

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Parts 430, 432, 451 and 531**

RIN 3206-AG34

Performance ManagementAGENCY: Office of Personnel
Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to deregulate performance management and incentive awards, including provisions allowing agencies to use as few as two levels for critical element appraisals for and summary performance assessments of non-SES employees, and to make conforming changes to related regulations. These changes provide agencies additional flexibility as called for by the National Performance Review.

EFFECTIVE DATE: September 22, 1995.

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SUPPLEMENTARY INFORMATION: OPM published for comment in the **Federal Register** on January 27, 1995, at 60 FR 5542-5557, proposed revisions to the regulations on performance management systems. A total of 52 comments and/or suggestions were received: 37 from agencies, 6 from unions, 6 from individuals, and 3 from management associations. The comments generally supported the proposed changes. On some topics, commenters suggested additional changes. In other instances, commenters either suggested that no change be made to the current regulations or suggested some modification to the proposed changes. Comments and suggestions, along with the rationale for and explanation of revisions to the final regulations, are discussed below.

I. Background

Following several years of study and recommendations for ways to improve the Federal Government's performance management system for non-Senior Executive Service (SES) employees, OPM reviewed the regulatory structure for appraisal and awards for opportunities to implement the various recommendations. OPM concluded that the regulations implementing the basic statutory requirements could be made much more flexible and constructive for managing and recognizing group as well as individual performance. Consequently, OPM proposed a variety of changes to the regulations covering performance appraisal (part 430) and

incentive awards (part 451), as well as related regulations that referenced appraisal results (e.g., granting within-grade and quality step increases).

OPM's intent in deregulating performance management was to give agencies a great deal of flexibility for both appraisal and awards so that the working organizations of the Federal Government could operate in a decentralized environment where the performance management procedures for planning, monitoring, evaluating, and rewarding individual, team, and organizational performance were tailored to fit local work technologies and cultures. A chief means of achieving this flexibility was to remove a great deal of regulatory language. As a result of comments received, OPM is restoring language in several instances that had been deleted in the proposed regulations (e.g., restoring a reference to "employee" in the definition of *critical element*). Whenever reasonable, the restoration is establishing a permissive authority, rather than a Governmentwide requirement. OPM's original strategy was to adopt a "permissive silence" approach to many issues. That is, by leaving the regulations silent, agencies would not be constrained from designing and implementing a variety of procedures and mechanisms. However, the comments clearly indicated that in some cases, agencies believe a direct reference to certain permissible techniques, such as permitting the assigning of a summary level as part of a performance rating, is needed to permit their use. Consequently, OPM is reinserting some broad language in certain cases.

Even with these additions, however, OPM believes that our goal of creating a deregulated Governmentwide policy framework in which performance management can be revitalized and reinvented is being achieved, without sacrificing agency accountability and adequate employee protections. OPM encourages agencies to seize these flexibilities and work to make performance appraisal and awards an integral part of their general efforts to address the serious challenges Government is facing to create and sustain high performance organizations.

II. Statutory Limitations

OPM's proposals for regulatory changes to performance management implemented specific National Performance Review recommendations which were achievable within the limits of existing statute and which we believe substantially reform performance management in the Federal Government. However, there were

several requests made by commenters to take actions that are outside OPM's authority. For example, a few commenters suggested that the regulations be further modified to require mandatory collective bargaining of aspects of performance appraisal and awards such as performance standards. Several other commenters made suggestions that also would require changes to statute; for example—

- integrate sections from different chapters of title 5, United States Code;
- eliminate the requirement that OPM approve performance appraisal systems;
- require that agencies take a chapter 43 action against employees whose performance is less than fully successful, but better than unacceptable as defined in statute;
- lift the prohibition on granting honorary, nonmonetary awards to political officers during a Presidential election period;
- modify regulations to permit that within-grade increases that are delayed do not have to be granted retroactively; and
- eliminate the connection between performance appraisal and retention standing in a reduction in force.

OPM does not have the authority under existing statute to take these actions. Therefore, they are not being adopted.

III. Employee Involvement and Labor Relations Issues

As OPM stated when publishing the proposed regulations, agencies are strongly urged to develop their performance management systems and programs in partnership with their employees and union representatives in accordance with law. Many studies have shown that the success of a performance management system in achieving its goals is dependent upon acceptance by the management and employees who use it. There is no better way to garner support for a system than by giving all stakeholders a role in developing it. Further, the National Performance Review stated in its accompanying report, *Reinventing Human Resource Management*, that under the ideal performance management system "Employees and their representatives will be involved in design and implementation of performance management programs and in development of performance expectations." Consequently, OPM advises agencies that these regulatory changes in performance management should be implemented through full partnership with employees and their union representatives.

Several comments pointed out that the elimination of a Governmentwide

regulation could affect the negotiability of a particular aspect of an appraisal or award program. OPM is aware of this potential implication of removing such regulations. In balancing among the interests of establishing flexibility for effective program design, decentralizing programs to facilitate their being properly tailored to local work settings and cultures, achieving meaningful employee involvement to increase program acceptance, and maintaining an appropriate framework of Governmentwide regulation to ensure that statutory requirements are met, OPM is deciding more often than not to remove regulatory constraints.

A number of comments focused on OPM's objective of providing for involving employees in the design and implementation of performance management programs and the implications of the proposed regulations for how that involvement could and should be achieved. The principle that successful performance management approaches are best served by the involvement of the employees that will be affected by them is well established. In the Federal Government, under the Federal Service Labor-Management Relations Statute (chapter 71 of title 5, United States Code), for employees in bargaining units where a labor organization has been given exclusive recognition, employee involvement must be through that exclusive representative for subject matters that are within the statutory duty to bargain. As well as striving to develop performance management systems and programs in partnership, agencies must be mindful of the requirements of chapter 71 as they implement these final regulations.

Several comments raised questions about the means and methods of involving employees who are not in recognized bargaining units. One commenter suggested that OPM mandate that agencies use representatives of professional and management associations to involve employees who make up their memberships. OPM has no authority to set such a requirement. OPM strongly encourages agencies to involve all employees, including managers and supervisors, in the design and implementation of performance management programs. Where appropriate, this should include the involvement of representatives of professional and managerial associations, OPM, however, does not have the authority to require such involvement.

Also, agency officials are reminded that 18 U.S.C. 201-216 place restrictions

on a wide range of activities by Federal employees, including representational activities on behalf of organizations that are not labor organizations. OPM therefore advises agency officials to consult with their designated agency ethics official for guidance regarding any conflicts of interest that may arise. Accordingly, OPM is revising text to clarify that agencies are free to choose appropriate forms of employee involvement in accordance with law. (See § 430.204(c), § 430.205(d), and § 451.103(b).)

Several comments raised related labor relations issues concerning employees who serve as representatives of labor organizations in their agencies under chapter 71 of title 5, United States Code. For example, one commenter suggested adding a requirement that union officials be granted presumptive ratings at the "Fully Successful" (or equivalent) level. Under performance appraisal provisions in part 430, the performance to be planned, monitored, and rated covers the work, duties, and responsibilities that accomplish the agency mission and for which the employee is accountable to the employing organization. When an employee is serving as the representative of a labor organization, he or she is performing duties for that labor organization. To intermingle performance of the representational duties into the appraisal program would be inappropriate because appraisal of the employee's performance must be based solely upon the employee's performance of agency duties. For employees who spend 100 percent of their time as labor representatives, and for employees who spend a significant amount of time as determined by the agency, this means that they cannot, and should not, be given performance appraisal ratings of record. In the interest of preserving the distinction between the agency-assigned duties of an official position and union duties and responsibilities, OPM is not adopting this suggestion. The regulations at part 430 continue to preclude a "presumptive" or "assumed" rating of record and such employees are considered "unratable." The only place in regulations where an "assumed" rating is used is in the regulations at § 351.504 for granting addition service credit based on performance in a reduction in force.

Other commenters asked whether the waiver of an acceptable level of competence (ALOC) determination at § 531.409(d) is discretionary or mandatory. OPM is clarifying that waiving the ALOC determination for labor representatives is not

discretionary for representatives who are unratable based upon the fact that ALOC must be based on a performance determination.

An additional comment stated that the provision addressing the ALOC waiver for union officials should also refer to representational duties. OPM is adopting the suggestion to clarify the representational duties are performed under the authority of chapter 71 of title 5, United States Code. (See § 531.409(d)(1)(v).)

One commenter suggested that where the proposed regulations at § 451.104(h) clarified that employees do not have appeal rights with respect to awards, language be added concerning the right to grieve an award. In considering this suggestion, OPM has concluded that it is not necessary to promulgate a Governmentwide regulation in this subpart that reminds employees about matters where they do and do not have appeal or grievance rights. Consequently, OPM is eliminating all reference to appealing awards by deleting § 451.104(h). Because appeal rights to the Merit Systems Protection Board must be granted specifically by law or regulation, deletion of this regulatory language does not have the effect of creating such an appeal right. (See § 541.104 (paragraph (h) as proposed, removed).)

IV. OPM Role Examined

Several comments raised questions that concern OPM's role in administering the Federal Government's performance management system under the provisions of chapters 43 and 45 of title 5, United States Code. One commenter asked whether these regulatory changes would affect the administrative exclusions that OPM had already granted some agencies for some excepted service employees under its authority at 5 U.S.C. 4301(2)(G). OPM has concluded that all existing administrative exclusions the Director of OPM has already granted will remain in effect and that agencies need not reapply for those exclusions.

One commenter suggested that OPM seek a reinterpretation of the statutory requirement that OPM review and approve agency appraisal systems in advance of program implementation. OPM believes that case law and established practice are sufficiently clear in this regard and that appraisal system approval must still be required in advance of program implementation.

One commenter expressed concern about the distinctions OPM is making between appraisal *system* and appraisal *program*. The commenter suggested that OPM would not be carrying out our

review and approval responsibilities properly if only a framework of parameters that an agency's programs must comply with were to be reviewed. OPM believes that the system descriptions that agencies will submit to OPM will provide sufficient information about the policies under which appraisals will be conducted to permit an adequate determination of whether the agency meets the requirements of subchapter I of chapter 43 of title 5, United States Code, which is OPM's responsibility under the law. As a consequence, the final regulations at §§ 430.203–205 continue to distinguish agency appraisal systems from appraisal programs and require at §§ 430.209–210 the submission and review of agency systems. (See § 430.203 (*appraisal program, appraisal system*) and §§ 430.205 (a) and (c).)

Other commenters asked about what documents agencies would be required to submit for OPM review. OPM will be distributing specific guidance and instructions, providing models, holding informational meetings, and supplying technical assistance to the agencies to facilitate the submission and approval of their systems and to support the design and implementation of revised appraisal and award programs.

One commenter suggested that the definition of "Performance Management Plan" be removed as paragraph § 430.102(c) and grouped with other definitions in § 430.203. OPM is taking this suggestion one step further by removing the provision and all references to "Performance Management Plan" in part 430, subparts A and B, which cover non-SES employees. Also, OPM is making conforming changes in subpart C by removing references to subpart A as a source of the continued SES requirement for a Performance Management Plan. From a Governmentwide regulatory perspective, reference to a document (e.g., a Performance Management Plan) that serves as the repository for an agency's non-SES performance management systems is no longer necessary because the regulations are clear in requiring agencies only to submit appraisal systems for OPM review and approval. However, agencies are free to continue to use a Performance Management Plan for internal purposes. The requirements for submitting appraisal systems for SES employees and for non-SES employees are spelled out separately in their respective subparts. (See § 430.102 (paragraph (c) as proposed, removed), § 430.209(d), § 430.303 (*Performance Management Plan*), and § 430.310.)

On OPM's evaluation responsibilities, one commenter suggested the wording "must evaluate" and another suggested the wording "will evaluate" to replace the wording "may evaluate" systems and programs at § 430.210(b) and § 451.107(d). Another commenter suggested that OPM include in the regulations at § 430.209(d) the criteria against which programs would be evaluated. OPM is fully committed to executing our evaluation role in a meaningful way. Moreover, OPM believes that agencies will be in the best position to establish criteria for evaluating their programs against the specific objectives that program design features were intended to achieve. Consequently, the suggested changes are not being adopted.

V. More Flexibility Requested

Some commenters did not feel that OPM had gone far enough in our proposals and urged OPM to consider providing further flexibilities. By far, the most commonly raised concern addressed the fact that OPM had not proposed any changes to the regulations at § 351.504 governing how additional service credit is granted during a reduction in force (RIF) on the basis of performance appraisal ratings of record. Most commenters noted that OPM's proposal to provide flexibility about the number of summary levels used in an appraisal program was a highly desirable system improvement. However, 27 of the 52 commenters suggested that OPM revisit the issue of crediting performance in a RIF. A few commenters urged that the connection between appraisal and retention be completely eliminated. Others suggested particular approaches for dealing with situations where employees in the same competitive area in a RIF were given ratings of record under programs that use different patterns of summary levels. To respond to the concerns expressed, OPM will review the RIF regulations in part 351 and consider whether any changes to the RIF retention provisions would be beneficial and appropriate. As part of this review, OPM will confer with stakeholders to assure that a full range of interests is considered.

In four other instances, changes were suggested that would have lifted regulatory requirements beyond what OPM had proposed. One commenter requested that the required progress review in the regulation at § 430.207(b) about monitoring performance during the appraised period be eliminated on grounds that agencies "should not be required to conduct a formalized review." OPM had maintained the

requirement for a progress review as a reasonable implementation of the specific statutory requirement that employees be evaluated *during* (and not just at the end of) their appraisal period. Given the more flexible definition of progress review, which could now be much simpler than a formally conducted or written review, OPM is preserving the requirement.

Another commenter suggested that after one appraisal period, journey-level employees should not be required under § 430.206(b)(2) to receive performance plans at the start of each subsequent period. Instead, a performance plan would be provided upon reaching the journey level and "carry over" after that. OPM understands that situations may continue where performance plans are constructed in such a way that they need not change from period to period. However, OPM believes that the statutory requirement for employees to be evaluated during each appraisal period on their standards is reasonably implemented by the current requirement. Also, eliminating the current requirement would strongly suggest that such plans are by their nature unchanging, at least at the journey level. One of OPM's goals in deregulating performance management is to reemphasize the value and importance of effective planning and goal setting. Consequently, OPM is not adopting the suggestion.

Two commenters sought greater flexibility with respect to assigning summary levels. One thought that the regulations at § 430.208(d)(1) should allow an appraisal program to use more than five summary levels. Other personnel systems and actions, including granting quality step increases, granting within-grade increases, and granting additional service credit in a reduction in force, are regulated to operate with reference to the five numerically-designated summary levels. The proposed regulations offered the flexibility for an appraisal program to assess performance at more than five levels, so long as the program included some method of translating such assessments to one of the patterns of summary levels that programs are permitted to use to designate their official ratings of record that the other personnel systems use. Given that flexibility, OPM is not adopting the suggestion to permit more than five summary levels.

The other commenter suggested that the proposed deregulation at § 430.208(e) to eliminate the Governmentwide requirement that all assigned summary levels be reviewed by a reviewing official should be extended

to Level 1 ("Unacceptable") ratings of record. OPM has proposed maintaining the requirement for reviewing Level 1 ratings as an appropriate employee protection in cases where the assigned rating of record could affect an employee's retention in the Federal service. OPM believes such a measure of protection is still justified and is not adopting the suggestion.

VI. Restoring or Adding Restrictions and Requirements

A considerable number of comments requested that Governmentwide restrictions or requirements be restored or that new ones be established. OPM considered each of these suggestions carefully, attempting to implement the National Performance Review recommendation to eliminate unnecessary regulation consistent with our responsibility to regulate the Governmentwide implementation of chapters 43 and 45 of title 5, United States Code, as required by law.

A. Team and Organizational Performance

A number of commenters wanted OPM to restore language that we had proposed be removed from the regulations. For example, in the provision dealing with performance plans, OPM had proposed to eliminate the language referring to supervisor. Several commenters suggested that OPM restore the language that referred to supervisors. Current regulation at § 430.204(c)(4) states that "Final authority for establishing such plans rests with the supervising officials." By proposing the removal of this type of language, OPM had hoped to broaden the coverage of the regulations to the management of team and organizational performance in other than traditional hierarchical organizations, as well as individual performance, without detracting from the management rights preserved by law.

The deletion of the reference to supervisors was not intended to, and cannot have the effect of, subtracting from management's inherent rights because those rights are preserved elsewhere in the law. For example, 5 U.S.C. 7106(a)(2) (A) and (B) protect management's right to direct employees and to assign work. Therefore, reference to the supervisor did not confer upon management any rights that did not already exist. Consequently, OPM is not adopting the suggestion to restore the reference to the supervisor establishing a performance plan.

The requirement for higher-level review of awards had been proposed for removal to accommodate restructured

organizational environments. Several commenters suggested that the requirement be restored because its removal could have the effect of making award programs negotiable. OPM is not adopting this suggestion because of our focus on eliminating unnecessary layers of review to create flatter, more effective organizations. Such delayering could be used to establish more effective recognition systems.

Four commenters suggested OPM restore an exclusive reference to the performance of "an employee." One of these suggestions applied to the definition of *performance rating* and another to the provision for ongoing appraisal at § 430.207(b). OPM is not adopting either change because each would limit performance to the individual, excluding the use of team or organizational performance from the appraisal process. A third commenter wanted to restore classification-centered references to duties and responsibilities in the definition of *critical element*. The third proposed change could result in limiting critical elements by tying them to position descriptions that are frequently outdated rather than allowing them to reflect the employee responsibilities needed by the organization. Accordingly, OPM is not adopting this suggestion. The fourth commenter, however, suggested restoring reference to "an employee's" overall performance in the definition of *critical element* as that which is found unacceptable if performance on one or more critical elements is unacceptable. OPM is adopting this suggestion because it emphasizes the necessary connection in the law between critical elements and the individual employee for retention purposes. (See § 430.203 (*critical element*) and § 432.103(b).)

B. Meaning and Use of Terms

1. Critical Elements and Other Performance Factors. OPM received a number of comments about the meaning and use of terms such as "other performance factors" and "non-critical elements" and the relationships among those and "critical elements," especially with respect to their use in performance plans and their impact on summary ratings of record. Two commenters requested OPM to restore the definition of "non-critical element."

In response to these comments, OPM is amending definitions and provisions to establish three distinct kinds of performance elements: critical, non-critical, and additional. The concept of "other performance factors" that the proposed regulations had included has been replaced and refined by using

"non-critical elements" and "additional performance elements."

The meaning and use of a "critical element" cannot change; as set forth in 5 U.S.C. 4301(3), failure to meet established performance standards on one or more critical elements means unacceptable performance. Because an appraisal system must be able to identify unacceptable performance, an appraisal program must use at least one critical element, and any critical element must have an established performance standard and be appraisable as "Unacceptable." Critical elements must be used in deriving a summary level, and they form the only basis for taking a performance-based action under 5 CFR part 432 or 752.

The definition of *non-critical element* is being adjusted to reflect a new, broader meaning. (This change renders moot another commenter's suggestion to remove all references to noncritical elements.) As in current regulation, establishing a non-critical element is optional. If used, it must be included in the employee's performance plan. It cannot be used as a basis for taking a performance-based action under 5 CFR part 432 or 752. However, a non-critical element would be used in deriving a summary level. As in the proposed regulations and because it must be factored into the summary level, it must be appraisable at a minimum of two levels with a performance standard established for at least one level, which need not be the "Fully Successful" level. This change is being made in recognition of 5 U.S.C. 4302(b)(3), which requires that employees be evaluated against their performance standards.

OPM is changing the definition and use of non-critical elements to permit them to focus on levels of performance other than individual and on a standard other than that required for retention. Critical elements are designed to be focused on individual performance and an established performance standard for retention because of the definition of unacceptable performance at 5 U.S.C. 4301(3). Agencies may continue to use non-critical elements as they are used now under current regulation, provided they are used to derive a summary level.

Under these regulations, an optional "additional performance element" gives agencies additional flexibility for communicating performance expectations important to the organization. This kind of performance element differs from the other two in that it may not be used in deriving a summary level. However, it may be used for other purposes, such as making award determinations. Therefore, as was

proposed for "other performance factors" in general in the proposed regulations, an additional performance element need not include a performance standard, be appraised at any particular level, or necessarily be included in the employee performance plan. Also, by making clear that performance on an additional performance element may not be used in assigning a summary level, this change addresses one commenter's concerns that summary level derivations could be affected by performance expectations ("other performance factors") not expressed at the beginning of the appraisal period in the performance plan.

Accordingly, OPM is adding definitions of *additional performance element* and *non-critical element*; revising procedures at § 430.206(b) required to establish performance plans to clarify options and requirements; and making conforming changes in other definitions and provisions. (See § 430.203 (*additional performance element, non-critical element, performance plan, performance rating, progress review*), § 430.204(b)(3)(iii), §§ 430.206 (b)(4) through (b)(7), § 430.207(b), and § 430.208(b).)

2. Summary Rating. Two commenters suggested that the definition of "summary rating" be retained. Another commenter suggested that either the definition be retained or all references to summary rating be removed. In current regulation at § 430.203, the definition of *summary rating* requires a label describing an employee's overall level of performance. In practice, the term "summary rating" frequently means the label only, without reference to the appraisal process or documentation that generated it. OPM proposed to replace *summary rating* with *performance rating*, which requires only the appraisal of critical and non-critical elements in an employee's performance plan. To help minimize confusion in this area, OPM is removing references to summary rating. OPM also is replacing references to "summary rating level" with "summary level." A summary level must be assigned with a performance rating is prepared as part of a rating of record. At other times, assigning a summary level is optional. (See § 430.203 (*performance plan, rating of record*); § 430.204(b)(3)(iv); §§ 430.208 (b), (c), and (d); and § 531.504(b).)

3. Other Terms. In several instances, commenters requested that definitions of terms such as "team," "informal recognition item," and the performance and summary levels themselves be provided in the regulations. Commenters also requested that—

- the regulations include precise requirements for performance standards;
- "as soon as practicable" be defined;
- the proposed provision at § 531.409(d)(1)(v) for waiving the acceptable level of competence (ALOC) determination for labor representatives be permitted only for employees who are performing representational duties a full 100 percent of their time; and
- "performance-based" be added to modify "actions based on unacceptable performance" that must be provided for under § 430.207(d)(2), which would have restricted the actions an agency could take to deal with a poor performer.

OPM is committed to emphasizing flexibility for the performance appraisal and award programs that will be established under these regulations. Accordingly, OPM is not adopting these suggestions.

C. Appraisal Program Procedures

A number of commenters suggested restoring or adding procedural requirements within an appraisal program, such as—

- requiring paper copies of performance plans and ratings of record;
- requiring a minimum appraisal period of at least 90 days;
- requiring close-out ratings;
- specifying how to treat employees on detail;
- coordinating the assignment of summary levels between programs to assure equitable distribution of rewards; and
- establishing specific requirements and criteria for granting quality step increases under appraisal programs that do not use a Level 5 summary.

OPM believes that agencies should have the flexibility and authority to design their own means of addressing these procedures so that they fit their work technologies or cultures well. Consequently, OPM is not adopting these suggestions.

Five commenters urged OPM to reconsider removing the requirement to assist employees whose performance is better than "Unacceptable," but not "Fully Successful" (or equivalent). OPM had removed the requirement on the basis that it went further than the statute required and that agencies would have the full discretion to provide such assistance without a Governmentwide regulation. However, OPM agrees that a commitment to improving performance includes assisting a marginal performer. Accordingly, OPM is adding language to emphasize that agencies should offer assistance to employees whose performance is less than "Fully

Successful" (or equivalent). (See § 430.207(c).)

Some commenters suggested that the proposed provision to permit the delay of an acceptable level of competence (ALOC) determination for employees completing an opportunity to improve or under notice of a performance-based action to be taken under 5 CFR part 432 or 752 is unfair to employees whose performance is less than "Fully Successful" but better than "Unacceptable." These marginal performers would not have access to such a delay and, upon improvement to the "Fully Successful" level, to a retroactive within-grade increase. Thus, those whom management deemed to be performing at an unacceptable level would be endowed with greater rights than those whose performance is somewhat better, thereby creating an inequity in the application of the law.

OPM agrees. The proposed regulation does not further our policy objectives. All employees whose performance is deemed less than "Fully Successful" should be treated equally for ALOC determinations. No group of less than "Fully Successful" performers should be granted advantage over any others. Accordingly, these final regulations do not include the provision at § 531.409(c) as described above for delaying the ALOC determination. (See § 531.409 (amendments to paragraphs (c)(2) through (c)(3) as proposed, withdrawn).)

Four commenters addressed the provision requiring agencies to communicate to employees about relevant parts of applicable performance management systems and programs. All stressed, to varying degrees, the importance of training and the concern that OPM's omitting specific mention of it would send inappropriate signals about its importance, if not necessity, in implementing effective systems and programs. One commenter specifically recommended that OPM re-insert the training requirement. OPM is not adopting this suggestion because we had proposed to remove the training requirement to allow agencies the flexibility to use resources in addition to formal training funds to communicate system and program operations to supervisors and employees. OPM recognizes, however, that while formal training is rarely sufficient, it often is necessary to ensure adequate communication. Accordingly, OPM is adding a specific reference to formal training as an example of communicating to employees and supervisors about the relevant parts of applicable appraisal systems and programs and award programs. (See § 430.209(c) and § 451.106(c).)

D. Forced Distributions of Ratings

Several commenters questioned OPM's proposal at § 430.208(c) to permit agency appraisal programs to use "forced distributions" of summary levels for ratings of record and urged that OPM restore the existing prohibition on their use. These commenters believed that forced distributions were incompatible with effective performance management. OPM is persuaded by the arguments that criticized the use of forced distributions and is adopting the suggestions that the regulations continue to prohibit forced distributions, as the current regulations do at § 430.206(d). Therefore, the proposed language at § 430.208(c) is being changed from being a permissive authority. Under these final regulations, no limitations on ratings at any level used by an appraisal program are permitted. The regulations still require that a summary level be derived solely from comparing performance to the pre-established standards required for critical and non-critical elements and not be based at all on additional performance elements. Definitions of *additional performance element* and *non-critical element* are added or restored as outlined above to clarify this issue. OPM is permitting more flexibility to use non-critical elements to derive a summary level and in making performance distinctions above a Level 3 summary ("Fully Successful" or equivalent), while heeding the commenters' calls for not permitting quotas for summary levels. However, OPM is also adding language to clarify that using methods where relative comparisons are made among individuals or groups, such as rank ordering or categorizing employees, may be used for purposes outside appraisal and assigning a summary level, such as making decisions about distributing rewards. (See § 430.208(c).)

VII. Performance and Awards Data

Nine commenters requested additional information and OPM guidance regarding how to report award and performance data to the Central Personnel Data File (CPDF) and clarification of the transfer of rating requirements when employees change agencies or leave Federal service.

The inclusion of these reporting requirements in the performance management and award regulations is intended to reinforce their mandatory nature. However, official OPM policy on how agencies are to comply with these reporting requirements is contained in three OPM Operating Manuals. Policy and instructions on how to submit data

to the CPDF are contained in FEDERAL WORKFORCE REPORTING SYSTEMS. Policy and instructions on how to process personnel actions, including appropriate nature-of-action codes (NOAC's) for awards, within-grade increases, and quality step increases, are in THE GUIDE TO PROCESSING PERSONNEL ACTIONS. Finally, policy and instructions on the transfer of performance records are addressed in the regulations at 5 CFR part 293 and, along with records documentation requirements for the Official Personnel Folder (OPF), in THE GUIDE TO PERSONNEL RECORDKEEPING.

The new regulations in part 451 remove the specific requirement to prepare an SF-50 for a time-off award. This is consistent with OPM's intent to review the data collection and reporting and documentation requirements for appraisal and awards in the coming months with the objective of simplifying requirements to the extent possible, given OPM's responsibilities for maintaining Governmentwide data in these areas. In the meantime, agencies are reminded that they should follow the reporting and documentation requirements specified in the relevant OPM Operating Manuals, which at this point still require SF-50's for all cash and time-off awards. Accordingly, the regulations are amended to clarify that transfer, documentation, and reporting of records must be done in compliance with these OPM Operating Manuals. Further, language is added to indicate where they can be obtained. (See §§ 430.209(b) and (e); §§ 451.106(e), (f), and (g); and § 531.507(b).)

VIII. Miscellaneous, Technical, and Editorial Changes

OPM is incorporating two structural changes in these final regulations. OPM is replacing text describing the summary levels available for program use with a table of permissible patterns of summary levels and explanatory text. In addition to providing a clearer presentation of what combinations of summary levels may be used, this table establishes a convenient pattern label (A through H) for possible reference in future data reporting instructions in the OPM Operating Manual, FEDERAL WORKFORCE REPORTING SYSTEMS. A conforming change requires agencies to specify in their systems which patterns, not levels, programs are permitted to adopt. (See § 430.204(b)(3)(iv) and §§ 430.208(d)(1) and (2).)

OPM is revising the definitions of *appraisal period* and *rating of record* to accommodate their establishment under programs in accordance with an agency

system. (See § 430.203 (*appraisal period, rating of record*).)

One commenter found it confusing that the definition of *performance rating* makes no mention of deriving a summary level. OPM had intended that silence on the derivation of a summary level would be taken to imply consent. To make our intent clearer, however, OPM is revising the definition of *performance rating* to specify explicitly that assigning a summary level is permitted. A summary level is required only for a rating of record. (See § 430.203 (*performance rating*).)

The definition of *performance rating* is being revised to include the new flexibility to use additional performance elements. (See § 430.203 (*Performance standard*).)

The provision requiring an appraisal program to establish a minimum period is being revised so that the minimum period applies to performance ratings only, rather than a more general performance determination. This change accommodates a commenter's suggestion to ensure that agencies retain the flexibility to make a determination about performance at any time, as permitted, for example, in an unacceptable performance determination. (See § 430.207(a).)

The provision prohibiting the assignment of a Level 1 ("Unacceptable") summary if all critical elements are rated "Fully Successful" (or equivalent) or better is being corrected to align with statute, which links unacceptable performance overall with an "Unacceptable" (not just "less than 'Fully Successful'") appraisal on one or more critical elements. (See § 430.208(b)(1).)

One commenter asserted that OPM must, but does not, allow itself to disapprove an appraisal system at § 430.210. OPM does not contemplate such disapproval because an agency must have an approved appraisal system under which it can manage performance, take performance-based actions under 5 CFR part 432 or 752, and make other personnel decisions. In this respect, an appraisal system is unlike an award, which OPM may disapprove in some cases. This does not mean that OPM cannot withhold approval of a proposed appraisal system until it is made to conform to regulatory requirements; it only means that ultimately an appraisal system must be approved. Of course, OPM would work with the agency to ensure that such approval could be given. Accordingly, OPM is not adopting the suggestion.

The provisions cross-referencing current regulation at § 534.403 are being revised to clarify that Senior Executive

Service (SES) performance awards are authorized by 5 U.S.C. 5384, not subchapter I of chapter 45, United States Code. Awards to SES members for goals, objectives, and accomplishments attained through sustained superior performance of regular job duties and responsibilities are properly made under 5 U.S.C. 5384. (See §§ 451.101(d) and 451.104(a)(3).)

One commenter suggested that the reference to "productivity gainshares" be removed from the definition of *award* proposed at § 451.102. OPM is adopting this suggestion and is including "productivity gain" among the contributions that can form the basis for granting an award. (See § 451.102 (*award*) and § 451.104(a)(1).)

One commenter asked whether time-off and honorary awards should be excluded from tax withholding. OPM does not have the authority to determine the applicability of tax withholding or any other tax rules. The provision specifying that awards are subject to tax withholding has always been intended to serve as a reminder to agencies of their obligations to the Internal Revenue Service and other tax collecting authorities. Accordingly, it is being broadened to reflect the fact that non-cash awards may be considered supplemental wages and subject to applicable tax rules. (See § 451.104(c).)

One commenter suggested that the awards regulations be amended to permit giving awards to private citizens and former Federal employees. OPM addressed a similar comment in the final regulations on incentive awards, pay, and leave published on June 27, 1995, at 60 FR 33097-33098. In the supplementary information published with those regulations, OPM explained that awards authorized by chapter 45 of title 5, United States Code, may be granted only to Federal employees or former Federal employees for contributions made while in the Federal service. To accord with current regulation (as amended June 27, 1995) and statutory intent, OPM is extending the provision permitting agencies to grant awards to the legal heirs or estates of deceased employees to include former employees, but not private citizens. (See § 451.104(e).)

To protect the integrity of quality step increases (QSI's), OPM is adding a provision that requires an employee covered by an appraisal program not using a Level 5 ("Outstanding, or equivalent) summary to receive the highest rating of record that the program *does* use as well as to meet whatever eligibility criteria the agency establishes before the employee can receive a QSI. QSI's are intended to recognize or

provide incentives for sustained, extraordinary performance. Granting one to an employee who has not demonstrated both by receiving the highest rating of record that can be achieved would be inconsistent with that intent. (See § 531.504(b).)

OPM is amending § 531.507 to eliminate the requirement that agencies establish plans for granting quality step increases. Executive Order 11721 (Providing for Federal Pay Administration, May 23, 1973), as amended, which required that OPM establish such an agency responsibility, has been revoked. Accordingly, OPM may now deregulate further in this area and will no longer require these plans. Of course, agencies may continue to establish such plans. Additional references to Executive Order 11721 are also being removed. (See § 531.404(a), § 531.501, and § 531.507 (paragraph (a) as proposed, removed).)

OPM is not revising, as was proposed, the authority citation for part 531 and two of the provisions establishing principal authorities for regulating within-grade increases. The authority citation and the provision at § 531.401(c) need not be revised because of final regulations on incentive awards, pay, and leave published on June 27, 1995, at 60 FR 33097-33098. Those regulations corrected references in the authority citation and revised § 531.401(c) to replace references to 5 U.S.C. 5335 and E.O. 11721 (revoked) with a general reference to 5 U.S.C. 5338. The provision at § 531.401(d) need not be revised because the title of Public Law 103-89 is already identified properly. Accordingly, the authority citation as proposed is being revised to match current regulation (as amended June 27, 1995), and its instruction line revised to indicate no change. Also, the entire instruction to revise paragraphs (c) and (d) in § 531.401 is being removed. (See part 531 (authority citation) and § 531.401 (amendments to paragraphs (c) and (d) as proposed, withdrawn).)

The undesignated provision at the end of § 531.409(d) is being designated, which requires redesignation of the rest of § 531.409(d). (See §§ 531.409 (d)(1) through (d)(2).)

Finally, OPM received several comments suggesting minor editorial changes to improve understanding and readability of regulatory text. OPM is adopting many of them and making conforming changes. Also, minor editorial changes are being made to correct typographical errors or to clarify text: (See § 430.102(b)(4); § 430.201(b); § 430.202(c); §§ 430.204 (b) and (b)(3) through (b)(5); § 430.205(b);

§ 430.206(b)(6); § 430.207(d); § 430.208(b); part 451 (authority citation); §§ 451.101 (a) and (c); § 451.102 (award program); § 451.104(b); §§ 451.105 (a) and (b), §§ 451.106 (b) and (h); §§ 451.107 (a) and (b); § 451.201(b); § 531.402(a); § 531.403 (*acceptable level of competence, equivalent increase*) § 531.409(d)(2); and §§ 531.507 (a) and (b).)

IX. Requests for Guidance

Fourteen commenters requested that OPM provide additional guidance on a variety of topics, including:

- how to proceed from a centralized to a decentralized approach to systems and programs;
- model appraisal and award programs and information about agency experience;
- examples of what the phrase "or otherwise recorded" might cover and how agencies can appropriately move to a paperless format;
- examples of Governmentwide regulations with compliance implications for designing an award program; and
- examples of criteria and procedures that could be used to identify "sustained performance of high quality" when determining eligibility for quality step increases under appraisal programs that do not use a Level 5 summary.

OPM will issue additional guidance in various formats on all of these issues. In particular, agency personnel directors will receive specific guidance for submitting agency system descriptions. OPM will also provide program designers with examples of the wide variety of programs that can be designed under a single, flexible agency appraisal system.

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 apply only to Federal agencies and employees.

List of Subjects

5 CFR Parts 430 and 451

Decorations, medals, awards, Government employees.

5 CFR Part 432

Administrative practice and procedure, Government employees.

5 CFR Part 531

Government employees, Law enforcement officers, Wages.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending parts 430, 432, 451 and 531 of title 5, Code of Federal Regulations, as follows:

PART 430—PERFORMANCE MANAGEMENT

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

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

2. Subpart A, is revised to read as follows:

Subpart A—Performance Management

Sec.

430.101 Authority.

430.102 Performance management.

Subpart A—Performance Management**§ 430.101 Authority.**

Chapter 43 of title 5, United States Code, provides for the performance appraisal of Federal employees. This subpart supplements and implements this portion of the law.

§ 430.102 Performance management.

(a) Performance management is the systematic process by which an agency involves its employees, as individuals and members of a group, in improving organizational effectiveness in the accomplishment of agency mission and goals.

(b) Performance management integrates the processes in agency uses to—

- (1) Communicate and clarify organizational goals to employees;
- (2) Identify individual and, where applicable, team accountability for accomplishing organizational goals;
- (3) Identify and address developmental needs for individuals and, where applicable, teams;
- (4) Assess and improve individual, team, and organizational performance;
- (5) Use appropriate measures of performance as the basis for recognizing and rewarding accomplishments; and
- (6) Use the results of performance appraisal as a basis for appropriate personnel actions.

3. Subpart B, consisting of §§ 430.201 through 430.210, is revised to read as follows:

Subpart B—Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees

Sec.

430.201 General.

430.202 Coverage.

430.203 Definitions.

430.204 Agency performance appraisal system(s).

430.205 Agency performance appraisal program(s).

430.206 Planning performance.

430.207 Monitoring performance.

430.208 Rating performance.

430.209 Agency responsibilities.

430.210 OPM responsibilities.

Subpart B—Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees**§ 430.201 General.**

(a) *Statutory authority.* Chapter 43 of title 5, United States Code, provides for the establishment of agency performance appraisal systems and requires the Office of Personnel Management (OPM) to prescribe regulations governing such systems. The regulations in this subpart in combination with statute set forth the requirements for agency performance appraisal system(s) and program(s) for employees covered by subchapter I of chapter 43.

(b) *Savings provision.* The performance appraisal system portion of an agency's Performance Management Plan approved by OPM as of August 23, 1995 shall constitute an approved performance appraisal system under the regulations in this subpart until such time changes to the system are approved. No provision of the regulations in this subpart shall be applied in such a way as to affect any administrative proceeding related to any action taken under regulations in this chapter pending on August 23, 1995.

§ 430.202 Coverage.

(a) *Employees and agencies covered by statute.* (1) Section 4301(1) of title 5, United States Code, defines agencies covered by this subpart.

(2) Section 4301(2) of title 5, United States Code, defines employees covered by statute by this subpart. Besides General Schedule (GS/GM) and prevailing rate employees, coverage includes, but is not limited to, senior-level and scientific and professional employees paid under 5 U.S.C. 5376.

(b) *Statutory exclusions.* This subpart does not apply to agencies or employees excluded by 5 U.S.C. 4301(1) and (2), the United States Postal Service, or the Postal Rate Commission.

(c) *Administrative exclusions.* OPM may exclude any position or group of positions in the excepted service under the authority of 5 U.S.C. 4301(2)(G). The regulations in this subpart exclude excepted service positions for which employment is not reasonably expected to exceed the minimum period

established under § 430.207(a) in a consecutive 12-month period.

(d) *Agency requests for exclusions.* Heads of agencies or their designees may request the Director of OPM to exclude positions in the excepted service. The request must be in writing, explaining why the exclusion would be in the interest of good administration.

§ 430.203 Definitions.

In this subpart, terms are defined as follows:

Additional performance element means a dimension or aspect of individual, team, or organizational performance that is not a critical or non-critical element. Such elements are not used in assigning a summary level but, like critical and non-critical elements, are useful for purposes such as communicating performance expectations and serving as the basis for granting awards. Such elements may include, but are not limited to, objectives, goals, program plans, work plans, and other means of expressing expected performance.

Appraisal means the process under which performance is reviewed and evaluated.

Appraisal period means the established period of time for which performance will be reviewed and a rating of record will be prepared.

Appraisal program means the specific procedures and requirements established under the policies and parameters of an agency appraisal system.

Appraisal system means a framework of policies and parameters established by an agency as defined at 5 U.S.C. 4301(1) for the administration of performance appraisal programs under subchapter I of chapter 43 of title 5, United States Code, and this subpart.

Critical element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.

Non-critical element means a dimension or aspect of individual, team, or organizational performance, exclusive of a critical element, that is used in assigning a summary level. Such elements may include, but are not limited to, objectives, goals, program plans, work plans, and other means of expressing expected performance.

Performance means accomplishment of work assignments or responsibilities.

Performance appraisal system: See *Appraisal system.*

Performance plan means all of the written, or otherwise recorded,

performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.

Performance rating means the written, or otherwise recorded, appraisal of performance compared to the performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for the minimum period. A performance rating may include the assignment of a summary level (as specified in § 430.208(d)).

Performance standard means the management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance. A performance standard may include, but is not limited to, quality, quantity, timeliness, and manner of performance.

Progress review means communicating with the employee about performance compared to the performance standards of critical and non-critical elements.

Rating of record means the performance rating prepared at the end of an appraisal period for performance over the entire period and the assignment of a summary level (as specified in § 430.208(d)). This constitutes the official rating of record referenced in this chapter.

§ 430.204 Agency performance appraisal system(s).

(a) Each agency as defined at section 4301(1) of title 5, United States Code, shall develop one or more performance appraisal systems for employees covered by this subpart.

(b) An agency appraisal system shall establish agencywide policies and parameters for the application and operation of performance appraisal within the agency for the employees covered by the system. At a minimum, a agency system shall—

- (1) Provide for—
 - (i) Establishing employee performance plans, including, but not limited to, critical elements and performance standards;
 - (ii) Communicating performance plans to employees at the beginning of an appraisal period;
 - (iii) Evaluating each employee during the appraisal period on the employee's elements and standards;
 - (iv) Recognizing and rewarding employees whose performance so warrants;
 - (v) Assisting employees in improving unacceptable performance; and
 - (vi) Reassigning, reducing in grade, or removing employees who continue to

have unacceptable performance, but only after an opportunity to demonstrate acceptable performance.

(2) Identify employees covered by the system;

(3) Specify the flexibilities an agency program established under the system has for setting—

- (i) The length of the appraisal period (as specified in § 430.206(a));
 - (ii) The length of the minimum period (as specified in § 430.207(a));
 - (iii) The number(s) of performance levels at which critical and non-critical elements may be appraised (as specified in § 430.206(b)(7) (i)(A) and (ii)(A)); and
 - (iv) The pattern of summary levels that may be assigned in a rating of record (as specified in § 420.208(d));
- (4) Include, where applicable, criteria and procedures for establishing separate appraisal programs under an appraisal system; and
- (5) Require that an appraisal program shall conform to statute, the regulations of this chapter, and the requirements established by the appraisal system.
- (c) Agencies are encouraged to involve employees in developing and implementing their system(s). When agencies involve employees, the method of involvement shall be in accordance with the law.

§ 430.205 Agency performance appraisal program(s).

(a) Each agency shall establish at least one appraisal program of specific procedures and requirements to be implemented in accordance with the applicable agency appraisal system. At a minimum, each appraisal program shall specify the employees covered by the program and include the procedures and requirements for planning performance (as specified in § 430.206), monitoring performance (as specified in § 430.207), and rating performance (as specified in § 430.208).

(b) An agency program shall establish criteria and procedures to address employee performance for employees who are on detail, who are transferred, and for other special circumstances as established by the agency.

(c) An agency may permit the development of separate appraisal programs under an appraisal system.

(d) Agencies are encouraged to involve employees in developing and implementing their program(s). When agencies involve employees, the method of involvement shall be in accordance with law.

§ 430.206 Planning performance.

(a) *Appraisal period.* (1) An appraisal program shall designate an official appraisal period for which a

performance plan shall be prepared, during which performance shall be monitored, and for which a rating of record shall be prepared.

(2) The appraisal period shall generally be designated so that employees shall be provided a rating of record on an annual basis. An appraisal program may provide that longer appraisal periods may be designated when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.

(b) *Performance plan.* (1) Agencies shall encourage employee participation in establishing performance plans.

(2) Performance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days).

(3) An appraisal program shall require that each employee be covered by an appropriate written, or otherwise recorded, performance plan based on work assignments and responsibilities.

(4) Each performance plan shall include all elements which are used in deriving and assigning a summary level, including—

- (i) At least one critical element that addresses individual performance; and
- (ii) Any non-critical element(s).

(5) Each performance plan may include one or more additional performance elements, which—

- (i) Are not used in deriving and assigning a summary level, and
- (ii) Are used to support performance management processes as described at § 430.102(b).

(6) An appraisal program shall establish how many and which performance levels may be used to appraise critical and non-critical elements.

(7) Elements and standards shall be established as follows—

- (i) For a critical element—
 - (A) At least two levels for appraisal shall be used with one level being "Fully Successful" or its equivalent and another level being "Unacceptable," and
 - (B) A performance standard shall be established at the "Fully Successful" level and may be established at other levels.

(ii) For non-critical elements, when established,—

- (A) At least two levels for appraisal shall be used, and
- (B) A performance standard(s) shall be established at whatever level(s) is appropriate.

(iii) The absence of an established performance standard at a level specified in the program shall not preclude a determination that performance is at that level.

§ 430.207 Monitoring performance.

(a) *Minimum period.* An appraisal program shall establish a minimum period of performance that must be completed before a performance rating may be prepared.

(b) *Ongoing appraisal.* An appraisal program shall include methods for appraising each critical and non-critical element during the appraisal period. Performance on each critical and non-critical element shall be appraised against its performance standard(s). Ongoing appraisal methods shall include, but not be limited to, conducting one or more progress reviews during each appraisal period.

(c) *Marginal performance.* Appraisal programs should provide assistance whenever performance is determined to be below "Fully Successful" or equivalent but above "Unacceptable."

(d) *Unacceptable performance.* An appraisal program shall provide for—

(1) Assisting employees in improving unacceptable performance at any time during the appraisal period that performance is determined to be unacceptable in one or more critical elements; and

(2) Taking action based on unacceptable performance.

§ 430.208 Rating performance.

(a) As soon as practicable after the end of the appraisal period, a written, or otherwise recorded, rating of record shall be given to each employee.

(b) Rating of record procedures for each appraisal program shall include a method for deriving and assigning a summary level as specified in paragraph (d) of this section based on appraisal of performance on critical elements and, as applicable, non-critical elements.

(1) A Level 1 summary ("Unacceptable") shall be assigned if and only if performance on one or more

critical elements is appraised as "Unacceptable."

(2) Consideration of non-critical elements shall not result in assigning a Level 1 summary ("Unacceptable").

(c) The method for deriving and assigning a summary level may not limit or require the use of particular summary levels (i.e., establish a forced distribution of summary levels). However, methods used to make distinctions among employees or groups of employees such as comparing, categorizing, and ranking employees or groups on the basis of their performance may be used for purposes other than assigning a summary level including, but not limited to, award determinations and promotion decisions.

(d) *Summary levels.* (1) An appraisal program shall use one of the following patterns of summary levels:

Pattern	Summary level				
	1	2	3	4	5
A	X	.....	X	.....	.....
B	X	.....	X	.....	X
C	X	.....	X	X	.....
D	X	X	X	.....	.....
E	X	.....	X	X	X
F	X	X	X	.....	X
G	X	X	X	X	.....
H	X	X	X	X	X

(2) Summary levels shall comply with the following requirements:

(i) Level 1 through Level 5 are ordered categories, with Level 1 as the lowest and Level 5 as the highest;

(ii) Level 1 is "Unacceptable";

(iii) Level 3 is "Fully Successful" or equivalent; and

(iv) Level 5 is "Outstanding" or equivalent.

(3) The term "Outstanding" shall be used only to describe a Level 5 summary.

(4) Summary levels (Level 1 through Level 5) shall be used to provide consistency in describing ratings of record and in referencing other related regulations (including, but not limited to, § 351.504 of this chapter).

(e) A rating of record of "Unacceptable" (Level 1) shall be reviewed and approved by a higher level management official.

(f) The rating of record or performance rating for a disabled veteran shall not be lowered because the veteran has been absent from work to seek medical treatment as provided in Executive Order 5396.

(g) When a rating of record cannot be prepared at the time specified, the

appraisal period shall be extended. Once the conditions necessary to complete a rating of record have been met, a rating of record shall be prepared as soon as practicable.

(h) A performance rating may be prepared at such other times as an appraisal program may specify for special circumstances including, but not limited to, transfers and performance on details.

§ 430.209 Agency responsibilities.

An agency shall—

(a) Submit to OPM for approval a description of its appraisal system(s) as specified in § 430.204(b) of this subpart, and any subsequent changes that modify any element of the agency's system(s) that is subject to a regulatory requirement in this part;

(b) Transfer the employee's most recent ratings of record, and any subsequent performance ratings, when an employee transfers to another agency or is assigned to another organization within the agency in compliance with part 293 of this chapter and instructions in the OPM Operating Manual, THE GUIDE TO PERSONNEL RECORDKEEPING, for sale by the U.S.

Government Printing Office, Superintendent of Documents;

(c) Communicate with supervisors and employees (e.g., through formal training) about relevant parts of its performance appraisal system(s) and program(s);

(d) Evaluate the performance appraisal system(s) and performance appraisal program(s) in operation in the agency;

(e) Report ratings of record data to the Central Personnel Data File in compliance with instructions in the OPM Operating Manual, FEDERAL WORKFORCE REPORTING SYSTEMS, for sale by the U.S. Government Printing Office, Superintendent of Documents;

(f) Maintain and submit such records as OPM may require; and

(g) Take any action required by OPM to ensure conformance with applicable law, regulation, and OPM policy.

§ 430.210 OPM responsibilities.

(a) OPM shall review and approve an agency's performance appraisal system(s).

(b) OPM may evaluate the operation and application of an agency's

performance appraisal system(s) and program(s).

(c) If OPM determines that an appraisal system or program does not meet the requirements of applicable law, regulation, or OPM policy, it shall direct the agency to implement an appropriate system or program or to take other corrective action.

4. In § 430.303, the last sentence of the definition of *Performance Management Plan* is revised to read as follows:

§ 430.303 Definitions.

* * * * *

Performance Management Plan * * *
The Performance Management Plan, which includes the SES performance appraisal plan, must be submitted to OPM for review and approval as required in § 430.310 of this subpart.

* * * * *

5. Section 430.310 is revised to read as follows:

§ 430.310 SES Performance appraisal systems.

Agencies must submit proposed SES performance appraisal plans to OPM for approval as part of Performance Management Plans in accordance with provisions of this subpart.

6. Subpart D [Reserved], and Subpart E, consisting of §§ 430.501 through 430.506, are removed.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

7. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

8. In § 432.103, paragraph (b) is revised to read as follows:

§ 432.103 Definitions.

* * * * *

(b) *Critical element* means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.

* * * * *

PART 451—AWARDS

9. The title of part 451 is revised to read as follows:

PART 451—AWARDS

10. The authority citation for part 451 is revised to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 12828.

11. Subpart A, consisting of §§ 451.101 through 451.107, is revised to read as follows:

Subpart A—Agency Awards

Sec.

- 451.101 Authority and coverage.
- 451.102 Definitions.
- 451.103 Agency award program(s).
- 451.104 Awards.
- 451.105 Award restrictions.
- 451.106 Agency responsibilities.
- 451.107 OPM responsibilities.

Subpart A—Agency Awards

§ 451.101 Authority and coverage.

(a) Chapter 45 of title 5, United States Code authorizes agencies to pay a cash award to, grant time-off to, and incur necessary expense for the honorary recognition of, an employee (individually or as a member of a group) and requires the Office of Personnel Management to prescribe regulations governing such authority. Chapter 43 of title 5, United States Code, provides for recognizing and rewarding employees whose performance so warrants. The regulations in this subpart, in combination with chapters 43 and 45 of title 5, United States Code, and any other applicable law, establish the requirements for agency award programs.

(b) Section 4 of E.O. 11438 (Prescribing Procedures Governing Interdepartmental Cash Awards to the Members of the Armed Forces, December 3, 1968) requires the Office of Personnel Management to prescribe procedures for covering the cost of a cash award recommended by more than one agency for a member of the armed forces for the adoption or use of a suggestion, invention, or scientific achievement. Section 1 of E.O. 12828 (Delegation of Certain Personnel Management Authorities, January 5, 1993) delegates to the Office of Personnel Management the authority of the President to permit performance-based cash awards under 5 U.S.C. 4505a to be paid to categories of employees who would not be eligible otherwise.

(c) This subpart applies to employees as defined by section 2105 and agencies as defined by section 4501 title 5, United States Code, except as provided in §§ 451.105 and 451.201(b).

(d) For the regulatory requirements for granting performance awards to Senior Executive Service (SES) employees under 5 U.S.C. 5384, refer to § 534.403 of this chapter.

§ 451.102 Definitions.

Award means something bestowed or an action taken to recognize and reward individual or team achievement that

contributes to meeting organizational goals or improving the efficiency, effectiveness, and economy of the Government or is otherwise in the public interest. Such awards include, but are not limited to, employee incentives which are based on predetermined criteria such as productivity standards, performance goals, measurement systems, award formulas, or payout schedules.

Award program means the specific procedures and requirements established by an agency or a component of an agency for granting awards under subchapter I of chapter 43 and subchapter I of chapter 45 of title 5, United States Code, and this subpart.

§ 451.103 Agency award program(s).

(a) Agencies shall develop one or more award programs for employees covered by this subpart.

(b) Agencies are encouraged to involve employees in developing such programs. When agencies involve employees, the method of involvement shall be in accordance with law.

(c) An agency award program shall provide for—

(1) Obligating funds consistent with applicable agency financial management controls and delegations of authority; and

(2) Documenting justification for awards that are not based on a rating of record (as defined in § 430.20 of this chapter).

§ 451.104 Awards.

(a) An agency may grant a cash, honorary, or informal recognition award, or grant time-off without charge to leave or loss of pay consistent with chapter 45 of title 5, United States Code, and this part to an employee, as an individual or member of a group, on the basis of—

(1) A suggestion, invention, superior accomplishment, productivity gain, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork;

(2) A special act or service in the public interest in connection with or related to official employment; or

(3) Performance as reflected in the employee's most recent rating of record (as defined in § 430.203 of this chapter), except that performance awards may be paid to SES employees only under § 534.403 of this chapter and not on the basis of this subpart.

(b) A cash award under this subpart is a lump sum payment and is not basic pay for any purpose.

(c) An award is subject to applicable tax rules, such as withholding.

(d) When an award is approved for—
 (1) An employee of another agency, the benefiting agency shall make arrangements to transfer funds to the employing agency to cover the award. If the administrative costs of transferring funds would exceed the amount of the award, the employing agency shall absorb the award costs and pay the award; and

(2) A member of the armed forces for a suggestion, invention, or scientific achievement, arrangements shall be made to transfer funds to the agency having jurisdiction over the member in accordance with E.O. 11438, "Prescribing Procedures Governing Interdepartmental Cash Awards to the Members of the Armed Forces".

(e) An award may be granted to a separated employee or the legal heir(s) or estate of a deceased employee.

(f) A time-off award granted under this subpart shall not be converted to a cash payment under any circumstances.

(g) When granting an award on the basis of a rating of record that is paid as a percentage of basic pay under 5 U.S.C. 4505a(a)(2)(A), the rate of basic pay used shall be determined without taking into account any locality-based comparability payment under 5 U.S.C. 5304 or an interim geographic adjustment or special law enforcement adjustment under section 302 or 404 of the Federal Employees Pay Comparability Act of 1990, respectively.

§ 451.105 Award restrictions.

(a) In accordance with 5 U.S.C. 4508, agencies shall not grant awards under this subpart during a Presidential election period to employees who are—

(1) In a Senior Executive Service position and not a career appointee as defined under 5 U.S.C. 3132(a)(4); or

(2) In an excepted service position of a confidential or policy-determining character (schedule C).

(b) In accordance with 5 U.S.C. 4509, agencies shall not grant cash awards under this subpart to employees appointed by the President with Senate confirmation who serve in—

(1) An Executive Schedule position, or

(2) A position for which pay is set in statute by reference to a section or level of the Executive Schedule.

§ 451.106 Agency responsibilities.

(a) In establishing and operating its award program(s), an agency shall assure that a program does not conflict with or violate any other law or Governmentwide regulation.

(b) When a recommended award would grant more than \$10,000 to an individual employee, the agency shall

submit the recommendation to OPM for approval.

(c) Agencies shall provide for communicating with employees and supervisors (e.g., through formal training) about the relevant parts of their award program(s).

(d) Agencies shall evaluate their award program(s).

(e) Agencies shall document all cash and time off awards in compliance with instructions in the OPM Operating Manual, THE GUIDE TO PROCESSING PERSONNEL ACTIONS, for sale by the U.S. Government Printing Office, Superintendent of Documents.

(f) Agencies shall file award documents in the Official Personnel Folder in compliance with instructions in the OPM Operating Manual, THE GUIDE TO PERSONNEL RECORDKEEPING, for sale by the U.S. Government Printing Office, Superintendent of Documents.

(g) Agencies shall report award data to the Central Personnel Data File in Compliance with instructions in the OPM Operating Manual, FEDERAL WORKFORCE REPORTING SYSTEMS, for sale by the U.S. Government Printing Office, Superintendent of Documents.

(h) Agencies shall maintain and submit to OPM such records as OPM may require.

(i) Agencies shall give due weight to an award granted under this part in qualifying and selecting an employee for promotion as provided in 5 U.S.C. 3362.

(j) Agencies shall take any corrective action required by OPM to ensure conformance with applicable law, regulation, and OPM policy.

§ 451.107 OPM responsibilities.

(a) OPM shall review and approve or disapprove each agency recommendation for an award that would grant more than \$10,000 to an individual employee.

(b) When a recommended award would grant more than \$25,000 to an individual employee, OPM shall review the recommendation and submit it (if approved) to the President for final approval.

(c) OPM shall review and approve or disapprove a request from the head of an Executive agency to extend the provisions of 5 U.S.C. 4505a to any category of employees within that agency that would not be covered otherwise.

(d) OPM may evaluate the operation and application of an agency's award program(s).

12. In § 451.201, the second introductory paragraph (a) is removed, paragraph (b), (c), and (d) are redesignated as paragraphs (c), (d), and

(e) respectively, and a new paragraph (b) is added to read as follows:

§ 451.201 Authority and coverage.

* * * * *

(b) Awards granted under paragraph (a) of this section are subject to the restrictions as specified in § 451.105.

* * * * *

13. Subpart C, consisting of §§ 451.301 through 451.307, is removed.

PART 531—PAY UNDER THE GENERAL SCHEDULE

14. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316;

Subpart A also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101-509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101-509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102-378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) 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(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682.

15. In § 531.402, paragraph (a) is revised to read as follows:

§ 531.402 Employee coverage.

(a) Except as provided in paragraph (b) of this section, this subpart applies to employees who occupy permanent positions classified and paid under the General Schedule and who are paid less than the maximum rate of their grades.

* * * * *

16. In § 531.403, the definitions of *acceptable level of competence*, *critical element*, and *equivalent increase* are revised to read as follows:

§ 531.403 Definitions.

* * * * *

Acceptable level of competence means performance by an employee that warrants advancement of the employee's rate of basic pay to the next higher step of the grade or the next higher rate within the grade (as defined in this section) of his or her position, subject to the requirements of § 531.404 of this subpart, as determined by the head of the agency.

* * * * *

Critical element has the meaning given that term in § 430.203 of this chapter.

* * * * *

Equivalent increase means an increase or increases in an employee's rate of basic pay equal to or greater than the difference between the employee's rate of basic pay and the rate of pay for the next higher step of that grade or the next higher rate within the grade (as defined in this section).

* * * * *

17. In § 531.404, the introductory text, and the introductory text of paragraph (a) are revised to read as follows:

§ 531.404 Earning within-grade increase.

An employee paid at less than the maximum rate of the grade of his or her position shall earn advancement in pay to the next higher step of the grade or the next higher rate within the grade (as defined in § 531.403) upon meeting the following three requirements established by law:

(a) The employee's performance must be at an acceptable level of competence, as defined in this subpart. To be determined at an acceptable level of competence, the employee's most recent rating of record (as defined in § 430.203 of this chapter) shall be at least Level 3 ("Fully Successful" or equivalent).

* * * * *

18. Section 531.408 is removed and reserved.

§ 531.408 [Reserved].

19. In § 531.409, paragraphs (b) and (d) are revised to read as follows:

§ 531.409 Acceptable level of competence determinations.

* * * * *

(b) *Basis for determination.* When applicable, an acceptable level of competence determination shall be based on a current rating of record made under part 430, subpart B, of this chapter. For those agencies not covered by chapter 43 of title 5, United States Code, and for employees in positions excluded from 5 U.S.C. 4301, an acceptable level of competence determination shall be based on performance appraisal requirements established by the agency. If an employee has been reduced in grade because of unacceptable performance and has served in one position at the lower grade for at least the minimum period established by the agency, a rating of record at the lower grade shall

be used as the basis for an acceptable level of competence determination.

* * * * *

(d) *Waiver of requirement for determination.* (1) An acceptable level of competence determination shall be waived and a within-grade increase granted when an employee has not served in any position for the minimum period under an applicable agency performance appraisal program during the final 52 calendar weeks of the waiting period for one or more of the following reasons:

(i) Because of absences that are creditable service in the computation of a waiting period or periods under § 531.406 of this subpart;

(ii) Because of paid leave;

(iii) Because the employee received service credit under the back pay provisions of subpart H of part 550 of this chapter;

(iv) Because of details to another agency or employer for which no rating has been prepared;

(v) Because the employee has had insufficient time to demonstrate an acceptable level of competence due to authorized activities of official interest to the agency not subject to appraisal under part 430 of this chapter (including, but not limited to, labor-management partnership activities under section 2 of Executive Order 12871 and serving as a representative of a labor organization under chapter 71 of title 5, United States Code); or

(vi) Because of long-term training.

(2) When an acceptable level of competence determination has been waived and a within-grade increase granted under paragraph (d)(1) of this section, there shall be a presumption that the employee would have performed at an acceptable level of competence had the employee performed the duties of his or her position of record for the minimum period under the applicable agency performance appraisal program.

* * * * *

20. Section 531.501 is revised to read as follows:

§ 531.501 Applicability.

This subpart contains regulations of the Office of Personnel Management to carry out section 5336 of title 5, United States Code, which authorizes the head of an agency, or another official to whom such authority is delegated, to grant quality step increases.

21. Section 531.503 is revised to read as follows:

§ 531.503 Purpose of quality step increases.

The purpose of quality step increases is to provide appropriate incentives and recognition for excellence in performance by granting faster than normal step increases.

22. Section 531.504 is revised to read as follows:

§ 531.504 Level of performance required for quality step increase.

A quality step increase shall not be required but may be granted only to—

(a) An employee who receives a rating of record at Level 5 ("Outstanding" or equivalent), as defined in part 430, subpart B, of this chapter; or

(b) An employee who, when covered by a performance appraisal program that does not use a Level 5 summary—

(1) Receives a rating of record at the highest summary level used by the program; and

(2) Demonstrates sustained performance of high quality significantly above that expected at the "Fully Successful" level in the type of position concerned, as determined under performance-related criteria established by the agency.

23. Section 531.506 is revised to read as follows:

§ 531.506 Effective date of a quality step increase.

The quality step increase should be made effective as soon as practicable after it is approved.

24. Section 531.507 is revised to read as follows:

§ 531.507 Agency responsibilities.

(a) Agencies shall maintain and submit to OPM such records as OPM may require.

(b) Agencies shall report quality step increases to the Central Personnel Data File in compliance with instructions in the OPM Operating Manual, FEDERAL WORKFORCE REPORTING SYSTEMS, for sale by the U.S. Government Printing Office, Superintendent of Documents.

25. Section 531.508 is revised to read as follows:

§ 531.508 Evaluation of quality step increase authority.

The Office of Personnel Management may evaluate an agency's use of the authority to grant quality step increases. The agency shall take any corrective action required by the Office.

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