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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 530, 531, and 536

RIN 3206–AM43

Pay in Nonforeign Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations on certain pay administration rules dealing with employees in nonforeign areas outside the 48 contiguous States. We are revising provisions related to special rates, locality rates, and retained rates. Some of the revisions are necessary to address the effects of implementing the Non-Foreign Area Retirement Equity Assurance Act of 2009, while others are to improve the administration of special rates.

DATES: *Effective Date:* December 7, 2011.

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SUPPLEMENTARY INFORMATION: On August 1, 2011, the U.S. Office of Personnel Management (OPM) published proposed regulations (76 FR 45710) to revise certain pay administration rules for employees in ''nonforeign areas,'' which include Alaska, Hawaii, Guam, Puerto Rico, the Virgin Islands, and certain other areas listed in 5 CFR 591.205. Some of the revisions are necessary to address the effects of implementing the Non-Foreign Area Retirement Equity Assurance Act of 2009 (NAREAA), as contained in subtitle B of title XIX of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84, October 28, 2009), while others are to improve the administration of special rates.

The 45-day comment period ended on September 15, 2011. During the comment period, we received comments from three Senators, one agency, and six individuals. This supplementary information addresses the comments we received. The agency concurred with OPM's proposed changes as written.

Special Rates

In the supplementary information accompanying the proposed regulations, we stated that certain provisions of NAREAA required additional increases in special rate schedules to levels beyond what may be justified to prevent significant recruitment or retention difficulties. We stated that, accordingly, OPM may consider reducing special rate schedules in nonforeign areas. We proposed to provide OPM with discretionary authority to establish a separate special rate schedule that temporarily maintains the higher special rates for current employees covered by a given special rate schedule before the effective date of the schedule reduction. This means that future hires would be covered by a lower special rate schedule established consistent with labor market conditions while current employees would have ''grandfather'' coverage under a higher special rate schedule that would provide pay protection, but would be phased out over time.

The Senators and one individual were concerned about the proposal. Specifically, the individual does not want OPM to phase out any special rates. The Senators were concerned that OPM has decided to eliminate additional adjustments for special rate employees and by the suggestion that the adjusted rates may be higher than justified without supporting analysis. The Senators were also concerned that the proposal could lead to losses in take-home pay if cost-of-living allowance (COLA) reductions are not adequately considered and the phase-out is done too quickly. (As locality pay increases, payable COLA rates must be reduced as specified in section 1912(b) of NAREAA. As a consequence, covered employees may receive both locality pay and a reduced COLA for a number of years, until the applicable COLA rate is reduced to zero.) They stated that pay reductions could impair agencies' recruitment and retention efforts and recommended that any decreases in special rates be done gradually in order to protect pay.

During the January 2010–January 2012 transition period, additional adjustments are being added to the original special rates to compensate for COLA reductions, as required by NAREAA. The original special rates without the NAREAA additional adjustments were set at levels necessary to address recruitment and/or retention difficulties. We note that most of the special rate schedules established in nonforeign areas were derived from nationwide or worldwide schedules for which the special rates were set without consideration of the fact that employees in the nonforeign areas would receive COLA on top of special rates. Thus, the total pay rates may have been beyond what was necessary to prevent significant recruitment or retention problems in the nonforeign areas. Accordingly, as part of the annual review of special rates, we have asked agencies to conduct reviews to determine whether they need the special rates set at a level above the original special rates, taking into consideration the remaining COLA that will be paid on top of the special rates. See CPM 2011–11, issued July 8, 2011, at *http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3995.* An agency finding that reducing a special rate schedule would cause significant recruitment or retention problems would merit special consideration by OPM and may result in no schedule reduction.

OPM has not yet determined how it will adjust special rates for employees in nonforeign areas after January 1, 2012, because we are waiting for agencies to complete their reviews of special rates that apply to their employees. OPM will announce its decisions resulting from the annual review of special rates in a memorandum that is typically issued in December. Under 5 U.S.C. 1103(b)(4), the Director of OPM is not required to publish in the **Federal Register** a notice of the establishment or adjustment of any schedules or rates of basic pay or allowances under subpart D of part III of title 5.

OPM is adopting as final the proposed change providing the discretionary authority to establish a separate special rate schedule that temporarily maintains

the higher special rates for employees covered by the given special rate schedule before the effective date of the schedule reduction. This is an authority OPM may or may not exercise based on agency input and the circumstances and factors OPM considers in evaluating the need for special rates in 5 CFR 530.304(b) and 530.306.

OPM is also adopting the proposal to add locality pay and nonforeign COLA as circumstances and factors OPM may consider in evaluating the need for special rates. This means that OPM can take into account any COLA reductions or locality pay increases as it is determining how to adjust special rate schedules in nonforeign areas.

Locality Rates

Another individual requested that OPM's regulations provide locality pay for employees in foreign areas. OPM does not have the authority to provide locality pay for employees in foreign areas because 5 U.S.C. 5304(f) does not cover foreign areas.

Retained Rates

A third individual was concerned that there is no provision in NAREAA allowing non-appropriated fund (NAF) employees covered by NAREAA to receive a rate exceeding the maximum of the NAF pay band. The individual asked OPM to address NAF pay issues in the regulations.

These regulations do not address NAF pay issues because OPM has the authority to regulate pay setting only for NAF employees who move to the General Schedule. We note that, under section 1918(b) of NAREAA, administrators of pay systems not administered by OPM must carry out the provisions of NAREAA consistent with OPM rules, subject to the concurrence of OPM. Thus, if there are nonforeign area employees in the NAF pay system who are covered by NAREAA and who are receiving a retained rate similar to a retained rate under 5 U.S.C. 5363, then the NAF pay system administrator should prescribe rules consistent with OPM's regulations on retained rates.

On December 27, 2010, OPM issued a memorandum (CPM 2010–23) that provided a special (more generous) rule for adjusting retained rates under 5 U.S.C. 5363 for employees in nonforeign areas receiving COLAs during the January 2010–January 2012 transition period. Without the special rule, some retained rate employees may have experienced a reduction in gross pay during the transition period because the increase in pay resulting from a retained rate adjustment may have been less than the loss in pay resulting from the COLA reduction. OPM stated in the supplementary information accompanying the proposed regulations that OPM was not proposing to continue the special rule after the transition period. OPM explained that a continuing exception to the statutory retained rate adjustment rule would not be appropriate. The NAREAA section 1918(a)(2) authority under which OPM established the special retained rate adjustment rule applies only during the transition period, when locality pay is being increased by significant amounts and there are corresponding large reductions in COLA payments.

The Senators and an individual recommended that OPM continue the special retained rate adjustment rule beyond the transition period. The Senators believed that the rule was consistent with Congressional intent to protect employees' pay. They cited the sense of Congress in section 1915(a) of NAREAA, which states: ''It is the sense of Congress that the application of this subtitle to any employee should not result in a decrease in the take home pay of that employee.'' The Senators further maintained that there is no basis for distinguishing between the transition period and the post-transition period in terms of providing employee pay protection.

While a sense of Congress does not have the effect of law, OPM has recognized that it is an expression of the general intent of Congress. OPM has taken this intent into account in implementing NAREAA, while complying with the requirements of NAREAA and other applicable law.

In NAREAA, Congress did provide for special treatment during the transition period. For example, section 1918(a)(2) gave OPM authority to enact special rules governing the adjustment of pay rates during the transition period for certain employees (including retained rate employees). Also, section 1915(b)(1) established special rules governing the adjustment of special rates during the transition period. The transition period is distinguishable from the post-transition period because locality pay is being phased in by providing large increases each year equal to one-third of the applicable locality rate, which results in correspondingly large reductions in COLA payments. This was the basis for Congress enacting special authorities for the transition period.

Since certain NAREAA provisions are applicable only to the transition period, OPM understands that the law generally intended a return to the normal pay rules after the transition period, absent a specific NAREAA provision providing otherwise. For example, OPM expects to apply the normal provisions of its special rates authority in 5 U.S.C. 5305 in making determinations regarding the adjustment of special rates after January 1, 2012, rather than rely on the formula in NAREAA section 1915(b). Likewise, OPM expects to follow the normal retained rate adjustment rules in 5 U.S.C. 5363 after the transition period. Any reduction in take-home pay would not be attributable to the application of NAREAA, but to the application of the regular pay laws.

We note that the idea of protecting take-home pay has always been problematic, since take-home pay for each individual is affected by various deductions, some of which can be controlled by the employee and some of which have nothing to do with the application of NAREAA. Also, a focus on take-home pay fails to take into account the benefits of replacing COLA with basic pay. Basic pay is used to compute retirement annuities, Government contributions towards Thrift Savings Plan accounts, life insurance benefits, and other payments and benefits.

When OPM established a more generous retained rate adjustment rule during the NAREAA transition period, it did so because analysis showed that the large reductions in COLA payments during the transition period could result in a significant reduction in a retained rate employee's gross total pay. Our analysis shows that such reductions will not occur when locality pay increases and corresponding COLA reductions are more modest. That difference does provide a basis for treating the transition period differently than the post-transition period.

It is important to remember that employees receiving a retained rate are, by definition, being paid above the regular salary range for their position. That salary range, including the maximum rate of the range that is the eventual target salary for the retained rate employee, is receiving the full pay adjustments. By design, retained rate employees receive lesser increases so that they can fall back into the normal salary range over time and be paid appropriately for their position.

The three Senators recommended that OPM use the authority in NAREAA section 1918(a)(3) to establish a more generous retained rate adjustment rule for the post-transition period. Section 1918(a)(3) provides that OPM may establish ''rules governing the establishment and adjustment of saved or retained rates for any employee whose rate of pay exceeds applicable pay limitations on the first day of the

first pay period beginning on or after January 1, 2012'' (*i.e.,* the last day of the transition period). However, this authority may be applied only to those whose rate of pay exceeds applicable pay limitations ''on'' the last day of the transition period. The regulations proposed by OPM would use this authority for two closed sets of ''grandfathered'' employees to (1) Waive the normal cap on retained rates of level IV of the Executive Schedule (EX–IV) for nonforeign area employees with a retained rate in excess of that cap at the end of the transition period and (2) allow temporary and term employees to have a retained rate established at the end of the transition period or afterwards. While we could perhaps use the section 1918(a)(3) authority to establish a more generous retained rate adjustment rule for employees who have a retained rate at the end of the transition period, we do not believe we could use this authority to apply that more generous rule to nonforeign area employees whose retained rate is created at a later date or who move to the nonforeign area at a later date with a retained rate. Thus, agencies would be required to apply a different retained rate adjustment rule to different categories of nonforeign area employees, which would raise equity concerns and pose significant administrative problems. The more generous retained rate adjustment rule for a limited category of employees would be in place until COLA was entirely eliminated, which may be many years away. We do not believe that NAREAA requires OPM to depart from the normal statutory retained rate adjustment rule for years after the transition period has ended.

As indicated by our responses above, we are not using the authority in NAREAA section 1918(a)(3) to adopt a more generous retained rate adjustment rule for certain grandfathered employees at this time; however, we will study and analyze this issue further. For General Schedule employees, OPM will use the more generous retained rate adjustment rule on January 1, 2012. The next possible application of the retained rate adjustment rule after January 2012 will be in January 2013 under current law. That gives us some time to further consider this matter.

The Senators and an individual supported OPM's proposed rule change to 5 CFR 536.310 to lift the EX–IV pay cap for employees who are receiving special rates in excess of the rate for EX–IV on January 1, 2012, that are converted to retained rates consistent with section 1913 of NAREAA. It has come to our attention that the exception to the level IV cap should apply to other employees. In the memorandum announcing the special retained rate adjustment rule to be used during the transition period, OPM stated ''the Executive Schedule level IV cap on retained rates under 5 CFR 536.306(a) does not apply to a retained rate adjusted under this special authority.'' Therefore, we are revising 5 CFR 536.310(a) to provide that a nonforeign area employee who is receiving a retained rate in excess of EX–IV on January 1, 2012, consistent with NAREAA, may continue to receive this rate until the retained rate becomes equal to or falls below the rate for EX-IV, or the employee ceases to be entitled to pay retention under § 536.308. This includes employees who are receiving special rates in excess of EX–IV on January 1, 2012, that are converted to retained rates consistent with section 1913 of NAREAA.

Biweekly Premium Pay Cap

Another individual was concerned about nonforeign area employees whose pay is limited by the biweekly cap on premium pay under 5 U.S.C. 5547(a) and 5 CFR 550.105. Specifically, the individual states that such employees who are receiving law enforcement availability pay (LEAP) under 5 U.S.C. 5545a have experienced reductions in total pay because, as the employee's locality pay increases and COLA decreases under NAREAA, the employee's LEAP is reduced so that the sum of the employee's basic pay and premium pay does not exceed the biweekly cap on premium pay. (COLA is not subject to the biweekly premium pay cap while locality pay is subject to the biweekly premium pay cap.) The individual requests that OPM use the authority in section 1918(a)(3) of NAREAA to issue regulations preventing employees subject to the biweekly premium pay limitation in nonforeign areas from experiencing reductions in total pay.

We are not adopting this recommendation. Section 1918(a)(3) provides OPM the authority to prescribe rules governing the establishment and adjustment of saved or retained rates for any employee whose rate of pay exceeds applicable pay limitations on the first day of the first pay period beginning on or after January 1, 2012. The authority is intended to apply to nonforeign area employees who have a rate in excess of applicable pay limitations on the last day of the transition period and who will have a saved or retained rate. That does not fit the premium pay situations cited by the commenter. There is no authority to prevent premium pay from being reduced as a result of the biweekly cap on premium pay. Any reduction is due to application of the longstanding premium pay cap law, not the application of NAREAA. We note that employees whose official worksites are within the continental United States may also experience reductions in their premium pay as a result of the biweekly premium pay cap when their locality pay increases.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 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 Parts 530, 531 and 536

Administrative practice and procedure, Freedom of information, Government employees, Law enforcement officers, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is amending 5 CFR parts 530, 531, and 536 as follows:

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 1. Revise the authority citation for part 530 to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338, sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981, and sec. 1918 of Public Law 111–84, 123 Stat. 2619.

Subpart C—Special Rate Schedules for Recruitment and Retention

■ 2. In § 530.304—
■ a. Remove ''or'' at the end of paragraph (b)(3);
■ b. Redesignate paragraph (b)(4) as (b)(6);
■ c. Add new paragraphs (b)(4) and (b)(5);
■ d. Revise paragraph (c); and
■ e. Add a new paragraph (e).

The revisions and additions read as follows:

§ 530.304 Establishing or increasing special rates.

* * * * *

(b) * * *

(4) Locality pay authorized under 5 U.S.C. 5304 for the area involved;

(5) A nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved; or

* * * * *

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used—

(1) For grades GS–1 and GS–2, where within-grade increases vary throughout the range; and

(2) In the nonforeign areas listed in 5 CFR 591.205 for special rate schedules established before January 1, 2012.

* * * * *

(e) Using its authority in section 1918(a)(1) of the Non-Foreign Area Retirement Equity Assurance Act of 2009 in combination with its authority under 5 U.S.C. 5305, OPM may establish a separate special rate schedule for a category of employees who are in GS positions covered by a nonforeign area special rate schedule in effect on January 1, 2012, and who are employed in a nonforeign area before an OPM-specified effective date. Such a separate schedule may be established if the existing special rate schedule is being reduced. An employee's coverage under the separate special rate schedule is contingent on the employee being continuously employed in a covered GS position in the nonforeign area after the OPM-specified effective date. Such a separate special rate schedule must be designed to provide temporary pay protection and be phased out over time until all affected employees are covered under the pay schedule that would otherwise apply to the category of employees in question.

■ 3. In § 530.306—

■ a. Remove ''and'' at the end of paragraph (a)(8);

■ b. Remove the period at the end of paragraph (a)(9) and add ''; and'' in its place; and

■ c. Add a new paragraph (a)(10) to read as follows:

§ 530.306 Evaluating agency requests for new or increased special rates.

(a) * * *

(10) The level of any locality pay authorized under 5 U.S.C. 5304 and any nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved.

* * * * *

■ 4. In § 530.308—

■ a. Revise paragraph (a);

■ b. Remove paragraph (b); and

■ c. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

The revision reads as follows:

§ 530.308 Treatment of special rate as basic pay.

* * * * *

(a) The purposes for which a locality rate is considered to be a rate of basic pay in computing other payments or benefits to the extent provided by 5 CFR 531.610, except as otherwise provided in paragraphs (b) and (c) of this section;

* * * * *

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 5. Revise the authority citation for part 531 to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 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), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335 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, and 5941(a); 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 F—Locality-Based Comparability Payment

■ 6. In § 531.610, revise paragraph (g) to read as follows:

§ 531.610 Treatment of locality rate as basic pay.

* * * * *

(g) Nonforeign area cost-of-living allowances and post differentials under 5 U.S.C. 5941 and 5 CFR part 591, subpart B;

* * * * *

PART 536—GRADE AND PAY RETENTION

■ 7. Revise the authority citation for part 536 to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.301(b) also issued under 5 U.S.C. 5334(b); § 536.308 also issued under sec. 301(d)(2) of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411), 118 Stat. 2305; § 536.310 also issued under sections 1913 and 1918 of the Non-Foreign Area Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L.111–84), 123 Stat. 2619; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

Subpart C—Pay Retention

■ 8. Add a new § 536.310 to read as follows:

§ 536.310 Exceptions for certain employees in nonforeign areas.

(a) Notwithstanding §§ 536.304(b)(3) and 536.306(a), an employee who is receiving a retained rate in excess of Executive Schedule level IV on January 1, 2012, consistent with the Non-Foreign Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L. 111–84), may continue to receive a retained rate higher than Executive Schedule level IV until—

(1) The retained rate becomes equal to or falls below Executive Schedule level IV; or

(2) The employee ceases to be entitled to pay retention under § 536.308.

(b) Notwithstanding 5 U.S.C. 5361(1) and § 536.102(b)(2), an employee who is employed on a temporary or term basis is not barred from receiving a retained rate if such employee—

(1) Is receiving a special rate above Executive Schedule level IV on January 1, 2012, and is covered by paragraph (a) of this section; or

(2) Is receiving a special rate incorporating an additional adjustment under section 1915(b)(1) of the Non-Foreign Retirement Equity Assurance Act (subtitle B of title XIX of Pub. L. 111–84) at the time the employee's special rate schedule is reduced or terminated.

[FR Doc. 2011–28742 Filed 11–4–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1151; Directorate Identifier 95–ANE–10–AD; Amendment 39–16855; AD 2011–23–04]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the engines identified above. That AD currently requires initial and repetitive visual inspections of the forward engine mount assembly side links for cracks, stripping and reapplying the Sermetel W coating on the side links at every exposure of the side link. This new AD requires those same inspections, stripping and reapplying the Sermetel W coating, and adds two part numbers