Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 430 and 534

RIN 3206–AH77

Performance Ratings

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to codify longstanding policy regarding retroactive, assumed, and carry-over ratings of record. The proposed regulations amend the current performance management regulations to explicitly specify that ratings of record are final upon issuance unless challenged by the employee, and that retroactive, assumed, and carry-over ratings of record are prohibited.

DATES: Comments must be submitted on or before June 19, 1998.

ADDRESSES: Comments may be sent or delivered to: Henry Romero, Associate Director, Workforce Compensation and Performance Service, U.S. Office of Personnel Management, Room 7508, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Barbara Colchao, (202) 606–2720.

SUPPLEMENTARY INFORMATION: The purpose of these amendments is to clarify the Office of Personnel Management's (OPM) longstanding interpretation of the law regarding the finality of a rating of record given to reflect the actual work performed during one appraisal period, which has been the consistent response to agencies' inquiries for many years. OPM is experiencing an increasing number of inquiries, as agencies develop new performance management programs to encourage high performance organizations, and to conform to the requirements of the Government Performance and Results Act. OPM concurs with the opinion voiced by several agencies that these policies should be codified in regulation, in order to provide this information in a more uniform and consistent manner.

There are four issues addressed in the proposed regulations: (1) A prohibition against an agency unilaterally changing a rating that has been issued as a final rating of record to an employee; (2) a prohibition against an agency going back to provide a rating of record for a past appraisal period where none was given; (3) a prohibition against an agency issuing an employee an ''assumed'' rating of record that does not reflect an appraisal of actual performance; and (4) a prohibition against ''carrying over'' a previous rating of record to cover more than one appraisal period.

Retroactive Change to a Rating of Record

Agencies are most often confronted with the issue of whether management has the authority to retroactively change a rating of record in situations where information about an employee's performance has been discovered long after the rating was finalized. This situation generally comes about when an employee has deliberately kept information from management and, therefore, has exhibited conduct that would warrant adverse action under part 752, Adverse Actions. Otherwise, if the information was not deliberately withheld but went undiscovered at the time the rating of record was prepared, an agency should review its appraisal process and determine if it is designed to capture adequately all significant performance information. It is OPM's position that only in very rare circumstances would a rating official be unaware of significant performance issues that went undetected at the time of appraisal due to no fault on the part of the employee or the rating official.

While no explicit language in the law states that a rating of record should be considered final, the prohibition on retroactively changing a rating can be derived from the overall construction and intent of the performance appraisal statute and regulations, as well as OPM's regulations addressing reduction in force (RIF). The statute at 5 U.S.C. 4302(a)(3) and 5 CFR 430.102(b)(6) of the regulations require that the results of performance appraisal must be used as a basis for appropriate personnel actions. To allow the retroactive change of ratings of record would result in requiring the agency to correct all records and personnel actions that were affected by that rating. The most obvious of these subsequent actions would involve the review of any pay changes or monetary awards, which were based in whole or in part on the rating of record, to determine whether the new rating would have resulted in a different pay or award outcome.

In addition, an agency would be required to scrutinize any intervening personnel actions that had been affected by the original rating of record and that would need to be corrected due to the new rating of record. For example, the regulations that prescribe RIF procedures implicitly rely on a rating of record that can be assumed to be final. Furthermore, agencies generally strive to avoid the perception that RIF actions could be manipulated through the introduction of new ratings of record. If retroactive changes to final ratings of record were allowed, agencies would be compelled to correct any retention register that uses a changed rating of record and would once again run the risk that employees would perceive an unfairness in using this changed rating of record, unless the change could be shown to be a previous miscalculation or administrative error.

Additionally, the very structure of the performance appraisal regulations leads to the logical conclusion that the intent of the system is to reach a point of finality when management is held accountable for issuing a rating of record that represents an employee's performance for the defined time of the appraisal period. Sections 430.206, 430.207, and 430.208 of title 5 of the Code of Federal Regulations regulate and describe the cycle of planning, monitoring, and issuance of a rating. Section 430.208(g) states that when an agency extends the rating cycle, a rating of record must be prepared as soon as practicable after the conclusion of the extension. Section 430.209(e) establishes a requirement for agencies to report ratings of record to OPM through the Central Personnel Data File. Taken as a whole, the regulatory scheme for performance appraisal is constructed around an appraisal period that concludes with a final rating of record.

As an exception to the general prohibition regarding retroactively changing ratings of record, there is a

relatively limited set of circumstances where an agency might feel compelled to change a rating of record long after it has been presumed to be final. An administrative error, such as a rating official who inadvertently ''checks the wrong box'' and assigns a summary rating level that does not correspond to the element levels that have been assigned, would certainly be good cause for an agency's decision to retroactively change the overall rating of record. Information regarding the employee's performance during the appraisal period that provides indisputable proof that the original rating of record was erroneous, and which was previously unknown or unavailable to the agency, could form the basis for a decision to retroactively change the rating. This situation probably would arise most often in cases where the employee was evaluated against numerical standards with objective requirements, and where the rating official would have had no subjective input into the evaluation process.

While OPM believes it was not the intent of the law governing performance appraisal to allow for independent action by management to retroactively alter a final rating of record, it does recognize some circumstances where such a change would be required. These proposed regulations are designed to be sufficiently flexible to allow for changes to ratings of record that occur in the normal course of communication between supervisors and employees close to the original issuance of a rating of record, as well as changes resulting from administrative procedures that provide employees with an avenue to challenge their ratings of record.

Retroactively Issuing a Rating of Record Where None Existed

The second issue addressed in the proposed regulation is the prohibition against producing a retroactive rating of record for an appraisal period that has passed and for which no rating of record was issued. The statute requires the periodic appraisal of employees (5 U.S.C. 4302(a)(1)), and the regulations require that a rating of record be given to an employee as soon as practicable after the end of the appraisal period (5 CFR 430.208(a)). When an appraisal cannot be given at the end of the appraisal period, the regulations already provide for extending the appraisal period until the conditions to complete a rating of record are met (5 CFR 430.208(g)). A rating of record then is issued that covers the entire appraisal period, including the extension. If the appraisal period was not extended, or if a rating of record for a later appraisal period was issued, the agency cannot go back and ''fill in the blanks'' at some future point in time. To permit such a practice would undermine the basic concepts of performance appraisal and severely limit the accuracy of the ratings produced due to the very passage of time involved.

Assumed Ratings of Record

The third issue addressed in the proposed regulation is the prohibition against issuing to an employee a rating of record that does not reflect actual performance, but assumes a level of performance without evaluation. The intent of the law is clear; Congress intended Federal employees to be evaluated based upon the actual work they performed during the appraisal period. Some confusion has arisen over the years because of the process used to include the value of performance credit when agencies are establishing retention registers in preparation for a reduction in force. In situations where an employee did not receive a rating of record, an agency previously could, **for RIF purposes only,** assign the value of performance credit for that appraisal period at the Fully Successful level. Regulations, published in November 1997, changed the procedures for dealing with missing ratings of record and changed the reference point for assigning additional service credit for performance for employees who have **no** rating of record to the value assigned to the applicable modal rating level in the competitive area, or some larger agency population aggregation. These proposed regulations make no further change to the reduction in force process. Their sole purpose is to regulate that an agency may not **issue** a bona fide rating of record to an employee that assumes some level of performance since employees are entitled to a rating of record that reflects their actual level of performance. This does not impose a requirement that performance must be reflected only by means of a narrative justification. Agencies are free to design the process and procedures they will use to evaluate employee performance. These regulations are intended to ensure that an evaluation of actual employee performance is the basis of the rating of record.

Carrying Over a Rating of Record

Finally, these proposed regulations would codify the prohibition against carrying over a previous rating of record into another appraisal period as a bona fide rating of record. This is obviously tied closely to the above requirement that employees be given a rating of record that reflects their performance during a specific appraisal period. This prohibition does not negate the fact that an employee may perform at the same level for several years and, therefore, appropriately be assigned the same summary level in the rating of record for each of those separate appraisal periods. As noted in 5 U.S.C. 4302 (b) (1) and (2), agencies are required by law to provide performance standards to employees at the beginning of each appraisal period, and to evaluate the employee ''during the appraisal period.'' To allow agencies to carry over a previous year's rating of record without an actual evaluation of the employee's performance would defeat the intent of the law and render the performance appraisal program of the agency meaningless. This provision would not prohibit an agency from using previous ratings of record as the basis for personnel actions when a current rating of record is not available, provided the recency of the previous rating of record is reasonable. Such a feature was used by the Performance Management and Recognition System for pay administration purposes, and also is contained in some of the demonstration projects, where a past rating of record, usually not more than one year old, is used as the basis for a pay adjustment when a current rating is not available.

Technical Correction

The Office of Personnel Management is taking this opportunity to make minor corrections to citations that were overlooked when regulations revising the awards provisions were finalized in September 1995.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

List of Subjects

5 CFR Part 430

Decorations, medals, awards, Government employees.

5 CFR Part 534

Government employees, Hospitals, Students, Wages.

Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM is proposing to amend parts 430 and 534 of title 5, Code of Federal Regulations, as follows:

PART 430—PERFORMANCE MANAGEMENT

1. The authority citation for part 430 continues to read as follows:

Authority: 5 U.S.C. chapter 43.

2. In § 430.208, paragraphs (a)(1), (a)(2), (a)(3) and (i) are added; paragraph (h) is redesignated as paragraph (j) and a new paragraph (h) is added to read as follows:

§ 430.208 Rating performance.

(a) * * *

(1) A rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period.

(2) An agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance.

(3) Except as provided in § 430.208(i), a rating of record is final when it is issued to an employee with all appropriate reviews and signatures.

* * * * *

(h) Each rating of record shall cover a specified appraisal period. Agencies shall not carry over a rating of record prepared for a previous appraisal period to a subsequent appraisal period(s).

(i) When either a regular appraisal period or an extended appraisal period ends and a performance plan has been established for a subsequent appraisal period with no rating of record issued for the earlier appraisal period, an agency shall not produce a rating of record to cover that period retroactively. Once issued, ratings of record shall not be changed retroactively except that a rating of record may be changed—

(1) Within 60 days of issuance based upon an informal request by the employee;

(2) As a result of a grievance, complaint, or other formal proceeding permitted by law that results in a final determination by appropriate authority that the rating of record must be changed; or

(3) Where the agency determines that a rating of record was incorrectly recorded or calculated.

PART 534—PAY UNDER OTHER SYSTEMS

3. The authority citation for part 534 continues to read as follows:

Authority: 5 U.S.C. 1104, 5307, 5351, 5352, 5353, 5376, 5383, 5384, 5385, 5541, and 5550a.

4. In § 534.505, paragraph (b) is revised to read as follows:

§ 534.505 Pay related matters.

* * * * *

(b) *Performance awards.* Performance awards may be paid under 5 U.S.C. chapter 45 and § 451.104(a)(3) of this chapter.

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FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2424 and 2429

Processing of Negotiability Petitions: Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority.

ACTION: Notice of proposed rulemaking with request for comments.

SUMMARY: The Federal Labor Relations Authority intends to revise its regulations concerning the processing of negotiability appeals (part 2424). The Federal Labor Relations Authority established a Task Force to study and evaluate part 2424 of its regulations. The Task Force proposes to conduct focus groups to solicit and consider customers' views prior to undertaking these revisions.

DATES: Written comments must be received on or before May 29, 1998. A meeting will be held at 10:00 a.m. on May 12, 1998, in Washington, DC.

ADDRESSES: Mail or deliver written comments to the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW, Washington, DC 20424–0001. The meeting will be held at the Federal Labor Relations Authority, 607 14th Street, NW, Second Floor Agenda Room, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Peter Constantine, Director, Office of Case Control, at the address listed above or by telephone: (202) 482–6540.

SUPPLEMENTARY INFORMATION:

1. Background

The Chair and Members of the Federal Labor Relations Authority (the Authority) intend to review and, where appropriate, implement mechanisms to improve the manner in which negotiability appeals are processed, and to revise the regulations governing review of these appeals. The Authority has established an internal Task Force to study this matter.

Part 2424 of chapter XIV of Title 5 of the Code of Federal Regulations (1997) contains, among other things, the current regulations which govern all matters relating to the processing of negotiability appeals. Part 2429 contains general regulatory requirements which also govern these appeals. The regulations apply to petitions for review of negotiability issues that concern union proposals for bargaining as well as petitions for review of negotiability issues that arise from disapprovals of collective bargaining provisions that have been agreed on by parties.

In conjunction with its review of the procedures for processing negotiability appeals, the Task Force is requesting oral and/or written comments concerning issues to be addressed in the regulatory revisions it is developing. A focus group meeting has been scheduled for Tuesday, May 12, 1998, at 10:00 a.m. in Washington, DC to discuss matters relevant to the negotiability appeal process. Persons interested in attending this meeting on the proposed rulemaking should call or write the point of contact listed in the preceding section to confirm attendance. If appropriate, other discussions may be scheduled.

The Task Force will make written recommendations to the Chair and Members of the Authority, who will, as determined appropriate, issue proposed amendments to the existing negotiability and miscellaneous regulations. All agencies, unions, and interested persons will be afforded an opportunity to submit further comments on any proposed specific modifications to the existing regulations. The Task Force will conduct additional focus group meetings after the Authority proposes its revisions to the existing regulations.

2. The Federal Service Labor-Management Relations Statute (the Statute)

Section 7117 of Title 5, United States Code, empowers the Authority to consider negotiability appeals under the conditions prescribed by section 7117(b) and (c), directs the Authority to expedite these appeals to the extent practicable, and instructs the Authority to issue a written decision at the earliest practicable date.

The appeal process is set forth in Section 7117(c) of the Statute. Under this process, the exclusive representative may ''institute an appeal'' by ''filing a petition with the Authority.'' 5 U.S.C. 7117(c)(2). Once an exclusive representative institutes a negotiability appeal, section 7117(c)(3)(A) and section 7117(c)(4) provide that an agency involved in a negotiability dispute ''shall file with the Authority'' a statement of position responding to the petition for review,