

(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

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§9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) falls below the minimum adjusted rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the locality or special rate supplement adjustment, issue a new rating of record under §9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the locality or special rate supplement adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a locality or special rate supplement adjustment, the employee becomes entitled to the minimum adjusted rate of his or her band range on the first day of the first pay period beginning on or after the 90th day following the date of the locality or special rate supplement adjustment.

### PERFORMANCE-BASED PAY

#### §9701.341 General.

Sections 9701.342 through 9701.346 describe various types of performance-based pay adjustments that are part of the pay system established under this subpart. Generally, these within-band pay increases are directly linked to an employee's rating of record (as assigned under the performance management system described in subpart D of this part). These provisions are designed to provide DHS with the flexibility to allocate available funds based on performance as a means of fostering a high-performance culture that supports mission accomplishment. While performance measures primarily focus on an employee's contributions (as an individual or as part of a team) in accomplishing work assignments and achieving mission results, performance

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also may be reflected in the acquisition and demonstration of required competencies.

#### §9701.342 Performance pay increases.

(a) *Overview.* (1) The DHS pay system provides employees in a Full Performance or higher band with increases in basic pay based on individual performance ratings of record as assigned under a performance management system established under subpart D of this part. The DHS pay system uses pay pool controls to allocate pay increases based on performance points that are directly linked to the employee's rating of record, as described in this section. Performance pay increases are a function of the amount of money in the performance pay pool, the relative point value placed on ratings, and the distribution of ratings within that performance pay pool.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period (subject to the requirements of subpart D of this part), except that if the supervisor or other rating official determines that an employee's current performance is inconsistent with that rating, the supervisor or other rating official may prepare a more current rating of record, consistent with §9701.409(b). If an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle for the purpose of determining the employee's performance pay increase.

(b) *Performance pay pools.* (1) DHS will establish pay pools for performance pay increases.

(2) Each pay pool covers a defined group of DHS employees, as determined by DHS.

(3) An authorized agency official(s) may determine the distribution of funds among pay pools and may adjust those amounts based on overall levels of organizational performance or contribution to the Department's mission.

(4) In allocating the monies to be budgeted for performance pay increases, the Secretary or designee must take into account the average value of within-grade and quality step increases