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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 550

RIN 3206-AF89

#### Pay Administration (General); Severance Pay for Panama Canal Commission Employees

**AGENCY:** Office of Personnel  
Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to exclude certain categories of employees of the Panama Canal Commission (PCC) from entitlement to severance pay. On December 31, 1999, the Republic of Panama will take over operation of the Panama Canal under the terms of the Panama Canal Treaty of 1977. The proposed changes apply to PCC employees who receive an offer of reasonably comparable employment with the successor Panamanian public entity before separation, accept such employment within 30 days after separation, or are hired by PCC 90 days or more after publication of these regulations.

**EFFECTIVE DATE:** October 20, 1997.

**FOR FURTHER INFORMATION CONTACT:** D. Bryce Baker, (202) 606-2858, FAX (202) 606-0824, or email to [payleave@opm.gov](mailto:payleave@opm.gov).

**SUPPLEMENTARY INFORMATION:** On July 7, 1995, the Office of Personnel Management published proposed regulations (60 FR 35342) barring severance pay for certain PCC employees who continue in their positions when the Panama Canal is transferred to Panamanian control as a result of the Panama Canal Treaty of 1977. The changes will affect PCC employees who are offered reasonably comparable employment with the successor Panamanian public entity

before separation from PCC employment or who accept such employment within 30 days after separation. Individuals hired by the Panama Canal Commission on or after the 90th day following publication of these regulations will also be excluded from severance pay eligibility.

Severance pay was intended as a transition benefit for Federal employees who lost their jobs involuntarily. Severance pay was intended to "help tide Federal employees over difficult transition periods" and to "help cushion the readjustment" associated with the loss of employment. (See H.R. Rep. No. 792, 89th Cong., 1st Sess., at 11, 30 (1965).)

The severance pay law lists certain categories of employees who are excluded from coverage and provides that additional categories of employees may be excluded by regulation (5 U.S.C. 5595(a)(2)). OPM's regulations exclude certain groups and individual employees because of the nature of their appointment, type of work schedule, circumstances of separation, etc. For example, the regulations bar entitlement to severance pay for any employee who declines a "reasonable offer" of another Federal position before separation. (See 5 CFR 550.701-704.) Severance payments are discontinued if the recipient is reemployed by the United States Government (5 U.S.C. 5595(d)).

Prior to 1990, OPM's severance pay regulations provided that an employee involuntarily separated due to transfer of a Federal function to a non-Federal (private or public) successor organization could be denied severance pay based on the offer of "comparable employment" with the successor organization, or on acceptance of any employment with such successor organization within 90 days of transfer. (These provisions were formerly located at 5 CFR 550.701(b) (5) and (6) and were in effect when the Panama Canal Treaty of 1977 was signed and entered into force.) OPM deleted those regulatory provisions in 1990 (54 FR 23215 and 55 FR 6591). This change was made to make contracting out (i.e., privatization) of Federal functions more attractive to Federal employees. It also was intended to address the problem of some employees not being offered comparable jobs by private contractors before transfer and then delaying acceptance of jobs until after the expiration of the 90-

day restriction period. We note that the driving purpose of encouraging contracting out, which was behind the deletion of the above severance pay restrictions, is not relevant to the Panama Canal situation. We also note that the rule OPM is adopting in these regulations differs in several respects from the above former rules—e.g., a 30-day period instead of a 90-day period—as explained in the notice of proposed rulemaking (60 FR 35342) and in this notice.

OPM believes it is appropriate, and consistent with the original purpose of the severance pay law, to deny severance pay eligibility for PCC employees who have the opportunity to maintain the same job, or a reasonably comparable one, with the successor Panamanian public entity and who furthermore have legally guaranteed protections with respect to benefits and working conditions while employed by that entity. We also believe that it is reasonable to deny severance pay eligibility for employees hired by PCC during the final years of United States control of the Canal, since the long-scheduled transfer is now imminent and these employees will know when they are hired that their tenure with PCC will be of short duration. We believe the Panama Canal transfer presents a unique situation that requires special treatment.

PCC estimates that, without these changes in OPM's severance pay regulations, \$68 million in severance pay costs would be incurred, of which only \$7 million is currently funded. PCC states that the remaining \$61 million would need to be prefunded by a reduction in operating expenses and the capital program, and possibly a modest toll increase in fiscal years 1998, 1999, and the first quarter of fiscal year 2000. PCC believes that these measures would have a negative impact on the Canal's competitive and fiscal position. Since, under the Panama Canal Treaty of 1977, the Canal operation must be transferred to the Republic of Panama in December 1999 free of any debt or encumbrances, preventing severance payments to the employees in question would help PCC meet its treaty obligations.

Comments on the proposed regulations were received from 6 labor organizations (14 letters), 5 groups of employees (648 individuals), 10

individual employees, 2 agencies, and 1 Member of Congress.

Comments from one labor organization included a letter transmitting certain resolutions adopted at a February 1996 conference of trade union representatives dealing with the transfer of the Panama Canal. One of the resolutions requested that OPM withdraw the proposed regulations. Although OPM declines to withdraw the proposed regulations, we are making certain changes in response to the comments we received, as described below.

Some commenters questioned whether the proposed limitations on severance pay for Panama Canal Commission employees were in keeping with the United States Government's treaty obligations under the Panama Canal Treaty of 1977. OPM conferred with the Department of State, which confirmed that our proposed regulatory changes do not violate the provisions of the Panama Canal Treaty and also expressed the view that the proposed regulations do not conflict with foreign policy concerns.

By the terms of the Panama Canal Treaty, "pre-Treaty hires" —i.e., employees who were employed by the Panama Canal Company or the Canal Zone Government *before* the Treaty took effect in October 1979 and who were transferred to the newly established PCC—were entitled to the protection of certain pre-Treaty employment conditions and benefits, including severance pay (as applicable), during their PCC employment. (See Article X of the Panama Canal Treaty of 1977 and section 1231(a) of Public Law 96-70.) There are no similar treaty provisions for post-Treaty hires—employees who knew when they were first hired that the United States Government would cease to be their employer no later than December 31, 1999.

We quote from the letter to OPM from the Acting Assistant Secretary of State for Inter-American Affairs regarding this matter:

"The Department of State concurs with the view that the Panama Canal Treaty of 1977 and related agreements do not prohibit the United States from adopting the proposed regulation on severance pay \* \* \*. We understand that pre-Treaty employees who are the subject of Article X will not be affected at all by the proposed regulations. Because these employees will all be eligible for an immediate annuity under U.S. law on or before December 31, 1999, they are and will be ineligible for any severance pay benefits, whether or not the proposed regulations go into effect. Thus, pre-Treaty employees will

not be adversely affected by the proposed new regulations. The United States, therefore, will be in full compliance with its obligations under Article X of the Panama Canal Treaty.

"In addition, Article X of the Treaty does not require the United States to guarantee severance pay to post-Treaty employees under all circumstances. Thus, as a legal matter, the Treaty and related agreements do not prohibit the United States from adopting the proposed regulations which realign the severance pay benefit with its intended purpose of protecting federal employees who lose their jobs."

As indicated in the Department of State letter, since all pre-Treaty hires are or will be eligible for immediate retirement benefits prior to the December 1999 Canal transfer and are excluded from severance pay on that basis (5 U.S.C. 5595(a)(2)(iv)), these regulations affect only post-Treaty hires. Thus, there is no issue with regard to compliance with the Panama Canal Treaty terms applicable to pre-Treaty employees.

Some commenters pointed out that severance pay was paid to certain PCC employees whose functions were transferred some years ago. OPM has authority to revise the regulations regarding severance pay coverage (5 U.S.C. 5595(a)(viii)). We believe it is appropriate for OPM to change the regulations regarding severance pay coverage based on periodic reassessments of personnel policies or in response to new information or circumstances. We also note that most of the employees involved in these earlier severance pay cases were pre-Treaty hires.

A number of commenters addressed the estimated costs that would be incurred by PCC for severance pay if the proposed regulations were not adopted. Several commenters argued that any such costs could be covered by increases in future tolls and that the failure to prefund these costs at an earlier time should not serve as the basis for denying severance pay in the future. While PCC's cost concerns are a relevant factor, OPM's decision to adopt restrictions on severance pay for PCC employees is based primarily on our judgment that payment of severance pay in these circumstances would be inappropriate and contrary to the purpose of the severance pay benefit.

Several commenters stated that the proposed limitation on severance pay would have an adverse impact on Canal operations before and after the transfer. Concerns were expressed that the proposed severance pay changes would interfere with the goal of a smooth and

seamless transition of the operation of the Panama Canal or that they would in some way undermine the efficient operation of the Panama Canal. Specifically, possible staffing-up problems at the time of transfer were cited—e.g., the possibility that individual employees may wait 30 days after separation to accept employment with the successor agency in order to qualify for severance pay. However, any employee who has already received an offer of reasonably comparable employment before separation from PCC employment would already be ineligible for severance pay and would have no incentive to postpone accepting a job. Furthermore, an employee who does not receive an offer until after separation would be at risk of being passed over and not securing a position at all should he or she delay accepting the offer. Accordingly, we do not believe the regulations will cause problems in staffing up the successor entity.

We believe that not providing severance pay to employees who retain their positions after transfer is consistent with the goal of a seamless transition. These employees will be treated as if there were no interruption in their public employment, which is in fact the reality of the situation.

Some commenters referred to the adverse effect the proposed severance pay limitation would have on the Panamanian economy. We do not believe this regulation will have a significant impact on the general economy of the Republic of Panama. Any individual who would be denied severance pay because of an offer of reasonably comparable employment will continue to receive a paycheck in his or her new position unless he or she chooses to reject that offer. Thus, the income received by affected employees should remain at about the same level when Panama Canal operations are transferred to the Republic of Panama.

Some commenters characterized the proposed changes as an unfair labor practice (ULP) because conditions of employment were changed without consultation. The labor organizations have brought that issue before the Federal Labor Relations Authority for adjudication. We do not believe the Office of Personnel Management's legal authority to regulate severance pay entitlement is in any way affected by the dispute between PCC and the labor organizations.

One labor organization commented that employees already employed by the PCC should be grandfathered into severance pay entitlement. Such a grandfathering approach would defeat the primary purposes of the regulatory

changes—namely, to prevent severance payments to employees who maintain the same or comparable jobs with the successor Panamanian authority and to ensure that the Canal operation can be transferred in a healthy fiscal condition, free of debts and encumbrances.

Several commenters expressed their belief that the successor entity will be unable to make a “reasonably comparable offer” of continued employment. The commenters cited the Panamanian economy, wage structure, past treatment of transferred employees, and inequality of benefits (including severance pay). Two commenters also listed a number of fringe benefits and employment protections which they maintain are not available under Panamanian law. In addition, two commenters cited the treatment of PCC Ports and Railroad employees whose wages were frozen after their transfer in 1979. For these reasons, they contend that there can be no comparability of employment.

A number of commenters also pointed out that the United States can offer no guarantees to former PCC employees after December 31, 1999. Therefore, they contend that “reasonably comparable” employment cannot be offered beyond the date of transfer. However, on November 25, 1994, the Panamanian Constitutional Assembly approved a new Panamanian Constitutional Title, which, among other things, subjects the “Panama Canal Authority” to a special merit-based employment regime under which permanent employees are to maintain, at a minimum, the same benefits and working conditions they enjoy up to December 31, 1999. (See Article 316 of Title XIV, “The Panama Canal,” of the Political Constitution of Panama.) The PCC, in its comments, characterized this new constitutional provision as a “substantial commitment on the part of Panama, made expressly to assure PCC employees continuity of the terms of their employment across the transition.”

In addition, on June 11, 1997, the government of the Republic of Panama enacted an organic law creating the basic legal framework under which the Panama Canal Authority will operate. (This organic law, Law 19, was passed by the Republic of Panama Legislative Assembly on May 14, 1997, by unanimous vote and signed by Panama President Ernesto Perez Balladares on June 11, 1997.) The law implements the constitutional title approved in 1994 and specifically reaffirms the protection of current PCC employees’ working conditions and benefits. (See Chapter V of Law 19.) The Panama Canal Authority will promulgate detailed

regulations to ensure that specific employment provisions and protections applicable to PCC employees on December 31, 1999, will be carried over into the new system.

Several commenters brought up a perception that non-U.S. citizen employees of PCC would be treated differently from U.S. citizen employees under the proposed regulations. PCC informs us that, in conformance with the terms of the Canal treaty, almost all employees hired after October 1, 1979, are Panamanian citizens and that the workforce is now over approximately 90 percent Panamanian. Therefore, it is unavoidable that the regulatory change will affect primarily Panamanian citizens.

We are making changes in the proposed definition of the term “reasonably comparable employment” in section 550.714(b) of the regulations. PCC recommended that the requirement that the offered position be within 20 percent of the employee’s PCC basic pay be changed to within 10 percent of PCC basic pay. The reasoning is that the change will reduce employee apprehension concerning post-transfer employment, thereby enhancing the orderly transfer of the Canal in 1999. We have adopted that suggestion and revised § 550.714(b)(2) accordingly.

In addition, questions were raised about the reference to a “private entity” in the proposed § 550.714(b)(1). After requesting clarification from PCC staff, we learned that, under the new Constitutional Title, responsibility for Panama Canal operations will be assumed by a single public agency of the government of Panama referred to as the “Panama Canal Authority.” We believe severance pay should not be payable to those employees who are offered or accept reasonably comparable employment with the Panamanian public entity that is replacing the PCC, since the Panamanian Constitutional Title guaranteeing special employment protections applies only to employees of that entity. Therefore, we have revised the proposed regulations to delete any reference to private successor entities and to clarify that the rule applies only to the Panamanian public agency responsible for managing, operating, and maintaining the Panama Canal after its transfer under the Panama Canal Treaty.

#### **E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with 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 Part 550**

Administrative practice and procedure, Claims, Government employees, Wages.

Office of Personnel Management.

**Janice R. Lachance,**

*Acting Director.*

Accordingly, OPM is amending part 550 of title 5, Code of Federal Regulations, as follows:

#### **PART 550—PAY ADMINISTRATION (GENERAL)**

##### **Subpart G—Severance Pay**

1. The authority citation for subpart G continues to read as follows:

**Authority:** 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964–1965 Comp., p. 357.

2. Section 550.714 is added to read as follows:

##### **§ 550.714 Panama Canal Commission employees.**

(a) Notwithstanding any other provisions of this subpart, an employee separated from employment with the Panama Canal Commission as a result of the implementation of any provision of the Panama Canal Treaty of 1977 and related agreements shall not be entitled to severance pay if he or she—

(1) Receives a written offer of reasonably comparable employment when such offer is made before separation from Commission employment;

(2) Accepts reasonably comparable employment within 30 days after separation from Commission employment; or

(3) Was hired by the Commission on or after December 18, 1997.

(b) The term *reasonably comparable employment* means a position that meets all the following conditions:

(1) The position is with the Panamanian public entity that assumes the functions of managing, operating, and maintaining the Panama Canal as a result of the Panama Canal Treaty of 1977;

(2) The rate of basic pay of the position is not more than 10 percent below the employee’s rate of basic pay as a Panama Canal Commission employee;

(3) The position is within the employee’s commuting area;

(4) The position carries no fixed time limitation as to length of appointment; and

(5) The work schedule (that is, part-time or full-time) of the position is the same as that of the position held by the employee at the Panama Canal Commission.

(c) A Panama Canal Commission employee who resigns prior to receiving an official written notice that he or she will not be offered reasonably comparable employment shall be considered to be voluntarily separated. Section 550.706(a) shall be applied, as appropriate, to any employee who resigns after receiving such notice.

(d) Except as otherwise provided by paragraphs (a) through (c) of this section, the provisions of this subpart remain applicable to Panama Canal Commission employees.

[FR Doc. 97-24885 Filed 9-18-97; 8:45 am]  
BILLING CODE 6325-01-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 920

[Docket No. FV97-920-2 FR]

#### Kiwifruit Grown in California; Relaxation in Pack Requirements

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule increases the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by count, and increases the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count. This relaxation was recommended by the Kiwifruit Administrative Committee (committee), the agency responsible for local administration of the marketing order. The committee expects this rule to reduce handler costs, increase grower returns, and allow the kiwifruit industry to meet the increased demand for lower priced kiwifruit.

**EFFECTIVE DATE:** This final rule becomes effective September 22, 1997.

**FOR FURTHER INFORMATION CONTACT:** Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey St., suite 102B, Fresno,

California 93721; telephone: (209) 487-5901, Fax: (209) 487-5906 or George Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456, telephone: (202) 720-2491, Fax: (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Order No. 920 (7 CFR part 920), as amended, regulating the handling of kiwifruit grown in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises pack requirements for Size 42 and Size 45 kiwifruit under the Federal marketing order for kiwifruit grown in California. This rule will increase the size variation tolerance for Size 42 kiwifruit from 5 percent, by count, to 10 percent, by

count, and will increase the size variation tolerance for Size 45 kiwifruit from 10 percent, by count, to 25 percent, by count.

Section 920.52 authorizes the establishment of pack requirements. Section 920.302(a)(4) of the rules and regulations outlines the pack requirements for fresh shipments of California kiwifruit. Under § 920.302(a)(4)(i) of the rules and regulations, kiwifruit packed in containers with cell compartments, cardboard fillers, or molded trays shall be of proper size and fairly uniform in size. Section 920.302(a)(4)(ii) outlines pack requirements for kiwifruit packed in cell compartments, cardboard fillers or molded trays and includes a table that specifies numerical size designations and the size variation tolerances. It also outlines pack requirements for kiwifruit packed in bags, volume fill or bulk containers, and includes a separate table that specifies numerical size designations and size variation tolerances. This section provides that not more than 10 percent, by count of the containers in any lot may fail to meet pack requirements. It also provides that not more than 5 percent, by count, of kiwifruit in any container, (except that for Size 45 kiwifruit, the tolerance, by count, in any one container, may not be more than 10 percent) may fail to meet pack requirements. This size variation tolerance does not apply to other pack requirements such as how the fruit fills the cell compartments, cardboard fillers, or molded trays, or any weight requirements.

Prior to the 1995-1996 season, handlers were experiencing difficulty meeting the size variation tolerance for Size 45 kiwifruit. Size 45 is the minimum size. The committee determined that the best solution was to increase the size variation tolerance, by count, in any one container, for Size 45 kiwifruit. Section 920.302 (a)(4) was revised by a final rule issued June 21, 1995 (60 FR 32257) to include a provision that increased the size variation tolerance, by count, in any one container, from 5 percent to 10 percent for Size 45 kiwifruit.

This increased size variation tolerance for Size 45 kiwifruit has been utilized for two seasons. Handlers are still experiencing difficulty discerning if size variation tolerances for smaller fruit are being met during the packing process.

As the size of the kiwifruit increases, so does the size of the variation allowed. In the larger kiwifruit sizes, failure to meet the required size variation standards results in packs that are visibly irregular in size. In Size 42 and