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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 304

RIN 3206-AF37

Expert and Consultant Appointments

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is adopting regulations for the employment and pay of persons appointed under the expert and consultant authority. The Technical and Miscellaneous Civil Service Amendments Act of 1992 requires OPM to prescribe such regulations and to ensure agency compliance.

EFFECTIVE DATE: October 2, 1995.

FOR FURTHER INFORMATION CONTACT:

Employment and reporting

requirements—Tracy E. Spencer or Christina Gonzales, (202) 606-0830, or fax (202) 606-2329;

Pay and leave administration—Frank Derby, (202) 606-1413, or fax (202) 606-0824.

SUPPLEMENTARY INFORMATION: A longstanding law, 5 U.S.C. 3109, authorizes agencies to make excepted appointments of qualified persons to perform expert or consultant work that is temporary (not to exceed 1 year) or intermittent. In 1991, the General Accounting Office (GAO) reviewed expert and consultant appointments made under section 3109 by nine installations during a 30-month period. GAO determined that almost one-third of those appointments were improper and recommended that Congress amend 5 U.S.C. 3109 to authorize OPM to regulate the employment of experts and consultants.

Section 2(8) of Pub. L. 102-378, October 2, 1992, requires OPM to regulate appointments under 5 U.S.C.

3109 and to collect data on pay and days worked. OPM issued proposed regulations to implement that requirement on December 29, 1994 (59 FR 67232). We received comments on those regulations from nine Federal agencies and one private firm.

Comments on Coverage

One agency suggested that the regulations use an alternative term for "consultant" to distinguish individuals who receive Federal civil service appointments from those serving under contracts for consulting services. We did not adopt that suggestion because the terms "expert" and "consultant," are contained in the law.

One agency asked whether the regulations cover appointments of advisory group members. The regulations cover all appointments made under 5 U.S.C. 3109, including those to advisory groups. Another agency asked how the regulations will affect current appointments of experts and consultants. Experts and consultants appointed without time limit will become subject to the new regulations immediately on the effective date. Those already appointed with time limits will become subject to the regulations upon expiration of their current appointment. We do not anticipate that the regulations will necessitate changes in employment conditions because the requirements either repeat or liberalize those contained in previous instructions and determinations issued by OPM and GAO.

Comments on Appointments and Reappointments (Section 304.103)

The law requires that experts and consultants be appointed on a temporary or intermittent basis. One agency suggested that the regulations should permit experts and consultants who work on a strictly intermittent basis to be appointed for periods longer than 1 year or without time limit. That has been done.

All other experts and consultants must be employed under temporary appointments. The proposed regulations included two options for limiting length of temporary service: By time (Option 1) or by cumulative earnings (Option 2).

Several agencies suggested that Option 1 should include the same flexibilities for extension or reappointment that are available for

other temporary Federal appointments. We have adopted suggestions to permit reappointment to demonstrably different duties and to provide for OPM approval of exceptions to time limits.

Several agencies asked whether an individual's maximum lifetime earnings limit under Option 2 would increase to reflect increases in basic pay rates. One agency asked whether an individual who had previously exhausted his/her lifetime limit could be reappointed following such an increase. The final regulations permit, but do not require, agencies to raise an appointee's lifetime earnings limit to reflect statutory pay increases.

One agency suggested that OPM provide examples of situations in which Option 1 or Option 2 would be appropriate. We did not adopt that suggestion because we believe that each agency can best make that determination based on first-hand knowledge of its own work. Another agency suggested that the determination be required prior to any reappointment, rather than upon initial appointment, to reduce documentation requirements for appointments that are never renewed. We have adopted that suggestion although, in practice, we expect that many appointees will want to know the possibility for reappointment when deciding whether to accept the agency's initial offer.

Comments on Pay and Leave Administration (Sections 304.104 through 304.106)

The regulation stipulates that experts and consultants are not automatically entitled to pay rate adjustments at the time of general pay increases under 5 U.S.C. 5303 unless provided for in the appointment document. (See 5 CFR 304.106(a).) One agency suggested that entitlement to receive those pay rate adjustments be at the discretion of agency managers. That comment seems to be based on a misunderstanding. The regulations do not impair any agency's ability to make ad hoc adjustments in expert or consultant pay under its administrative pay setting authority. The provision in question simply states that experts and consultants have no entitlement to pay adjustments equal to those under 5 U.S.C. 5303, unless the agency has chosen to convey such entitlement in the appointing document. In the absence of a documented

provision for such pay adjustments, they are at the employing agency's discretion. We have revised § 304.106(a) to make clear that agencies have discretionary authority to adjust the pay of experts and consultants.

One agency commented on the necessity for the use of an updated service computation date (SCD) for intermittent experts and consultants in the preparation of reports required under section 304.108. The concern was a need for the continuous updating of SCDs for intermittents. However, OPM does not require continuous updating of SCDs for intermittent employees.

Agencies are required to update those SCDs if the employee leaves the agency (transfer, separation, retirement, etc.) or changes to a non-intermittent work schedule.

One consultants' organization commented that there should be no provision for overtime for experts and consultants. Entitlement to overtime pay and other premium pay is a matter of law, if applicable eligibility requirements are met. That organization also suggested that agencies engage in a pre-screening process whereby available experts and consultants could be listed by subject expertise and fee schedule. Agencies are free to do so based upon foreseeable needs and funds available.

One agency asked whether experts and consultants who are covered under the Fair Labor Standards Act (FLSA) overtime provisions are subject to the special FLSA rules applicable to General Schedule employees under title 5, United States Code, and OPM regulations. Those experts and consultants are subject to OPM's regulations on FLSA overtime pay. (See section 4(f) of the Fair Labor Standards Act of 1938, as amended.) To clarify this, we have added a reference to OPM's FLSA regulations (part 551) in section 304.106(c).

One agency recommended that § 304.105 be revised to make clear how daily and biweekly pay limits are to be computed in cases where an agency has authority to pay an expert or consultant above the GS-15, step 10, limitation. Since these regulations are limited to implementation of 5 U.S.C. 3109, we have not included rules on implementing a pay limit under other statutory provisions. However, all Federal employees covered under 5 U.S.C. 5504 would be subject to the rules therein for the computation of hourly, daily and biweekly rates of pay.

An agency asked how pay would be administered for experts and consultants who are paid on a daily basis in the event that they are assigned to established regular tours of duty (i.e.,

not intermittent) and who therefore have an entitlement to annual and sick leave. Since these employees have scheduled tours, they are accountable for their scheduled work hours by performing work or taking annual leave, sick leave, leave without pay, compensatory time, etc. Accordingly, OPM believes that such employees should be compensated on an hourly basis rather than on a daily basis.

We are considering adding a provision to these regulations that would establish a clear requirement that any expert or consultant with an established regular tour of duty must be paid on an hourly basis. However, we are interested in agency comments regarding such a requirement before proceeding with a regulatory change. Therefore, we invite agency representatives to provide comments by calling the Compensation Administration Division at (202) 606-2858 or by writing to Donald J. Winstead, Assistant Director for Compensation Policy, Office of Personnel Management, Room 6H31, 1900 E Street, NW., Washington, DC 20415.

Comments on Reporting and Compliance Requirements (Sections 304.107 and 304.108)

As revised, 5 U.S.C. 3109 requires agencies to report annually on their use of *paid* experts and consultants and to provide the controls and oversight necessary to ensure proper use of the appointing authority. We have adopted an agency's suggestion to clarify that the pay to be reported does not include reimbursement for travel and related expenses. We did not adopt a suggestion to delete requirements that agencies conduct appropriate training and oversight to ensure proper use of the appointing authority because Congress intended these elements to be part of agencies' compliance programs. We have, however, reworded the regulation to clarify that the specific procedures for meeting these requirements are up to each agency.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it applies only to Federal Government employment practices.

List of Subjects in 5 CFR Part 304

Administrative practice and procedure, Government employees.

Office of Personnel Management,

James B. King,

Director.

Accordingly, OPM is adding part 304 to title 5, Code of Federal Regulations, as follows:

PART 304—EXPERT AND CONSULTANT APPOINTMENTS

Sec.

- 304.101 Coverage.
- 304.102 Definitions.
- 304.103 Authority.
- 304.104 Determining rate of pay.
- 304.105 Daily and biweekly basic pay limitations.
- 304.106 Pay and leave administration.
- 304.107 Reports.
- 304.108 Compliance.

Authority: 5 U.S.C. 3109.

§ 304.101 Coverage.

These regulations apply to the appointment of experts and consultants as Federal employees under 5 U.S.C. 3109. They do not apply to the appointments of experts and consultants under other employment authorities or to the procurement of services by contracts under the procurement laws.

§ 304.102 Definitions.

For purposes of this part:

(a) An *agency* is an executive department, a military department, or an independent agency.

(b) A *consultant* is a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. When an agency requires public advisory participation, a consultant also may be a person who is affected by a particular program and can provide useful views from personal experience.

(c) A *consultant position* is one that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a Federal official.

(d) An *expert* is a person who is specially qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity.

(e) An *expert position* is one that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary and/or

intermittent basis assigned by a Federal official. For example, a microbial contamination specialist may apply new test methods to identify bacteria on products, a computer scientist may adapt advanced methods to develop a complex software system, or a plate maker may engrave a novel design.

(f) *Intermittent employment*, as defined in part 340, subpart D, of this chapter, means employment without a regularly scheduled tour of duty.

(g) *Temporary employment* means employment not to exceed 1 year. An expert or consultant serving under a temporary appointment may have a full-time, part-time, seasonal, or intermittent work schedule.

(h) *Employment without compensation* means unpaid service that is provided at the agency's request and is to perform duties that are unclassified. It is not volunteer service.

§ 304.103 Authority.

(a) *Basic authority.* (1) When authorized by an appropriation or other statute to use 5 U.S.C. 3109, an agency may appoint a qualified expert or consultant to an expert or consultant position that requires only intermittent and/or temporary employment. Such an appointment is excepted from competitive examination, position classification, and the General Schedule pay rates.

(2) An expert or consultant who works on a strictly intermittent basis may be appointed under this authority without time limit or for any period determined by the agency. All other experts and consultants must receive temporary appointments. Temporary experts and consultants may be reappointed in the same agency only as provided in paragraph (c) of this section.

(b) *Inappropriate use.* An agency must not use 5 U.S.C. 3109 to appoint an expert or consultant:

(1) To a position requiring Presidential appointment. However, subject to the conditions of this part, an agency may appoint an individual awaiting final action on a Presidential appointment to an expert or consultant position.

(2) To a Senior Executive Service position (including an FBI or DEA Senior Executive Service position).

(3) To perform managerial or supervisory work (although an expert may act as team leader or director of the specific project for which he/she is hired), to make final decisions on substantive policies, or to otherwise function in the agency chain of command (e.g., to approve financial transactions, personnel actions, etc.).

(4) To do work performed by the agency's regular employees.

(5) To fill in during staff shortages.

(6) Solely in anticipation of giving that individual a career appointment. However, subject to the conditions of this part, an agency may appoint an individual to an expert or consultant position pending Schedule C appointment or noncareer appointment in the Senior Executive Service.

(c) *Reappointment.* An agency may reemploy an expert or consultant to perform demonstrably different duties without regard to the length of that individual's previous expert or consultant service with the agency. Reappointment to perform substantially the same duties is subject to the following limits:

(1) An agency may employ an expert or consultant who works on a full-time basis for a maximum of 2 years—i.e., on an initial appointment not to exceed 1 year and a reappointment not to exceed 1 additional year.

(2) An agency may reappoint an expert or consultant who works on a part-time or intermittent schedule in accordance with one of the following options. The agency must determine which option it will use in advance of any reappointment and must base its determination on objective criteria (e.g., nature of duties, pay level, whether or not work is regularly scheduled). Option 1 must be applied to reappointments of experts and consultants appointed without compensation.

(i) *Option 1—Annual service.* An agency may reappoint an expert or consultant, with no limit on the number of reappointments, as long as the individual is paid for no more than 6 months (130 days or 1,040 hours) of work, or works for no more than that amount of time without compensation, in a service year. (The service year is the calendar year that begins on the date of the individual's initial appointment in the agency.) An expert or consultant who exceeds this limit in his/her first service year may be reappointed for 1 additional year. An expert or consultant who exceeds the limit during any subsequent service year may not be reappointed thereafter.

(ii) *Option 2—Cumulative earnings.* Each expert or consultant will have a lifetime limit of twice the maximum annual rate payable under the annualized basic pay limitations of section 304.105. The agency may adjust this limit to reflect statutory increases in basic pay rates. The agency may reappoint an expert or consultant until his/her total earnings from expert or consultant employment with the agency reach the lifetime maximum, as

determined by using the applicable maximum salary rate. At that point, the employment must be terminated.

(3) OPM may authorize reappointment of an expert or consultant as an exception to the limits in the section when necessitated by unforeseen and unusual circumstances.

§ 304.104 Determining rate of pay.

(a) The rate of basic pay for experts and consultants is set by administrative action. The head of an agency, or his or her designee, must determine the appropriate rate of basic pay on an hourly or daily basis, subject to the limitations described in section 304.105.

(b) The head of an agency, or his or her designee, shall consider the following factors in setting the initial rate of basic pay for an expert or consultant:

- (1) The level and difficulty of the work to be performed;
- (2) The qualifications of the expert or consultant;
- (3) The pay rates of comparable individuals performing similar work in Federal or non-Federal sectors; and
- (4) The availability of qualified candidates.

(c) An expert or consultant appointed under 5 U.S.C. 3109 may be employed without pay, provided the individual agrees in advance in writing to waive any claim for compensation for those services.

§ 304.105 Daily and biweekly basic pay limitations.

(a) Unless specifically authorized by an appropriation or other statute, agencies subject to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, may not pay for any 1 day an aggregate amount of pay (including basic pay, locality pay under subpart F of part 531 of this chapter, and premium pay under subpart A of part 550 of this chapter) that exceeds the daily equivalent of the highest rate payable under 5 U.S.C. 5332—that is, the daily rate for GS-15, step 10, under the General Schedule (excluding locality pay or any other additional pay). The daily rate is computed by dividing the annual GS-15, step 10, rate by 2,087 hours to find the hourly rate of pay and by multiplying the hourly rate of pay by 8 hours.

(b) Unless specifically authorized by an appropriation or other statute, an expert or consultant shall not be paid for any biweekly pay period an aggregate amount of pay (including basic pay, locality pay under subpart F of part 531 of this chapter, and premium pay under subpart A of part 550 of this chapter) in excess of the biweekly rate

of pay for GS-15, step 10, under the General Schedule (excluding locality pay or any other additional pay). The biweekly rate is computed by dividing the annual GS-15, step 10, rate by 2,087 hours to find the hourly rate of pay and by multiplying the hourly rate of pay by 80 hours.

§ 304.106 Pay and leave administration.

(a) The employing agency has the authority to adjust the pay of experts and consultants after initial appointment and to establish appropriate policies governing the amount and timing of any such adjustments, subject to the limitations of § 304.105. In addition to the factors listed in § 304.104(b), the agency may consider factors such as job performance, contributions to agency mission, and the general pay increases granted to other Federal employees. Experts and consultants are not entitled to receive automatic adjustments in their rates of basic pay at the time of general pay increases under 5 U.S.C. 5303 unless specifically provided for in the official appointing document. In the absence of such automatic entitlement, any pay adjustments are at the agency's discretion.

(b) Experts and consultants paid on a daily rate basis are not entitled to overtime pay under section 5542 of title 5, United States Code. Otherwise, experts and consultants qualify for premium pay under subchapter V of chapter 55 of title 5, United States Code, if they meet the applicable eligibility requirements (including the requirement that an employee have a regularly scheduled tour of duty, where applicable).

(c) Experts and consultants may be entitled to overtime pay under the Fair Labor Standards Act if they are nonexempt under OPM regulations implementing that Act for Federal employees. (See 5 CFR part 551).

(d) An expert or consultant may be paid for service on an intermittent basis in more than one expert or consultant position, provided the pay is not received for the same period of time (5 U.S.C. 5533(d)(1)).

(e) Experts and consultants are subject to the provisions of 5 U.S.C. 8344 and 8468 on reduction of basic pay by the amount of annuity received.

(f) Experts and consultants are subject to the provisions of 5 U.S.C. 5532 on reduction of retired military pay.

(g) Experts and consultants with a regularly scheduled tour of duty (i.e., not intermittent) are entitled to sick and annual leave in accordance with chapter 63 of title 5, United States Code, and to pay for any holiday occurring on a

workday on which they perform no work, provided that workday is part of the basic workweek. Those employed on an intermittent basis do not earn leave and are not entitled to paid holidays.

§ 304.107 Reports.

As required by 5 U.S.C. 3109(e), each agency shall report to the Office of Personnel Management on an annual basis:

(a) The number of days the agency employed each paid expert or consultant; and

(b) The total amount the agency paid each expert or consultant so employed. (Do not include payments for travel and related expenses.)

§ 304.108 Compliance.

(a) Each agency using 5 U.S.C. 3109 must establish and maintain a system of controls and oversight necessary to assure compliance with 5 U.S.C. 3109 and these regulations. The system must include—

(1) Appropriate training and information procedures to ensure that officials and employees using the authority understand the statutory and regulatory requirements; and

(2) Appropriate provision for review of expert and consultant appointments.

(b) OPM will, as necessary—

(1) Review agency employment of experts and consultants and agency controls and oversight to determine compliance; and

(2) Issue instructions and guidance to agencies on employing experts and consultants and on reporting procedures.

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BILLING CODE 6325-01-M

5 CFR Parts 353, 870, and 890

RIN 3206-AG02

Restoration to Duty From Uniformed Service or Compensable Injury

AGENCY: Office of Personnel Management.

ACTION: Interim regulations with request for written comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations on the restoration rights of Federal employees who leave their employment to perform duty with the uniformed services. These regulations implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-

353, which was enacted into law on October 13, 1994. The new law revises and restructures the Veteran's Reemployment Rights law (codified in chapter 43 of title 38, United States Code), which governs the restoration rights of employees who perform military duty. USERRA clarifies, expands, and strengthens the rights and benefits of applicants and employees, alters the appeal procedures available to Federal employees, and, for the first time, provides Federal employees Department of Labor assistance in processing claims. USERRA also requires OPM to place certain returning employees when their former agencies determine that it is "impossible or unreasonable" to reemploy them.

Although the sections have been renumbered, and in some cases renamed, there is no substantive change in the regulations governing the restoration rights of employees who sustain compensable injuries. However, in § 353.301(a), the word "may" has been changed to "must" to make clear that an agency must place an employee who fully recovers from a compensable injury within 1 year, even if it means placing the person in a different location. Also, § 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide. (This provision was inadvertently omitted from the final regulations published in the **Federal Register** on January 13, 1995, that incorporated into the regulations various staffing provisions previously found only in the Federal Personnel Manual.)

These interim regulations also implement provisions that expand on the coverage of the affected employees under the Federal Employees' Group Life Insurance (FEGLI) Program and the Federal Employees Health Benefits (FEHB) Program. Both the FEGLI and the FEHB regulations are amended to show that employees who separate to perform military service under the provisions of this Act are considered to be employees in nonpay status. The FEHB regulations are further amended to show that FEHB coverage may continue for up to 18 months after the employee enters military service.

DATES: Effective: September 1, 1995. Comments must be received on or before November 30, 1995.

ADDRESS: Send or deliver comments to: Leonard R. Klein, Associate Director for Employment, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: For part 353: Raleigh M. Neville, (202) 606-