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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 351

RIN 3206-AL19

### Representative Rate; Order of Release From Competitive Level; Assignment Rights

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing final regulations clarifying how an agency determines employees' retention rights when the agency has positions in one or more pay bands. These regulations also clarify the order in which an agency releases employees from a competitive level. Finally, these regulations clarify how an agency determines employees' retention rights when a competitive area includes more than one local commuting area.

**DATES:** *Effective Date:* These regulations are effective June 20, 2008.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Glennon by telephone on 202-606-0960, by FAX on 202-606-2329, by TDD on 202-418-3134, or by e-mail at [employ@opm.gov](mailto:employ@opm.gov).

**SUPPLEMENTARY INFORMATION:** On March 15, 2007, OPM published proposed reduction in force regulations in the *Federal Register* at 72 FR 12122. Interested parties could submit comments to OPM on the regulations through May 14, 2007. OPM received comments from two agencies and one individual on these proposed regulations. Although OPM received comments from one agency and the individual shortly after the May 14, 2007, closing date, we considered these comments in publishing final regulations. We discuss all the comments below.

The individual asked OPM to clarify that the pay band provisions in the proposed regulations apply only to reduction in force actions under part 351 of title 5, Code of Federal Regulations (CFR), but do not apply to actions under demonstration projects. We found that no revision is necessary. If an alternative retention system (such as a retention system under a demonstration project) is not subject to part 351 of title 5, that system must clearly state the legal basis for exclusion from 5 CFR part 351.

The individual also asked OPM to clarify the definition of "representative rate" in section 351.203 for a General Schedule (GS) employee stationed outside the contiguous states (e.g., stationed in Alaska, Hawaii or overseas). We have not revised the regulations to address this suggestion. The definition of representative rate for any employee stationed outside the contiguous states remains unchanged and continues as the fourth step of the grade for a position covered by the GS using the base rate for GS positions. Employees in Alaska and Hawaii may receive nonforeign area cost-of-living allowance payments under 5 U.S.C. 5941. Employees in overseas locations may receive cost-of-living allowances under 5 U.S.C. 5924. Such allowances are not basic pay nor are they treated in a manner similar to locality pay for GS employees. Accordingly, such allowances are not included in a representative rate for reduction in force purposes.

One agency asked OPM to clarify the definition of "representative rate" in section 351.203 for a Federal Wage System (FWS) position. We are adopting this suggestion by adding a reference in section 351.203 to the definition of "representative rate" in 5 CFR 532.401 for FWS positions. Section 532.401 provides that the representative rate for an FWS position is the second rate on a five-rate regular wage schedule.

One agency suggested that OPM delete the definition of "representative rate" for pay band positions in paragraph (3) of proposed section 351.203. For an alternative, the agency suggested that, in reduction in force competition, it would instead use the pay-setting procedures that apply when one of its employees moves internally (e.g., via actions such as reassignment or voluntary demotion) from a pay band

position to a position not covered by a pay band. We did not adopt this suggestion. The Supplementary Information section of the proposed regulations explained that comparing representative rates is an impartial procedure to determine employees' potential "bump" or "retreat" right to a position on a different retention register when the positions are under different pay schedules (e.g., to determine the assignment rights of employees to and from positions covered by the GS system, FWS, and pay bands). In contrast, an agency-specific procedure to set pay based upon a voluntary or management-initiated movement from a pay band position to a position not covered by a pay band may include variables not covered by the proposed definition of "representative rate" for pay band positions in section 351.203. As a result, an agency-specific pay-setting procedure would not necessarily ensure that all competing employees have equivalent retention rights to and from positions under different pay schedules.

The two agencies suggested that section 351.403(a)(5) include all the criteria that an agency uses to determine whether two or more positions are interchangeable for purposes of establishing reduction in force competitive levels. Another comment asked for clarification when pay band positions are not interchangeable. We found that no revision is needed because section 351.403(a)(5) as written explains that the agency applies section 351.403(a)(1) through (4) to determine whether positions are interchangeable and must be placed in the same competitive level.

One agency asked whether section 351.403(a)(5) requires an agency to establish separate competitive levels for pay band positions with different representative rates. The agency also asked whether all positions in a pay band must have different representative rates if the pay band includes more than one competitive level. As written, section 351.403(a)(5) provides that the agency establishes each pay band competitive level to include interchangeable positions. Only then does the agency determine which representative rate is applicable to that competitive level.

One agency and the individual asked that OPM provide criteria for the agency

to consider under section 351.701(g) when determining which representative rate to use for reduction in force competition when a competitive area includes more than one local commuting area. We are not adopting this suggestion because we believe that the agency should have full discretion to determine which local commuting area is used as the basis for reduction in force representative rates under section 351.701(g). This is consistent with the agency's responsibility to make decisions under section 351.204.

The individual commenter noted that employees' potential assignment rights may differ, depending upon which local commuting area the agency designates under section 351.701(g) as the basis for representative rates when a competitive area includes more than one local commuting area. We explained in the Supplementary Information section of the proposed regulations that agencies will, for the first time, determine employees' reduction in force representative rates using a locality component for both GS and FWS positions. This is more equitable in determining employees' assignment rights than the current procedure in which the representative rate of FWS employees is based on a local prevailing rate, but the representative rate of GS employees does not include a locality component.

One agency asked OPM to clarify the range of potential assignment rights under section 351.708(h) when the competitive area includes only pay band positions. We found that no revision is needed. The language of the proposed regulation, which is further explained in the SUPPLEMENTARY INFORMATION, provides that a competitive service employee has a potential assignment right to a position in the same pay band or one pay band lower than the pay band from which released. In addition, a competitive service preference eligible employee with a service-connected disability of 30 percent or more has a potential assignment right to a position in the same pay band or up to two pay bands lower than the pay band from which released. These grade limits defining the range of potential assignment rights are consistent with the grade limits for a pay band environment that OPM approved and tested for demonstration projects for more than two decades.

One agency asked OPM to provide criteria for the agency to consider when designating the representative rate for pay band positions under paragraph (3) of the definition in section 351.203 when, under section 351.701(i), the competitive area includes pay band

positions and other positions not covered by a pay band. We are not adopting this suggestion because we believe that the agency should have full discretion to designate the representative rate for pay band positions, consistent with section 351.203 and the agency's responsibility to make decisions under section 351.204.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain Federal employees.

**Executive Order 12866, Regulatory Review**

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

**List of Subjects in 5 CFR Part 351**

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

**Linda M. Springer,**  
*Director.*

■ Accordingly, OPM is amending part 351 of title 5, Code of Federal Regulations, as follows:

**PART 351—REDUCTION IN FORCE**

■ 1. The authority citation for part 351 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965.

■ 2. In § 351.203, the definition of "representative rate" is revised to read as follows:

**§ 351.203 Definitions.**

In this part:

\* \* \* \* \*

*Representative rate* means:

(1) The fourth step of the grade for a position covered by the General Schedule, using the locality rate authorized by 5 U.S.C. 5304 and subpart F of part 531 of this chapter for General Schedule positions;

(2) The prevailing rate for a position covered by a wage-board or similar wage-determining procedure, such as provided in the definition of representative rate for Federal Wage System positions in 5 CFR 532.401 of this chapter;

(3) For positions in a pay band, the rate (or rates) the agency designates as representative of that pay band or competitive levels within the pay band, including (as appropriate) any applicable locality payment authorized

by 5 U.S.C. 5304 and subpart F of part 531 of this chapter (or equivalent payment under other legal authority); and

(4) For other positions (e.g., positions in an unclassified pay system), the rate the agency designates as representative of the position, including (as appropriate) any applicable locality payment authorized by subpart F of part 531 (or equivalent payment under other legal authority).

\* \* \* \* \*

■ 3. In § 351.403, paragraph (c)(4) is revised, and paragraphs (a)(5), (c)(5), and (c)(6) are added, to read as follows:

**§ 351.403 Competitive level.**

(a) \* \* \*

(5) If a competitive area includes positions in one or more pay bands, each set of interchangeable positions in the pay band under paragraphs (a)(1) through (4) of this section is a separate competitive level (e.g., with interchangeable positions under paragraphs (a)(1) through (4) of this section, each pay band is one competitive level; if the positions are not interchangeable under paragraphs (a)(1) through (4) of this section, the pay band may include multiple competitive levels).

\* \* \* \* \*

(c) \* \* \*

(4) A difference in the local wage areas when a competitive area includes positions covered by more than one wage-board or similar wage-determining procedure;

(5) A difference in locality payments under 5 U.S.C. 5304 and subpart F of part 531 of this chapter when a competitive level includes more than one locality pay area listed in § 531.603 of this chapter; or

(6) Representative rates in different local commuting areas when a competitive area includes General Schedule (GS) and Federal Wage System (FWS) positions in multiple GS locality pay areas, and/or FWS local wage areas.

■ 4. Section 351.601 is revised to read as follows:

**§ 351.601 Order of release from competitive level.**

(a) Each agency must select competing employees for release from a competitive level (including release from a competitive level involving a pay band) under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an

employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory exception or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

(b) At its option an agency may provide for intervening displacement within the competitive level before final release of the employee with the lowest-retention standing from the competitive level.

(c) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

■ 5. In § 351.701, paragraphs (g), (h), and (i) are added, to read as follows:

**§ 351.701 Assignment involving displacement.**

\* \* \* \* \*

(g) If a competitive area includes more than one local commuting area, the agency determines assignment rights under this part on the basis of the representative rates for one local commuting area within the competitive area (i.e., the same local commuting area used to establish competitive levels under § 351.403(c)(4), (5), and (6)).

(h) If a competitive area includes positions under one or more pay bands, a released employee shall be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or one pay band lower, as determined by the agency, than the pay band from which released. A preference eligible with a service-connected disability of 30 percent or more must be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or up to two pay bands lower, as determined by the agency, than the pay band from which released.

(i) If a competitive area includes positions under one or more pay bands, and other positions not covered by a pay band (e.g., GS and/or FWS positions), the agency provides assignment rights under this part by:

(1) Determining the representative rate of positions not covered by a pay band, consistent with § 351.203;

(2) Determining the representative rate of each pay band, or competitive level within the pay band(s), consistent with § 351.203;

(3) As determined by the agency, providing assignment rights under paragraph (b) of this section (bumping), or paragraphs (c) and (d) of this section (retreating), consistent with the grade intervals covered in paragraphs (b)(2) and (c)(2) of this section, and the pay band intervals in paragraph (h) of this section.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1160

[Docket No. AMS-DA-07-0156; DA-07-05]

#### National Fluid Milk Processor Promotion Program

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Fluid Milk Promotion Order (Order) by reducing the burden of late-payment charges applied to processors who mistakenly underreport the amount of assessments owed to the National Fluid Milk Processor Promotion Board (Board), provided that the processor has not made more than two reporting errors in the prior 12 months.

**DATES:** *Effective Date:* July 1, 2008.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** This final rule adopts a proposal submitted by the Board to reduce the burden of late payment fees applied to processors who underreport the amount of assessments they owe due to unintentional errors or miscalculations. Specifically, the amendment reduces late-payment charges provided that the processor has not made more than two reporting errors in the prior 12 months.

The Fluid Milk Promotion Order is issued under the Fluid Milk Promotion Act as amended (Act) [7 U.S.C. 6401-6417].

#### Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 1999K of the Act, any person subject to the Order may file with the Secretary of Agriculture (Secretary) a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with the law and request a modification of the Order or to be exempted from the Order. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act

The Agricultural Marketing Service (AMS) has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612). The final rule imposes no new burden on the industry but will in fact reduce late-payment charges applied to processors who underreport the amount of assessments which they owe to the Board provided that the processors have not made more than two reporting errors in the prior 12 months.

Small businesses in the fluid milk processing industry have been defined by the Small Business Administration (13 CFR 121.201) as those processors employing not more than 500 employees. As of April 2008, there were approximately 100 fluid milk processors subject to the provisions of the Order. While some processors own multiple plants, the majority of processors own just one plant with fewer than 500 employees, and are, therefore, small entities.

#### Paperwork Reduction Act

Information collection requirements and recordkeeping provisions contained in 7 CFR Part 1250 have been previously approved by the Office of Management