

Rules and Regulations

Federal Register

Vol. 59, No. 244

Wednesday, December 21, 1994

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 531 and 772

RIN 3206-AG04

Pay Under The General Schedule; Within-Grade Increases

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations relating to the interim relief provisions authorized under the Whistleblower Protection Act of 1989. The final regulations provide that an interim within-grade increase must be made effective on the date of the appellate decision ordering interim relief.

EFFECTIVE DATE: January 20, 1995.

FOR FURTHER INFORMATION CONTACT: Vincent Donahue, (202) 606-2858.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) published final regulations on interim relief under the Whistleblower Protection Act of 1989 (WPA) (5 U.S.C. 7701(b)(2)(A)) in the *Federal Register* on January 31, 1992 (57 FR 3707). The requirements for interim within-grade increases in existence at that time in 5 CFR 531.414(b) provided that "an interim within-grade increase granted under paragraph (a) of that 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."

However, the U.S. Merit Systems Protection Board (MSPB) issued a decision on December 22, 1993 (*Andrew W. Harrell v. Department of the Army*, AT-531D-93-0559-I-1), which stated that "OPM's provision contradicts the express language of 5 U.S.C. 7701(b)(2)(A), which states that 'the employee or applicant shall be granted

the relief provided in the decision effective upon the making of the decision' (emphasis added). Accordingly, we find that the agency has failed to provide evidence of complete relief, as ordered, and dismiss the agency's petition for review."

OPM's final regulation on the effective date of an interim within-grade increase was intended to carry out the purpose of the statute without creating an undue administrative burden for agencies and to be consistent with longstanding requirements governing the effective date of within-grade increases. OPM believed the regulation was consistent with the spirit and purpose of the WPA. While we were not persuaded that this regulation was inconsistent with the spirit and purpose of the WPA, we recognized that the interpretation reflected in MSPB's recent decision is a plausible reading of the law. Further, we did not wish to create undue difficulty for agencies that are required to provide interim relief under the WPA. Therefore, OPM issued interim regulations on May 10, 1994 (59 FR 24029), that modified the existing regulations on interim within-grade increases to be consistent with MSPB's decision.

Comments on the Interim Regulations

We received one comment on the interim regulations from a Federal agency. The agency observed that, since the interim regulations provide that an interim within-grade increase will become effective on the date of the appellate decision ordering interim relief under 5 U.S.C. 7701(b)(2)(A) rather than the first day of the first pay period beginning on or after the date of the favorable within-grade increase determination, it would be consistent for any final decision by MSPB upholding the negative within-grade increase determination to become effective also on the date of the decision. The agency suggests revising 5 CFR 531.414(c) to reflect such a change. We agree, and we are adopting this recommendation.

Conforming Change in Part 772

Because the effective date of an interim within-grade increase is being changed in these final regulations, a necessary conforming change in 5 CFR 772.102(a) is needed. The reference to interim within-grade increases as an exception to the general rule about

when interim personnel actions are to be made effective is deleted.

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

5 CFR Part 531

Government employees, Law enforcement officers, Wages.

5 CFR Part 772

Government employees, Health insurance, Life insurance, Retirement, Whistleblowing.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, the interim rule amending 5 CFR part 531, which was published at 59 FR 24029 on May 10, 1994, is adopted as final with the following changes:

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, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, February 4, 1991, 3 CFR 1991 Comp., p. 316;

Subpart A also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101-509, 104 Stat. 1462 and E.O. 12786, 56 FR 67453, December 30, 1991, 3 CFR 1991 Comp., p. 376;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2); Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101-509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102-378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C.

5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336,

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553, and E.O. 12833, 58 FR 63281, November 29, 1993, 3 CFR 1993 Comp., p. 682.

Subpart D—Within-Grade Increases

2. In § 531.414, paragraph (c) is revised to read as follows:

§ 531.414 Interim within-grade increase.

* * * * *

(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 on the date of the Board's final decision.

PART 772—INTERIM RELIEF

3. The authority citation for part 772 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, and 3701; Pub. L. 101-12.

Subpart A—General

4. In § 772.102, paragraph (a) is revised to read as follows:

§ 772.102 Interim personnel actions.

(a) Interim personnel actions 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 period after the date it becomes aware of a petition for review by the appellant;

[FR Doc. 94-31247 Filed 12-20-94; 8:45 am]
BILLING CODE 5325-01-M

5 CFR Part 630

RIN: 3206-AG48

Absence and Leave; SES Annual Leave Accumulation

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations governing annual leave accumulation for members of the Senior Executive Service (SES). Under recent legislation, there is now a 90-day (720-hour) maximum limitation on the amount of annual leave an SES member may carry over from one leave year to the next. Previously, SES members could accumulate annual leave on an unlimited basis.

DATES: *Effective Date:* October 14, 1994
Comment Date: Written comments must be received on or before February 21, 1995.

ADDRESSES: Send or deliver written comments to Donald J. Winstead, Acting Assistant Director for Compensation Policy, Personnel Systems and Oversight Group, Room 6H31, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jo Ann Perrini, (202) 606-2858.

SUPPLEMENTARY INFORMATION: Under Public Law 94-454, the Civil Service Reform Act of 1978, members of the Senior Executive Service (SES) were able to accumulate annual leave on an unlimited basis. Section 201 of the Government Management Reform Act of 1994 (Pub. L. 103-356, enacted October 13, 1994) amended 5 U.S.C. 6304(f) to provide a 90-day (720-hour) limit on the amount of annual leave an SES member may carry over from one leave year to the next.

Section 201 also contains a grandfather clause to allow individuals who were SES members on the effective date of the law and who had accumulated more than 90 days (720 hours) of annual leave to retain as their personal leave ceiling the annual leave they had accrued as of the effective date of the law. The personal leave ceiling is the maximum amount of accrued annual leave an affected member can carry over from one leave year to the next. The personal leave ceiling is subject to the existing reduction provisions contained in law and regulations.

We are amending paragraphs (a), (b), and (c) of 5 CFR 630.301 to implement the new 90-day (720-hour) limitation. Paragraph (a) specifies the maximum limitation on annual leave accumulation for members of the SES. Paragraph (b) specifies how leave is prorated when an employee serves part of a pay period in an SES position and part in a position outside the SES. Paragraph (c) provides that SES members may retain their leave balances when they take a non-SES position, but that the balance is subject to reduction under 5 U.S.C. 6304(c) until the balance reaches 30 days (240 hours) or 45 days (360 hours) depending on the leave ceiling for the new position.

We are adding paragraph (d) to explain how the grandfather clause is to be applied to establish a personal leave ceiling for SES members. The grandfather clause also applies to former career SES members who elected to retain SES leave benefits under 5 U.S.C. 3392(c) following appointment to an Executive Schedule or equivalent position. The personal leave ceiling does not include advanced annual leave or restored annual leave. Annual leave restored to an SES member under 5 U.S.C. 6304(d) will continue to be placed in a separate leave account and must be scheduled and used within the time period specified in 5 CFR 630.306 or 630.309.

Public Law 103-356 provides for the reduction of the personal leave ceiling

under the existing provisions of 5 U.S.C. 6304(c). Thus, if an SES member has a personal leave ceiling and uses more annual leave than he or she earns in a leave year (or between the start of the first pay period beginning after October 13, 1994, and the end of the 1994 leave year), the personal leave ceiling is reduced by the difference at the start of the next leave year. If the personal leave ceiling falls to or below 90 days (720 hours) at the end of a leave year, the member becomes subject to the 90-day (720-hour) limit.

If an SES member with a personal leave ceiling earns more annual leave than used in a leave year (or between the start of the first pay period beginning after October 13, 1994, and the end of the 1994 leave year), the excess hours are forfeited at the start of the next leave year. SES members are subject to the same provisions in the law and regulations for the restoration of unused annual leave as apply to other employees (5 U.S.C. 6304(d) and 5 CFR 630.305 through 630.309).

If an SES member separates from the Government before the end of a leave year, the member is paid a lump-sum payment for all accumulated annual leave (including any unused restored leave), even if the amount of leave exceeds the member's personal leave ceiling. (See 5 U.S.C. 5551.)

Example: An SES member had 1,000 hours of annual leave at the beginning of the first pay period after October 13, 1994. The SES member's personal leave ceiling would be 1,000 hours. If during the remainder of the 1994 leave year the member uses 100 hours more leave than earned, the member's personal leave ceiling for the 1995 leave year will be 900 hours (1,000 minus 100 hours). If during leave year 1995 the member earns 100 hours more leave than used, the member's personal leave ceiling for the 1996 leave year will remain at 900 hours, and the excess 100 hours will be forfeited. Finally, if the member separates from the Government on September 30, 1996, with 1,040 hours of accumulated annual leave, the member will receive a lump-sum payment for 1,040 hours of annual leave at the member's then current rate of pay.

If an SES member who had received a lump-sum payment for annual leave upon separation or retirement is reemployed in the Federal Government before the expiration of the period covered by the lump-sum payment, he or she must refund to the employing agency an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum payment. The individual's annual leave account will be credited with an amount of leave equal to the leave represented by the refund. (See 5 U.S.C. 6311.) If the individual is

reemployed in a non-SES position, he or she will be subject to the maximum annual leave ceiling for the new position—i.e., the 30-day or 45-day maximum annual leave ceiling under 5 U.S.C. 6304 (a) or (b).

Example: An SES member separated and received a lump-sum annual leave payment for 1,040 hours (130 days). Three months (i.e., 60 workdays) later, the individual is reemployed in a GS-15 position. The employee must refund an amount of pay equal to 560 hours (70 days). The employee's annual leave account is credited with 560 hours of annual leave. (Note: Since 560 hours is more than maximum annual leave ceiling of 240 hours for the GS-15 position, the employee acquires a leave ceiling of 560 hours (70 days). The leave ceiling will be reduced under the provisions of 5 U.S.C. 6304(c), if more annual leave is used than earned in any leave year, until it reaches 240 hours. In addition, annual leave earned in a leave year must be used or be subject to forfeiture at the end of the leave year.)

Finally, we are adding paragraph (e) to require agencies to maintain records of the amount of annual leave credited and reduced when an SES member has a personal leave ceiling and to inform affected members of their initial ceiling and any subsequent reduction.

Waiver of Notice of Proposed Rule Making and Delay in Effective Date

Section 201 of Public Law 103-356 became effective at the beginning of the first applicable pay period after October 13, 1994, the date of enactment. In order to give practical effect to this legislation, I find that good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B). Also, I find that good cause exists for making this rule effective on October 14, 1994. The delay in the effective date of this rule is being waived to cover employees as of the date required by the statute.

E.O. 12866, Regulatory Planning and Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

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 affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 630

Absence and leave.

U.S. Office of Personnel Management,
James B. King,
Director

Accordingly, OPM is amending 5 CFR part 630 as follows:

PART 630—ABSENCE AND LEAVE

1. The authority citation for part 630 is revised to read as follows:

Authority: 5 U.S.C. 6311; § 630.301 also issued under Public Law 103-356 (108 Stat. 3410); § 630.303 also issued under 5 U.S.C. 6133(a); § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, June 16, 1965, 3 CFR 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332 and Public Laws 100-566 (102 Stat. 2834), and 103-103 (107 Stat. 1022); subpart J also issued under 5 U.S.C. 6362 and Public Laws 100-566 and 103-103; subpart K also issued under Public Law 102-25 (105 Stat. 92); and subpart L also issued under 5 U.S.C. 6387 and Public Law 103-3 (107 Stat. 23).

Subpart C—Annual Leave

2. In subpart C, § 630.301 is revised to read as follows:

§ 630.301 Annual leave accumulation—Senior Executive Service.

(a) Unused annual leave accrued by an employee while serving under an appointment in the Senior Executive Service under 5 U.S.C. chapter 33, subchapter VIII, shall accumulate for use in succeeding years until it totals not more than 90 days (720 hours) at the beginning of the first full biweekly pay period (or corresponding period for an employee who is not paid on the basis of biweekly pay periods) occurring in a calendar year.

(b) Annual leave accrued for any pay period during only a portion of which the employee served under an appointment to the Senior Executive Service shall be prorated. Only that portion of the leave that is attributable to service in the Senior Executive Service shall be subject to the 90-day (720-hour) limitation on accumulation of annual leave provided in paragraph (a) of this section. Other annual leave accrued during the pay period shall be subject to the limitations imposed by subsections (a), (b), and (c) of 5 U.S.C. 6304, as appropriate.

(c) When an employee in the Senior Executive Service moves to a position outside the Senior Executive Service, any annual leave accumulated while serving in the Senior Executive Service that is in excess of the amount allowed for the position by subsection (a), (b), or (c) of 5 U.S.C. 6304 shall remain to the employee's credit and shall be subject to reduction under procedures identical to those described in 5 U.S.C. 6304(c).

(1) If the employee has more than 720 hours of annual leave at the time of the move and has a personal leave ceiling under paragraph (d) of this section, the employee may not carry over to the next

leave year an amount greater than the employee's personal leave ceiling.

(2) If the employee has more than 720 hours of annual leave at the time of the move and does not have a personal leave ceiling under paragraph (d) of this section, the employee may not carry over to the next leave year more than 720 hours.

(d) An employee in the Senior Executive Service who, as of the first day of the first pay period beginning after October 13, 1994, has accumulated annual leave in excess of 90 days (720 hours) is entitled to retain that leave as a personal leave ceiling. The leave shall be credited to the employee and shall be subject to reduction in the following manner:

(1) Annual leave credited to an employee shall be based on the amount of annual leave accumulated by the employee as of the end of the pay period preceding the first pay period beginning after October 13, 1994. The credited leave shall exclude—

(i) Any annual leave restored to the employee under 5 U.S.C. 6304(d); and

(ii) Any annual leave advanced to the employee under 5 U.S.C. 6302(d) that had not yet been earned.

(2) Annual leave credited to an employee that is in excess of 90 days (720 hours) shall be subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than 90 days (720 hours). For the 1994 leave year, 5 U.S.C. 6304(c) shall be applied only for leave earned and used between the start of the first pay period beginning after October 13, 1994, and the end of the 1994 leave year.

(e) Agencies shall notify affected employees and maintain records on the accumulated annual leave credited to each employee under paragraph (d) of this section and on any reductions in the credited annual leave made under 5 U.S.C. 6304(c). If the employee transfers to another agency, such records shall be provided to the gaining agency.

[FR Doc. 94-31245 Filed 12-20-94; 8:45 am]
BILLING CODE 6325-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 94-ASO-24]

Amendment of the Class D and Class E Airspace; Fort Campbell, KY

AGENCY: Federal Aviation Administration (FAA), DOT.