

## § 534.605

(2) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the administrative appeals judge's basic daily tour of duty.

(3) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

### § 534.605 Conversion.

On the first day of the first pay period beginning on or after December 11, 2001, agencies must convert the rate of basic pay of an administrative appeals judge to the lowest rate of basic pay provided by § 534.603(a) of this subpart that equals or exceeds the rate of basic pay the administrative appeals judge received immediately before that date.

## PART 535—CRITICAL POSITION PAY AUTHORITY

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AUTHORITY: 5 U.S.C. 5377; E.O. 13415, 71 FR 70641.

SOURCE: 73 FR 50181, Aug. 26, 2008, unless otherwise noted.

### § 535.101 Purpose.

The purpose of this part is to provide a regulatory framework for the critical position pay authority authorized by 5 U.S.C. 5377. The Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions under this part.

### § 535.102 Definitions.

*Agency* has the meaning given that term in 5 U.S.C. 5102.

*Critical position* means a position for which OPM has granted authority to the head of an agency to exercise the pay-setting authority provided in 5 U.S.C. 5377.

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*Critical position pay authority* means the authority that may be granted to the head of an agency by OPM under 5 U.S.C. 5377 to set the rate of basic pay for a given critical position under the provisions of that section.

*Critical position pay rate* means the specific rate of pay established by the head of an agency for an employee in a critical position based upon the exercise of the critical position pay authority. A critical position pay rate is a rate of basic pay to the extent provided in § 535.106.

*Employee* means an employee (as defined in 5 U.S.C. 2105) in or under an agency.

*Head of an agency* means the agency head or an official who has been delegated the authority to act for the agency head in the matter concerned.

### § 535.103 Authority.

(a) Subject to a grant of authority from OPM in consultation with OMB and all other requirements in this part, the head of an agency may fix the rate of basic pay for a critical position at a rate not less than the rate of basic pay that would otherwise be payable for the position, but not greater than—

(1) The rate payable for level II of the Executive Schedule (unless paragraph (a)(2) or (a)(3) of this section applies);

(2) The rate payable for level I of the Executive Schedule in exceptional circumstances based on information and data that justify a rate higher than the rate payable for level II of the Executive Schedule; or

(3) A rate in excess of the rate for level I of the Executive Schedule that is established in rare circumstances with the written approval of the President.

(b) The head of an agency may exercise his or her critical position pay authority only—

(1) When such a position requires expertise of an extremely high level in a scientific, technical, professional, or administrative field and is critical to the agency's successful accomplishment of an important mission; and

(2) To the extent necessary to recruit or retain an individual exceptionally well-qualified for the critical position.

(c) If critical position pay authority is granted for a position, the head of an

agency may determine whether it is appropriate to exercise the authority with respect to any proposed appointee or incumbent of the position.

(d) An agency granted critical position pay authority may continue to use the authority for an authorized position as long as needed. OPM will monitor the use of critical position pay authorities annually, through the agency's required reports under § 535.107, and will terminate the authority associated with a given position after notifying the agency if, in OPM's judgment in consultation with OMB, the authority is no longer needed.

**§ 535.104 Requests for and granting critical position pay authority.**

(a) An agency may request critical position pay authority only after determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Agency requests must include the information in paragraph (d) of this section. OPM, in consultation with OMB, will review agency requests. OPM will advise the requesting agency as to whether the request is approved and when the agency's critical position pay authority becomes effective.

(b) A request for critical position pay authority (or authorities) must be signed by the head of an agency and submitted to OPM. Requests covering multiple positions must include a list of the positions in priority order. The head of an agency may request coverage of positions of a type not listed in 5 U.S.C. 5377(a)(2), as authorized by 5 U.S.C. 5377(i)(2) and Executive Order 13415.

(c) Requests for critical position pay authority to set pay above the rate for level II of the Executive Schedule and up to the rate for level I of the Executive Schedule because of exceptional circumstances require information and data that justify the higher pay. Requests for critical position pay authority to set pay above the rate for level I of the Executive Schedule due to rare circumstances require approval by the President. The head of an agency must submit such requests to OPM with the information required in paragraph (d)

of this section. If OPM, in consultation with OMB, concurs with a request to set pay above the rate for level I of the Executive Schedule, OPM will seek the President's approval. The President may establish a maximum limitation on the critical pay rate.

(d) At a minimum, all requests for critical position pay authority must include:

- (1) Position title;
- (2) Position appointment authority (for Senior Executive Service positions, appointment authority for any incumbent);
- (3) Pay plan and grade/level;
- (4) Occupational series of the position;
- (5) Geographic location of the position;
- (6) Current salary of the position or incumbent;
- (7) Name of incumbent (or "Vacant");
- (8) Length of time the incumbent has been in the position or length of time the position has been vacant;
- (9) A written evaluation of the need to designate the position as critical. Such an evaluation must include—
  - (i) The kinds of work required by the position and the context within which it operates;
  - (ii) The range of positions and qualification requirements that characterize the occupational field, including those that require extremely high levels of expertise;
  - (iii) The rates of pay reasonably and generally required in the public and private sectors for similar positions; and
  - (iv) The availability of individuals who possess the qualifications to do the work required by the position;
- (10) Documentation, with appropriate supporting data, of the agency's experience and, as appropriate, the experience of other organizations, in efforts to recruit or retain exceptionally well-qualified individuals for the position or for a position sufficiently similar with respect to the occupational field, required qualifications, and other pertinent factors, to provide a reliable comparison;
- (11) Assessment of why the agency could not, through diligent and comprehensive recruitment efforts and without using the critical position pay