

(8) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304; and

(9) Any provisions for which DHS locality rate supplements must be treated as basic pay by law.

§9701.333 Special rate supplements.

DHS will, after coordination with OPM, establish special rate supplements that provide higher pay levels for subcategories of employees within an occupational cluster if DHS determines that such supplements are warranted by current or anticipated recruitment and/or retention needs. In exercising this authority, DHS will issue necessary implementing directives. Any special rate supplement must be treated as basic pay for the same purposes as locality rate supplements, as described in §9701.332(c), and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

§9701.334 Setting and adjusting locality and special rate supplements.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust locality and special rate supplements. In determining the amounts of the supplements, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted locality and special rate supplements. Established supplements will be reviewed for possible adjustment on an annual basis in conjunction with rate range adjustments under §9701.322.

§9701.335 Eligibility for pay increase associated with a supplement adjustment.

(a) When a locality or special rate supplement is adjusted under §9701.334, an employee to whom the supplement applies is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds perform-

ance expectations (*i.e.*, has a rating of record above the unacceptable performance level for the most recently completed appraisal period). This includes an increase resulting from the initial establishment and setting of a special rate supplement. The pay increase takes effect at the same time as the applicable supplement is set or adjusted, except as provided in §§9701.336 and 9701.337.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to any pay increase associated with a supplement adjustment, as provided in paragraph (a) of this section.

(c) An employee who has an unacceptable rating of record is prohibited from receiving a pay increase as a result of an increase in an applicable locality or special rate supplement, except as provided by §§9701.336 and 9701.337. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§9701.336 Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.

An employee who does not receive a pay increase under §9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) does not fall below the minimum adjusted rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under §9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§9701.337 Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.

(a) In the case of an employee who does not receive a pay increase under