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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 531, 536, and 550

Portability of Benefits for Nonappropriated Fund Employees

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim rules governing pay-setting and crediting of former nonappropriated fund (NAF) service for within-grade increases, grade and pay retention, and severance pay for certain former NAF employees under the Portability of Benefits for Nonappropriated Fund Employees Act of 1990.

DATES: Interim rules effective retroactively to January 1, 1987. Comments must be received on or before June 9, 1992.

ADDRESSES: Send or deliver written comments to Barbara L. Fiss, Assistant Director for Compensation Policy, U.S. Office of Personnel Management, room 6H31, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Bernadette Christie, (202) 606-2858 or (FTS) 266-2858.

SUPPLEMENTARY INFORMATION: The Portability of Benefits for Nonappropriated Fund Employees Act of 1990 was enacted as section 7202 of the Omnibus Budget Reconciliation Act of 1990, Public Law 100-508, November 5, 1990. It applies to employees of nonappropriated fund (NAF) instrumentalities of the Department of Defense (DoD) or Coast Guard who move or have moved, either voluntarily or involuntarily, on or after January 1, 1987, without a break in service of more than 3 days, to positions in DoD or the

Coast Guard, respectively. The law preserves the rate of basic pay earned as an NAF employee immediately prior to an involuntary move to a General Schedule position and allows the agency to consider the rate of basic pay as an NAF employee when setting pay after a voluntary move. The Act further credits former NAF service for within-grade increase and leave accrual purposes, and authorizes OPM to determine the appropriate circumstances in which former NAF employees may be granted grade and pay retention.

If an NAF employee has previous service in the Federal civil service employment system and would benefit from the highest previous rate provisions of 5 CFR 531.203(c), those provisions may be used to set his or her pay under General Schedule. The interim rule enables DoD or the Coast Guard to consider the highest previous rate an employee earned under an NAF instrumentality as his/her highest previous rate for pay-setting purposes under the General Schedule when the employee moves voluntarily without a break in service of more than 3 days to a position in the same agency. When such an employee moves involuntarily—that is, the employee's position is moved from an NAF instrumentality in DoD or the Coast Guard to the civil service employment system of the same agency—the employee's pay under the General Schedule may be set no lower than the lowest step of the grade to which the employee is moving that is equal to or greater than his or her rate of basic pay under the NAF instrumentality immediately before the move.

When the rate of basic pay of a former NAF employee immediately before an involuntary move exceeds the maximum rate of the grade to which the employee is moving, the interim rule also allows the agency to provide pay retention to the employee. Since such a move does not result from reduction in force or reclassification procedures, grade retention does not apply, but should an employee later be reduced in grade after moving to the civil service employment system, the employee's former NAF service may be applied to the 52 weeks of consecutive service required to be eligible for grade retention.

The interim rule credits the service of a former NAF employee, who moves

under the provisions of the Act, in the computation of the waiting period for one within-grade increase. When crediting the service of a former NAF employee, the waiting period for the next within-grade increase begins at the time the employee is deemed to have received his or her last equivalent increase, as provided in 5 CFR 531.407.

Finally, for severance pay purposes, NAF service will be credited toward meeting the requirement for 12 months of continuous employment under 5 CFR 550.705 and will be creditable service under 5 CFR 550.708.

Agencies must adjust the pay records of individuals who are entitled to benefit from the retroactive provisions of the Act affecting pay-setting, service credit for within-grade increases, and severance pay.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

The Portability of Benefits for Nonappropriated Fund Employees Act of 1990 is retroactive to January 1, 1987. In order to give practical effect to this legislation, I find good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B). Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective retroactively to January 1, 1987. The delay in the effective date is being waived to give affected employees the benefit of these new provisions as of the date required by the statute.

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

List of Subjects in 5 CFR Parts 531, 536, and 550

Administrative practice and procedure, Government employees, Wages.

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

Accordingly, OPM is amending parts 531, 536, and 550 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 is revised 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. 5303(g), 5333, 5402, and 7701(b)(2) and section 7202(d) of the Omnibus Budget Reconciliation Act of 1990, (Pub. L. 101-508), 104 Stat. 1388-335; subpart C also issued under section 404 of Pub. L. 101-509; 104 Stat. 1466, and E.O. 12748; subpart D also issued under 5 U.S.C. 7701(b)(2) and section 7202(e) of the Omnibus Budget Reconciliation Act of 1990, (Pub. L. 101-508)d, 104 Stat. 1388-336; subpart E also issued under 5 U.S.C. 5336.

2. In § 531.202, paragraphs (g) through (l) are redesignated as (h) through (m), respectively, and a new paragraph (g) is added to read as follows:

§ 531.202 Definitions.

(g) *Moved involuntarily* means the movement of the incumbent of a position in a nonappropriated fund instrumentality under the jurisdiction of the Department of Defense or the Coast Guard, as described in 5 U.S.C. 2105(c), with the position when it is moved to the civil service employment system of the Department of Defense or the Coast Guard, respectively.

3. A new section 531.206 is added to read as follows:

§ 531.206 Setting pay upon movement from nonappropriated fund instrumentalities.

(a) Unless the employee is eligible to receive a higher rate of basic pay under § 531.203(c) of this part, the initial rate of basic pay under the General Schedule of an employee of the Department of Defense or the Coast Guard who moves voluntarily, without a break in service of more than 3 days, from a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, may be set at any rate within the grade of the General Schedule position that does not exceed the highest previous rate of basic pay received by the employee during his or her service in a position in a nonappropriated fund instrumentality, as described in 5 U.S.C. 2105(c).

(b) Unless the employee is eligible to receive a higher rate of basic pay under

paragraph (c) of this section, the initial rate of basic pay under the General Schedule of an employee of the Department of Defense or the Coast Guard who is moved involuntarily, without a break in service of more than 3 days, from a position with substantially the same duties in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, shall be set at the rate for the lowest step of the General Schedule grade in which pay is being set, for which the rate of basic pay is equal to or greater than the employee's rate of basic pay under the nonappropriated fund instrumentality immediately before the move.

(c) Unless an employee is entitled to receive a higher rate of basic pay under paragraph (b) of this section, the initial rate of basic pay of an employee who is moved involuntarily, without a break in service of more than 3 days, from a position under a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, may be set—

(1) At any rate within the grade of the General Schedule position that does not exceed the highest previous rate of basic pay received by the employee during his or her service in a nonappropriated fund instrumentality, as described in 5 U.S.C. 2105(c);

(2) Under the maximum payable rate rules in § 531.203(c) of this part; or

(3) Under the authority to grant pay retention in § 536.104(c) of this part.

4. In § 531.406, a new paragraph (b)(3) is added to read as follows:

§ 531.406 Creditable Service.

(b) * * *

(3) Service by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who moves, within the civil service employment system of the Department of Defense or the Coast Guard, respectively, and without a break in service of more than 3 days, to a position classified and paid under the General Schedule, is creditable service in the computation of a waiting period.

PART 536—GRADE AND PAY RETENTION

5. The authority citation for part 536 is revised to read as follows:

Authority: 5 U.S.C. 5361-5366 and section 7202(f) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508), 104 Stat. 1338-

336; § 536.307 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502.

6. In § 536.103, paragraphs (c) (1) and (3) are revised to read as follows:

§ 536.103 Coverage and applicability of grade retention.

(c)(1) An employee who, immediately before being placed in a lower graded position as a result of reduction-in-force procedures, is in a position under a covered pay schedule, is eligible for grade retention only if the employee has served for 52 consecutive weeks or more in a position(s) under a covered pay schedule at a grade(s) higher than the position in which the employee is placed, including service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(2) * * *

(3) In situations other than those covered in paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more, provided the service was in an agency as defined in 5 U.S.C. 5102 at a grade(s) higher than the position in which the employee is placed, including service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

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

§ 536.104 Coverage and applicability of pay retention.

(c) The head of the agency may grant pay retention to an employee whose pay is reduced as the result of the movement of his or her position from a nonappropriated fund instrumentality under the jurisdiction of the Department of Defense or the Coast Guard to the civil service employment system of the Department of Defense or the Coast Guard, respectively.

**PART 550—PAY ADMINISTRATION
(GENERAL)****Subpart G—Severance Pay**

8. The authority citation for subpart G continues to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257.

9. In § 550.705, at the end of paragraph (a)(1), "or" is removed; at the end of paragraph (a)(2), "." is replaced with "; or"; and a new paragraph (a)(3) is added to read as follows:

§ 550.705 **Criteria for meeting the requirement for 12 months of continuous employment.**

(a) * * *

(3) An appointment to a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard that precedes the current qualifying appointment in the Department of Defense or the Coast Guard, respectively.

* * *

10. In § 550.708, at the end of paragraph (b), "and" is removed; at the end of paragraph (c), "." is replaced with "; and"; and a new paragraph (d) is added to read as follows:

§ 550.708 **Creditable service.**

* * *

(d) Service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who moves, within the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days, to a position classified and paid under the General Schedule.

[FR Doc. 92-8274 Filed 4-9-92; 8:45 am]

BILLING CODE 6325-01-M

5 CFR Part 553

RIN 3206-AE33

Reemployment of Military and Civilian Retirees To Meet Exceptional Employment Needs

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA). The Act permits OPM to authorize retired military and Federal civilian personnel to be employed without loss of pay or annuity when such employment is

needed to meet exceptional difficulty in recruiting or retaining qualified candidates for particular positions or under other unusual circumstances.

EFFECTIVE DATE: May 11, 1992.

FOR FURTHER INFORMATION CONTACT: Tracy E. Spencer (202) 606-0960 or FTS 266-0960.

SUPPLEMENTARY INFORMATION:

Generally, 5 U.S.C. 5532 requires a reduction in the retired or retiree pay of any regular officer who is employed in a civilian position. The law also requires a reduction in the retired or retiree pay of a retired reserve or enlisted member if combined compensation from civilian salary and retired or retiree pay exceeds the rate of basic pay for Executive Level V. No reduction is required if the member's retired or retiree pay is based in whole or in part on a combat disability as defined in the law. Under 5 U.S.C. 8344 and 8468, the amount of an annuity under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) is generally deducted from the basic pay of an annuitant who is reemployed in a Federal civilian position. Under certain circumstances, however, annuity payments stop upon reemployment, such as in the case of an annuitant who receives a Presidential appointment.

Section 108 of FEPCA amended 5 U.S.C. 5532, 8344, and 8468 to permit OPM to authorize exceptions to the reduction in pay or annuity normally required for either military or civilian retirees in two situations:

(1) For temporary employment that "is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances" (which may be delegated to agencies); and

(2) "(o)n a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee."

Interim regulations implementing these provisions were published on February 14, 1991 (56 FR 6204). Those regulations required that most requests for reemployment without penalty be approved by OPM on a case-by-case basis, but provided that OPM will entertain individual agency requests for delegation to meet specific situations. The regulations also required that all requests be submitted by the agency head or a designee at the agency or departmental headquarters level and set out basic criteria for submission of requests.

Five Federal agencies and four individuals commented on the interim regulations. Two commenters suggested

either repeal of the restrictions or general delegation to agencies of authority to waive the restrictions in any circumstances. These suggestions cannot be adopted because both the restrictions and the conditions under which they may be waived are prescribed by law.

Six commenters suggested broader delegation to agencies to approve waivers in emergencies or to approve waivers for a class of positions or situations. We did not adopt these suggestions because we believe that broad delegation of this authority at this time would exceed the intent of FEPCA. In enacting FEPCA, Congress left intact the basic statutory restrictions on simultaneous receipt of regular and retirement pay from the Federal Government. Although the new law permits some waivers of these restrictions, the language of the law ("unusual circumstances," "exceptional difficulty") indicates that these waivers are to be the exception, not the rule. OPM may reevaluate the policy set out in these final regulations after we gain substantive experience in applying the flexibility granted by FEPCA. Initially, however, we believe a literal reading of the law is appropriate to ensure that actions taken under FEPCA do not exceed statutory intent.

Some of the formal comments, as well as telephone inquiries about the interim regulations, showed a need to clarify coverage of the regulations. The final regulations state that exceptions may be requested from: (1) The reemployed annuitant provisions of 5 U.S.C. 8344 (for CSRS) or 8468 (for FERS), as appropriate; (2) either or both of the reductions in retired pay required by 5 U.S.C. 5532; or (3) any combination of (1) and (2) above. The final regulations also state that an individual who is receiving both military retired or retiree pay and a CSRS or FERS annuity is to be treated as a reemployed civilian annuitant. Such an individual is ineligible for retirement coverage during reemployment if the provisions of 5 U.S.C. 8344 or 8468 are waived.

The CSRS retirement provisions governing reemployed annuitants include provisions requiring termination of annuities based on discontinued service upon reemployment. Since the intent of those provisions is to move individuals from the annuity rolls back into regular employment, OPM will generally approve exceptions to them only for temporary or emergency employment, unless the agency can show that an exception in a particular case would be within the intent of the statute.