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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 430 and 534

RIN 3206-AH77

#### Performance Ratings

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to codify longstanding policy regarding retroactive, assumed, and carry-over ratings of record. These regulations amend the 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:** Effective date: November 4, 1998.

**FOR FURTHER INFORMATION CONTACT:** Barbara Colchao, (202) 606-2720, FAX (202) 606-2395, email: performance-management@opm.gov.

**SUPPLEMENTARY INFORMATION:** On April 20, 1998, the Office of Personnel Management (OPM) issued proposed regulations to codify OPM's longstanding interpretation of the law regarding the finality of a rating of record and the prohibition of retroactive, carry-over, or assumed ratings of record (63 FR 19411). The proposed regulations addressed four issues: (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.

#### Comments Received

We received comments from four agencies and one union. These comments, along with changes made to the proposed regulations, are summarized below.

**Comment Summary:** One commenter said that inasmuch as these provisions are longstanding policy it is good to see them finally in regulation. On the other hand, another commenter questioned why this regulation is needed and felt the matter should be left to agency discretion and interpretation.

**Response:** For a long time, OPM received periodic inquiries regarding these issues and the number of inquiries has been increasing, especially as agencies have been developing new performance management programs to encourage high performance organizations, and to conform to the requirements of the Government Performance and Results Act. Several agencies had suggested that these policies be codified in regulation, in order to provide, and ensure application of, this information in a more uniform and consistent manner. OPM concurs with this opinion.

**Change:** No change.

**Comment Summary:** One commenter asked whether the provision at § 430.208(i)(2) would apply in those situations where an agency issues a rating of record to cover a previously unrated period of time in compliance with the settlement of a grievance procedure. Similarly, another commenter asked whether this provision would cover settlement agreements reached through alternative dispute resolution processes.

**Response:** The intent in this section of the regulation is to provide for corrective action when ordered by a third party or as part of a *bona fide* settlement of a grievance, complaint, or other formal proceeding permitted by law. Therefore, if, as part of a grievance procedure, the decision or settlement agreement requires that a rating of record be provided where none had been given before, and the agency is able to do so, this would be considered to have been a change ordered by an appropriate authority as the result of a formal proceeding for purposes of

complying with § 430.208(i)(2). Likewise, a changed rating of record could result from a bona fide settlement through an agency's alternative dispute resolution process.

**Change:** The language at § 430.208(i)(2) has been revised.

**Comment Summary:** Three commenters stated that by using the issuance of a new performance plan following a completed appraisal period as the event that would cause any subsequent ratings of record to be considered retroactive, the regulation sets up situations where it would be impossible for their organizations to issue ratings of record.

**Response:** This certainly was not the intent behind this regulation. OPM considered setting a 3- to 6-month time frame after the end of the appraisal period for completing performance appraisals. However, in the spirit of decentralization, a decision was made not to set a specific, Governmentwide time frame within which ratings of record must be issued. Rather, agencies may establish and use such time frames or use the issuance of a subsequent rating of record as the boundary that would cause a rating of record, which covers an earlier appraisal period where no rating of record originally had been given, to be considered retroactive.

Individual agencies and organizations must determine whether they need a policy that clearly establishes when it is too late to provide a rating of record for an appraisal period that has ended. Otherwise, the issuance of a subsequent rating of record will be considered to clearly indicate that any former appraisal period(s) not included within the scope of this single rating of record have been allowed to pass without the issuance of a rating of record. The regulations prohibit going back, after the fact, and creating ratings of record for these previous appraisal periods, unless so ordered by a third party under the provisions of § 430.208(i)(2).

**Change:** The language at § 430.208(i) has been revised.

#### Related Issue

In two separate discussions with agency representatives who were not commenting on the proposed regulations, an issue arose that is related to the regulation prohibiting carry over ratings of record. The discussions were to clarify that current agency policies

that permit using a previous rating of record for a subsequent appraisal period only after evaluating the employee's performance and confirming that it continues to be the same would not violate the proposed regulation. The regulation prohibits using a previous rating of record as the actual rating of record for a subsequent appraisal period without evaluating the employee's performance for that subsequent appraisal period. Since an actual evaluation of the employee's performance during the current appraisal period is required prior to "revalidating" or "recertifying" the last rating of record as the applicable rating of record for the current appraisal period, it does not violate the regulation. The language at § 430.208(h) has been revised to clarify this.

No comments were received regarding the technical correction, and these regulations become final as proposed.

### 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 amending 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 as the rating of record for a subsequent appraisal period(s) without an actual evaluation of the employee's performance during the subsequent appraisal period.

(i) When either a regular appraisal period or an extended appraisal period ends and any agency-established deadline for providing ratings of record passes or a subsequent rating of record is issued, an agency shall not produce or change retroactively a rating of record that covers that earlier appraisal period 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 or regulation that results in a final determination by appropriate authority that the rating of record must be changed or as part of a *bona fide* settlement of a formal proceeding; 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.

[FR Doc. 98-26623 Filed 10-2-98; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

#### 7 CFR Part 1710

RIN 0572-AA89

### Long-Range Financial Forecasts of Electric Borrowers

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Rural Utilities Service's (RUS) regulations on long-range financial forecasting. This final rule provides that RUS may request a sensitivity study on a case-by-case basis.

**EFFECTIVE DATE:** This final rule is effective November 4, 1998.

**FOR FURTHER INFORMATION CONTACT:** Alex Cockey, STOP 1560, Deputy Assistant Administrator, Electric Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, DC 20250-1560, telephone number: (202) 720-9545, E-mail: acockey@rus.usda.gov.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by OMB.

#### Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. RUS has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order.

In accordance with the Executive Order and the rule; (1) all State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to the rule; and (3) administrative proceedings are required to be exhausted prior to initial litigation against the Department (7 U.S.C. 6912).

#### Regulatory Flexibility Act Certification

The Administrator of RUS has determined the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) definition of the rule does not include rules related to the RUS electric program, and therefore, the Regulatory Flexibility Act does not apply to this rule.

#### Information Collection and Recordkeeping Requirements

The reporting and recordkeeping requirements contained in this final rule were approved by the Office of Management and Budget (OMB)