the original 2-year period if the employee's grade was retained under this part in the appointment immediately preceding the interim appointment.

8. In § 536.205, paragraph (f) is redesignated as (g) and a new paragraph (f) is added, to read as follows:

§ 536.205 Determination of rate of basic pay.

(f) Notwithstanding § 536.209(a)(1) of this part, pay retention shall continue to apply to an employee serving under an interim appointment made under § 772.102 of this chapter if the employee's pay was retained under this part in the appointment immediately preceding the interim appointment.

PART 772—INTERIM RELIEF

9. A new part 772 is added to title 5 of the Code of Federal Regulations to read as follows:

PART 772—INTERIM RELIEF**Subpart A—General****Sec.**

772.101 Basic authority.

772.102 Interim personnel actions.

Authority: 5 U.S.C. 1302, 3301, 3302, and 7301; Pub. L. 101-12.

Subpart A—General**§ 772.101 Basic authority.**

This part establishes a mechanism for agencies to provide interim relief to employees and applicants for employment who prevail in an initial decision issued by the Merit Systems Protection Board (MSPB) as required by the *Whistleblower Protection Act of 1989*, Pub. L. 101-12 (codified at 5 U.S.C. 7701(b)(2)(A)). The interim relief provisions of the law are applicable whether or not alleged reprisal for whistleblowing is at issue in an appeal to MSPB.

§ 772.102 Interim personnel actions.

When an employee or applicant for employment appeals an action to MSPB and the appeal results in an initial decision by an MSPB administrative judge granting interim relief under 5 U.S.C. 7701(b)(2)(A) and a petition for review of the initial decision is filed (or will be filed) with the full Board under 5

U.S.C. 7701(e)(1)(A), the agency shall provide the relief ordered in the initial decision by taking an interim personnel action subject to the following terms:

(a) Interim personnel actions, except interim within-grade increases under § 531.414 of this chapter, shall be made effective upon the date of issuance of the initial decision and must be initiated on or before the date of a petition for review by the agency or within a reasonable time after the date it becomes aware of a petition for review by the appellant;

(b) The relief provided by interim personnel actions shall end:

(1) When the full Board issues a final decision on a petition for review filed by an applicant for employment, employee, and/or agency under 5 U.S.C. 7701(e)(1)(A);

(2) When the initial decision becomes final pursuant to an action of the full Board or pursuant to a decision by an applicant for employment, employee, and/or agency to withdraw (or change intentions to file) any petition for review filed under 5 U.S.C. 7701(e)(1)(A), or

(3) When the applicant for employment or employee requests or reaches agreement with the agency that the interim relief ordered in the initial decision be cancelled;

(c) Interim relief shall entitle the applicant for employment or employee to the same compensation and benefits he or she would receive if the relief effected had not been on an interim basis except as provided in paragraph (f) of this section;

(d) Upon the taking of an interim personnel action, the agency shall place the applicant for employment or employee in a paid, duty status, in the same or similar position previously occupied, unless the agency determines that the return or presence of the individual would be unduly disruptive to the work environment, whereupon the agency may place him or her in a paid, non-duty status (with the applicant for employment or employee receiving the same compensation and benefits he or she would be entitled to if placed on interim relief in a paid, duty status) during the pendency of a petition for review to the full Board under 5 U.S.C. 7701(e)(1)(A);

(e) An interim personnel action shall not be taken if the MSPB administrative judge, pursuant to 5 U.S.C. 7701(b)(2)(A)(i), determines that granting interim relief is not appropriate;

(f) An interim personnel action under this part shall not entitle the applicant for employment or employee to an award of back pay or attorney fees; and

(g) The agency shall follow the instructions in Federal Personnel

Manual Supplement 296-33 and Federal Personnel Manual Chapter 296 in taking an interim personnel action.

PART 831—RETIREMENT

10. The authority citation for Part 831 is amended in part to add a cite for § 831.201(b)(6) as set out below:

Authority: 5 U.S.C. 8347
* * * § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); * * *

11. In § 831.201, paragraph (b) is amended by removing the period at the end of (b)(5) and adding the semicolon in its place, and by adding (b)(6) to read as follows:

§ 831.201 Exclusions from retirement coverage.

* * * * *

(b) * * *

(6) The employee receives an interim appointment under § 772.102 of this chapter and was covered by CSRS at the time of the separation for which interim relief is required.

* * * * *

12. In Subpart H, a new § 831.805 is added to read as follows:

§ 831.805 Effect of part 772 of this chapter on CSRS annuity benefits.

(a) *Agency notification to OPM.* (1) When it is determined that a CSRS retiree is to be given interim relief under 5 U.S.C. 7701(b)(2)(A), the employing agency must notify OPM of the effective date of the interim appointment under § 772.102 of this chapter. The notice must specify that the appointment is required by the *Whistleblower Protection Act of 1989*.

(2) Upon receiving a final MSPB order requiring cancellation of the retiree's separation or after the retiree and the agency agree to cancel the separation, the employing agency must notify OPM and request the amount of the erroneous payment to be covered under § 550.805(e) of this chapter from any back pay adjustment to which the employee may be entitled.

(b) *Suspension of annuity payments during the appointment.* Except as provided in paragraph (d)(4) of this section, the provisions of 5 U.S.C. 8344 will not apply while the retiree is employed in an interim appointment under § 772.102 of this chapter. In all cases, OPM will suspend the retiree's annuity effective on the commencing date of the interim appointment. The suspension will last until the interim appointment ends.

(c) *Employee deductions and agency contribution.* For the duration of the interim appointment, the agency will withhold the appropriate employee

deduction and contribute the matching agency contribution as prescribed by OPM.

(d) *Erroneously paid retirement benefits.* (1) Any erroneous payment of a CSRS annuity or a lump sum credit, including the alternative form of annuity lump sum, resulting from the action which led to the interim appointment under § 772.102 of this chapter will be determined when the MSPB initial decision overturning the employee's separation becomes final, when the Board issues a final order cancelling the separation, or when the agency agrees to cancel the separation.

(2) If OPM determines that an overpayment has occurred and the employee is entitled to receive back pay because of the cancelled separation, the overpaid retirement benefits must be deducted to the extent they can be recovered from the back pay adjustment as required by 5 CFR 550.805(e).

(3) Amounts recovered from back pay will not be subject to waiver consideration under the provisions of 5 U.S.C. 8346(b). If there is no back pay or the back pay is insufficient to recover the entire erroneous payment, the employee may request that OPM waive the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

(4) If the MSPB action does not result in cancellation of the separation, the retiree may apply for any additional benefits for which he or she qualifies under the provisions of 5 U.S.C. 8344.

(e) *Resumption of annuity payments.*

(1) If the retiree withdraws his or her objection to the separation or MSPB issues a final order sustaining the retiree's separation, the employing agency must notify OPM of the date that the interim appointment ends so that annuity payments may be resumed.

(2) OPM will resume annuity payments effective the day after the interim appointment ends. The annuity rate will be adjusted to reflect any cost-of-living increases or other adjustments that would have been made during the period the annuity was suspended.

13. In Subpart T, a new § 831.2011 is added to read as follows:

§ 831.2011 Effect of part 772 of this chapter on CSRS lump-sum payments.

(a) An interim appointment under § 772.102 of this chapter does not affect the lump-sum payment of retirement contributions made to a separated employee unless it becomes effective within 31 days of the employee's separation from the service. An interim appointment effective within 31 days of

the employee's separation makes the employee ineligible for the lump-sum payment. Payments made in error will be collected under subpart M of part 831 of this chapter.

(b) When an employee's separation is cancelled after the MSPB initial decision becomes final, when the Board issues a final order cancelling the employee's separation, or when the agency and the employee agree to cancel the separation, the agency must notify OPM and request the amount of the erroneous lump-sum payment.

(c) At the time the employee's separation is cancelled, the agency must deduct the amount of the lump-sum payment from any back pay to which the employee is entitled as required by 5 CFR 550.805(e).

(d) Amounts recovered from back pay will not be subject to waiver consideration under 5 U.S.C. 8346(b). If there is no back pay or the back pay is insufficient to recover the erroneous payment, the employee may request that OPM waive the recovery of the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

14. The authority citation for subpart E of part 841 is amended in part to add the following cites for § 841.506 and 841.508 to read as follows:

Authority: 5 U.S.C. 8461 * * * § 841.506 also issued under 5 U.S.C. 7701(b)(2); § 841.508 also issued under section 505 of Pub. L. 99-335.

§§ 841.506 and 841.507 [Redesignated as §§ 841.507 and 841.508]

15. In part 841, subpart E is amended by redesignating §§ 841.506 and 841.507 as §§ 841.507 and 841.508, respectively, and adding a new § 841.506 to read as follows:

§ 841.506 Effect of part 772 of this chapter on FERS payments.

(a) *Agency notification to OPM.* (1) When it is determined that a FERS employee is to be given interim relief under 5 U.S.C. 7701(b)(2)(A), the employing agency must notify OPM of the effective date of the interim appointment under § 772.102 of this chapter. The notice must specify that the appointment is required by the *Whistleblower Protection Act of 1989*.

(2) When the MSPB initial decision cancelling the employee's separation becomes final, when the Board issues a final order cancelling the retiree's

separation, or when the agency agrees to cancel the separation, the employing agency must notify OPM of the date the interim appointment ends and request the amount of the erroneous payment to be recovered under § 550.805(e) of this chapter from any back pay adjustment to which the employee may be entitled.

(b) *Suspension of annuity payments during the appointment.* Except as provided in paragraph (d)(2) of this section, the provisions of 5 U.S.C. 8468 will not apply while the retiree is employed in an interim appointment under § 772.102 of this chapter. In all cases, OPM will suspend the retiree's annuity effective on the commencing date of the interim appointment. The suspension will last until the interim appointment ends.

(c) *Employee deductions and normal cost percentage.* For the duration of the appointment, the agency will withhold the appropriate employee deduction and contribute the total amount of the normal cost percentage for the employee as prescribed by OPM. If and when a separation action is cancelled, the agency must make the corrections specified under § 841.507 of this subpart.

(d) *Erroneously paid retirement benefits.* (1) Any erroneous payment of a FERS annuity or a lump sum credit, including the alternative form of annuity lump sum, resulting from the action which led to the interim appointment under § 772.102 of this chapter will be determined when the initial MSPB decision cancelling the separation action becomes final, when the Board issues a final order cancelling the separation of the retiree, or when the agency agrees to cancel the separation.

(2) If the MSPB action does not result in cancellation of the separation, the retiree may apply for additional benefits under 5 U.S.C. 8468 for which he or she qualifies based on the service performed during the interim appointment.

(e) *Resumption of annuity payments.* (1) If the retiree withdraws his or her objection to the separation or MSPB issues a final order sustaining the retiree's separation, the employing agency must notify OPM of the date the interim appointment ends so that annuity payments may be resumed.

(2) OPM will resume annuity payments effective the day after the interim appointment ends. The annuity rate will be adjusted to reflect any cost-of-living increases or other adjustments that would have been made during the period the annuity was suspended.

16. In § 841.507, a new paragraph (d) is added to read as follows:

§ 841.507 Correction of unjustified or unwarranted personnel action.

(d) (1) Any FERS benefits—lump-sum payments or annuity benefits—paid based on a separation that is later cancelled are considered erroneous payments that must be repaid to OPM. Agencies must deduct such payments from any back pay adjustment to which the employee may be entitled as required by 5 CFR 550.805(e).

(2) Amounts recovered from back pay will not be subject to waiver consideration under 5 U.S.C. 8470(b). If there is no back pay, or the back pay is insufficient to recover the entire erroneous payment, the employee may request that OPM waive recovery of the uncollected portion of the overpayment. If waiver is not granted, the employee must repay the erroneous payment.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

17. The authority citation for part 842 is amended to revise the cites for §§ 842.105 and 842.106 to read as follows:

Authority: 5 U.S.C. 8461(g) * * * § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under sec. 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, and 5 U.S.C. 8402(c)(1); * * *

18. § 842.105 is amended by adding a new paragraph (c) to read as follows:

§ 842.105 Regulatory exclusions.

(c) Paragraph (a) of this section does not deny FERS coverage to an employee who receives an interim appointment under § 772.102 of this chapter and was covered by FERS at the time of the separation for which interim relief is required.

PART 846—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION

13. The authority citation for part 846 is revised to read as follows:

Authority: 5 U.S.C. 8461(g); § 846.201(b) also issued under 5 U.S.C. 7701(b)(2); § 846.202 also issued under section 301(d)(3) of Pub. L. 99-335.

14. Section 846.201(b) is revised to read as follows:

§ 846.201 Elections to become subject to FERS.

(b) *Separated employees who are reemployed.* A former employee who,

after June 30, 1987, becomes reemployed and subject to CSRS may elect, during the 6-month period beginning on the date he or she becomes subject to CSRS, to become subject to FERS, except that an employee serving under an interim appointment under the authority of § 772.102 of this chapter is not eligible to elect to become subject to FERS.

PART 870—BASIC LIFE INSURANCE

21. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8716; § 870.202(c) also issued under 5 U.S.C. 7701(b)(2).

22. In § 870.202, a new paragraph (c) is added to read as follows:

§ 870.202 Exclusions.

(c) Paragraph (a) of this section does not deny coverage to an employee serving under an interim appointment established under § 772.102 of this chapter.

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

23. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; § 890.102 also issued under 5 U.S.C. 1104, 5 U.S.C. 7701(b)(2) and Pub. L. 100-654; § 890.803 also issued under sec. 303 of Pub. L. 99-569, 100 Stat. 3190, sec. 188 of Pub. L. 100-204, 101 Stat. 1331, sec. 204 of Pub. L. 100-238, 101 Stat. 1744, and 50 U.S.C. 403p, 22 U.S.C. 4060(c) and 4069c-1; Subpart K also issued under title II of Pub. L. 100-654; Subpart L also issued under sec. 599C of Pub. L. 101-513, 104 Stat. 2064.

24. In § 890.102, paragraph (d) is revised to read as follows:

§ 890.102 Coverage.

(d) Paragraph (c) of this section does not deny coverage to:

(1) An employee appointed to perform "part-time career employment," as defined in section 3401(2) of title 5, United States Code, and 5 CFR part 340, subpart B; or

(2) An employee serving under an interim appointment established under § 772.102 of this chapter.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Docket No. FV-91-449IR]

Avocados Grown in South Florida; Relaxation of Grade Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes grade requirements for Florida avocados to permit handlers to ship avocados of dissimilar varieties in the same container when they are shipped to destinations within the production area (South Florida). Currently, all of the avocados in a particular container for shipment to any destination must have similar varietal characteristics in order to meet the current minimum grade requirement of U.S. No. 2. This action is expected to facilitate the picking and preparation of avocados for production area markets when more than one avocado variety matures at the same time, and help the Florida avocado industry more efficiently market its crop in production area markets.

DATES: This rule becomes effective January 31, 1992. Comments must be received by March 2, 1992.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456. Three copies of all written material shall be submitted, and they will be made available for public inspection at the office of the Docket Clerk during regular business hours. All comments should reference the docket number, date, and page number of this issue of the *Federal Register*.

FOR FURTHER INFORMATION CONTACT:

Gary D. Rasmussen, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-5331.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under the Marketing Agreement and Marketing Order No. 915, as amended (7 CFR Part 915), regulating the handling of avocados grown in South Florida. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This interim final rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are about 40 handlers of Florida avocados subject to regulation under Marketing Order No. 915, and about 300 avocado producers in the production area in South Florida. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural services firms are defined as those whose annual receipts are less than \$3,500,000. The majority of the avocado handlers and producers may be classified as small entities.

The interim final rule amends § 915.306 (7 CFR 915.306) by relaxing grade requirements so that handlers may ship avocados of dissimilar varieties in the same container when they are shipped to destinations within the production area. Currently, all of the avocados in a particular container shipped to any destination must have similar varietal characteristics in order to meet the current minimum grade requirement of U.S. No. 2. This grade requirement is defined in the United States Standards for Grades of Florida Avocados. Container regulations for Florida avocados are specified in §§ 915.305 and 915.306.

This action is designed to facilitate the picking and preparation of avocados for production area markets when more than one avocado variety matures at the same time, and help the Florida avocado industry more efficiently market its crop. Sometimes growers and handlers have relatively small quantities of avocados consisting of several different varieties ready for picking and packing at the same time, which they intend to ship to markets within the production area only.