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.
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606–0824, or email to
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
mitigate 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
departs 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 prudently fund 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.

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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 be maintained 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 section 550.714(b) accordingly.

In addition, questions were raised about the reference to a "private entity" in the proposed section 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 guarantees 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:


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;
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.

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)(i) 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. This section also 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 increases 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