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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 531

RIN: 3206-AI81

Locality-Based Comparability Payments

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations to clarify and redefine the limitations on locality rates of pay for categories of non-General Schedule employees approved by the President's Pay Agent to receive locality-based comparability payments. This change was prompted by an Executive order that delegated the President's authority to establish such limitations to the President's Pay Agent. The final regulations will ensure that all employees receiving locality payments are treated consistently.

EFFECTIVE DATE: This regulation is effective on December 28, 2001.

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SUPPLEMENTARY INFORMATION: On March 24, 2000, the Office of Personnel Management (OPM) published a proposed rule (65 FR 15875) to revise the locality pay regulations in subpart F of part 531 of title 5, Code of Federal Regulations. This proposed rule clarified and redefined the limitations on locality rates of pay for categories of non-General Schedule employees approved by the President's Pay Agent to receive locality payments. The proposed rule had a 60-day public comment period, during which OPM did not receive any formal comments. Therefore, we are adopting the proposed rule as final without change.

Background

Locality-based comparability payments are authorized under 5 U.S.C. 5304. By law, locality payments automatically apply to General Schedule (GS) employees. The maximum rate of basic pay (excluding locality payments) for GS employees is the rate for GS-15, step 10, subject to a cap linked to the rate of pay for level V of the Executive Schedule. (See 5 U.S.C. 5303(f).) GS rates of basic pay adjusted by locality payments are capped at the rate of pay for level IV of the Executive Schedule. (See 5 U.S.C. 5304(g)(1).)

The locality pay law provides that the President may extend locality payments to various groups outside the GS pay system, such as members of the Senior Executive Service (SES), administrative law judges (ALJs), and other groups for which basic pay is limited to no more than the rate of pay for level IV of the Executive Schedule. (See 5 U.S.C. 5304(h).) Executive Order 12883 of November 29, 1993, provided that the President's Pay Agent (the Secretary of Labor and the Directors of the Office of Management and Budget and the Office of Personnel Management) may act for the President in exercising the authority to extend locality payments to such non-GS groups.

Section 5304(g)(2)(A) of title 5, United States Code, provides that locality rates approved for certain categories of non-GS employees specified in 5 U.S.C. 5304(h)(1)(A)-(E), including members of the SES and ALJs, are capped at the rate for level III of the Executive Schedule. Section 5304(g)(2)(B) of title 5, United States Code, provides that a level III locality pay cap applies to "any positions under subsection (h)(1)(F) which the President may determine." Subsection (h)(1)(F) is a catch-all category of non-GS positions to which locality pay may be extended. This catch-all category includes Executive agency positions not otherwise listed in the law whose rates of basic pay are limited to not more than the rate for level IV of the Executive Schedule. Section 8 of Executive Order 13106 of December 7, 1998, delegated the President's authority under section 5304(g)(2)(B) of title 5, United States Code, to determine such limitations for categories of positions covered by 5 U.S.C. 5304(h)(1)(F) to the President's Pay Agent.

Final Regulations

These final regulations amend 5 CFR 531.604 by revising paragraph (c) to clarify that a locality rate of pay may not exceed the rate for level III of the Executive Schedule for categories of positions specified in 5 U.S.C. 5304(h)(1)(A)-(E). This includes senior-level, SES, Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES, administrative law judge, and contract appeals board positions. This final rule does not change the locality pay cap applicable to members of the SES and other categories of positions specified in 5 U.S.C. 5304(h)(1)(A)-(E). The final rule merely clarifies the level III locality pay cap prescribed in law at 5 U.S.C. 5304(g)(2)(A).

The final rule also amends § 531.604 by revising paragraph (c) to provide that, for categories of non-GS employees under 5 U.S.C. 5304(h)(1)(F) (i.e., the catch-all category of positions previously described), locality rates of pay may not exceed:

(1) The rate for level IV of the Executive Schedule, if the maximum scheduled annual rate of pay for such positions is less than or equal to the maximum payable scheduled annual rate of pay for GS-15, or

(2) The rate for level III of the Executive Schedule, if the maximum scheduled annual rate of pay for such positions exceeds the maximum payable scheduled annual rate of pay for GS-15, but is not more than the rate for level IV of the Executive Schedule.

The final regulations include pay protection for any employee who otherwise would suffer a reduction in his or her locality rate of pay under the locality pay cap provisions. It is possible that the locality pay cap for a group of non-GS employees under 5 U.S.C. 5304(h)(1)(F) could be reduced from level III to level IV of the Executive Schedule as GS rates of basic pay increase. This could occur if the rate of basic pay for GS-15, step 10, becomes equal to or exceeds the maximum scheduled annual rate of pay for a non-GS group. To prevent reductions in pay that would otherwise occur, § 531.606(c)(3) of the final regulations limit an affected employee's locality pay cap to the higher of (1) his or her locality rate on the day before the scheduled annual rate of pay for GS-15, step 10, becomes equal to or exceeds the

maximum scheduled annual rate of pay for the group of non-GS employees or (2) the rate for level IV of the Executive Schedule. This means that the employee's locality rate would be frozen until it is exceeded by the rate for level IV of the Executive Schedule.

The final regulations add a new paragraph (d) to § 531.604 to exclude experts and consultants appointed under 5 U.S.C. 3109 from the locality pay limitations. Unless otherwise authorized by law, the aggregate pay (including basic pay, locality pay, and premium pay) for experts and consultants appointed under 5 U.S.C. 3109 may not exceed the daily rate for GS-15, step 10 (excluding locality pay or any other additional pay). (See 5 CFR 304.105.)

The final regulations also clarify the definition of *employee* in § 531.602 to include positions in the FBI and DEA SES under 5 U.S.C. 5304(h)(1)(C) and other non-GS employee categories under 5 U.S.C. 5304(h)(1)(F) for which the President's Pay Agent has authorized locality payments. The regulations also amend paragraph (4) in the definition of *scheduled annual rate of pay* in § 531.602 to include the rates of basic pay for employees in the FBI and DEA SES and other categories of non-GS positions for which the Pay Agent has authorized locality pay. The proposed regulations clarify that the scheduled annual rate of pay for such employees must exclude any locality-based pay adjustments, special basic pay adjustments analogous to special salary rates established under 5 U.S.C. 5305, or other additional pay of any kind.

The President's Pay Agent has reviewed and approved this final rule.

Waiver of Delay in Effective Date

Pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to make these regulations effective in less than 30 days. These regulations must be made effective prior to January 1, 2002. If they become effective after the January 2002 statutory pay adjustments, agencies may be forced in some scenarios to use the pay protection provision to freeze the pay of a few employees whose pay was capped at level III of the Executive Schedule.

Execute Order 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities

because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 531

Government employees, Law enforcement officers, Wages.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM is amending part 531 of title 5 of the Code of Federal Regulations as follows:

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, 3 CFR, 1991 Comp., p. 316;

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 the Federal Employees Pay Comparability Act of 1990 (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; E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682; and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224;

Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of FEPCA, Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

Subpart F—Locality-Based Comparability Payments

2. In § 531.602, paragraph (2) of the definition of *employee* and paragraph (4) of the definition of *scheduled annual rate of pay* are revised to read as follows:

§ 531.602 Definitions

* * * * *

Employee means—* * *

(2) An employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(F) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2) and whose official duty station is located in a locality pay area.

* * * * *

Scheduled annual rate of pay means—* * *

(4) For an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(F) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2), the rate of basic pay fixed by law or administrative action, exclusive of any locality-based adjustments (including adjustments equivalent to local special rate adjustments under 5 U.S.C. 5305) or other additional pay of any kind.

3. In § 531.604, paragraph (c) is revised and a new paragraph (d) is added to read as follows:

§ 531.604 Determining locality rates of pay.

* * * * *

(c)(1) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(E) may not exceed the rate for level III of the Executive Schedule.

(2) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(F) may not exceed—

(i) The rate for level IV of the Executive Schedule, when the maximum scheduled annual rate of pay (excluding any retained rate) for such positions is less than or equal to the maximum payable scheduled annual rate of pay for GS–15; or

(ii) The rate for level III of the Executive Schedule, when the maximum scheduled annual rate of pay (excluding any retained rate) for such positions exceeds the maximum payable scheduled annual rate of pay for GS–15, but is not more than the rate for level IV of the Executive Schedule.

(3) If application of paragraph (c)(2) of this section would otherwise reduce an employee's existing locality rate of pay, the employee's locality rate of pay will be capped at the higher of—

(i) The amount of his or her locality rate of pay on the day before paragraph (c)(2) of this section is applied, or

(ii) The rate for level IV of the Executive Schedule.

(d) Paragraph (c) of this section does not apply to experts and consultants appointed under 5 U.S.C. 3109 if the pay for those experts and consultants is limited to the highest rate payable under 5 U.S.C. 5332 (i.e., the unadjusted maximum GS–15 rate). Pay limitations for such experts and consultants must be determined in accordance with § 304.105 of this chapter.

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