

Rules and Regulations

Federal Register

Vol. 72, No. 7

Thursday, January 11, 2007

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 451

RIN 3206-AL06

Awards

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations to amend the incentive awards regulations. The amended regulations clarify that if agencies grant rating-based awards, they must base such awards on a rating of record of "Fully Successful" (or equivalent) or higher. In addition, agencies must ensure that rating-based awards granted make meaningful distinctions based on levels of performance.

DATES: The regulations are effective on February 12, 2007.

FOR FURTHER INFORMATION CONTACT: Barbara Colchao by telephone at (202) 606-2720, by fax at (202) 606-2307, or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On June 21, 2006, the Office of Personnel Management (OPM) published proposed regulations amending the incentive awards regulations in part 451 of title 5, Code of Federal Regulations, regarding performance-based cash awards (particularly those authorized under 5 U.S.C. 4505a and 5 CFR 451.101(e) and 451.104(a)(3)). The proposed regulations clarified that agencies using these incentive awards authorities to grant employees performance-based cash awards must base them on a rating of record of "Fully Successful" (or equivalent) or higher and ensure that such awards reflect meaningful distinctions based on levels of performance.

The changes to the regulations address only rating-based awards, i.e., those awards given to recognize performance over the course of the appraisal period and that require only the rating of record as justification for granting the award. These changes do not affect other awards agencies may grant, when appropriate, that require independent documentation, such as those based on special acts, suggestions, and gainsharing or goalsharing formulas tied to group performance. In making these changes, OPM intends to retain the flexibilities agencies currently have to design their awards programs while reiterating there is no statutory entitlement to recognition.

The proposed regulations provided for a 30-day public comment period that ended July 21, 2006. During the public comment period OPM received about 74 comments in 39 submissions and 5 phone calls that raised multiple questions or concerns. We received written comments from 31 individuals (representing approximately 19 Federal agencies, and 1 from the private sector), 3 letters from 2 labor unions (American Federation of Government Employees and the National Treasury Employees Union), and 5 agencies (Departments of Agriculture, Commerce, Justice, and Veterans Affairs, and the Nuclear Regulatory Commission).

Most of the comments can be grouped into ten major themes—support for the proposal, concerns about the influence of favoritism and bias, the need to train rating officials, the impact on two-level (pass/fail) rating systems, funding awards, making meaningful distinctions and calculating the awards, the use of performance review boards or awards committees, opposition to changing the regulations, base pay and other awards, and other miscellaneous observations. The following information summarizes and responds to these issues.

Support for the Proposed Regulations

We received three comments from individuals in support of the changes. One comment wholeheartedly supports the proposed regulations. Another comment supports the proposed changes and agrees with the emphasis on making meaningful distinctions between levels of performance. An additional comment suggests that the regulations should require employees to have a rating higher than "Fully

Successful" to be eligible to receive a performance-based cash award.

These regulations are codifying the statutory threshold for performance-based cash awards established under 5 U.S.C. 4505a, as regulated under 5 CFR 451.101(e) and 451.104(a)(3). Neither the statute nor the regulations require granting awards on the basis of any specific rating level or to all employees who receive such a rating. Therefore, agencies continue to have the flexibility to design their awards programs to support their performance culture and can establish threshold performance levels that are appropriate for them as long as those levels are not lower than the one set forth in statute. Those agencies using rating-based awards typically design their programs so that the awards increase for employees with higher rating levels. Such a design complies with these regulations. Agencies must ensure that in applying their rating-based awards program they retain this aspect of their design. In doing so, they also retain the flexibility to take into consideration other forms of recognition that have been granted to the employee, especially if it recognizes aspects of the employee's performance that are also captured in the rating of record.

Favoritism and Bias

By far the most frequent comment expressed in various fashions was the concern that awards would be influenced by favoritism or bias. We received 11 comments (1 union and 10 individuals) regarding a perceived tendency to show favoritism or bias toward particular groups or categories of employees. The union comments that the proposed regulations do not address possible favoritism and bias, such as the prospect that minorities and women might suffer an adverse impact from changes in personnel policies. The union recommends that, before implementing these regulations, OPM order all Federal agencies to conduct an adverse impact analysis to ensure that there will be no adverse impact on classes of employees based on race, national origin, gender, grade or bargaining unit status. A few comments state that men or supervisors and managers would profit from this policy change more than others. Several other comments state that supervisors would

grant awards to their favorite employees.

OPM understands some employees may fear favoritism will influence the distribution of rating-based awards. However, we believe establishing and maintaining rating-based awards programs with clear guidelines that are applied in a fair and transparent manner and consistently granting awards that make meaningful distinctions based on differences in levels of performance are effective ways to confront favoritism, either real or perceived. Agencies need to inform supervisors and employees on the specifics of their rating-based awards program and the effective use of recognition and incentives. Since rating-based awards are not the only type of award agencies have in their award programs, it is important for all involved to understand the criteria used to grant different types of awards and how they can be used most effectively. Understanding the full range of the types of awards available and the bases for which they might be granted supports the transparency of any awards program.

Regarding the union's comment on conducting an impact analysis, these regulations formalize a practice that has been prevalent in agencies for a long time, i.e., granting performance-based awards so that larger awards go to employees with higher ratings of record. We concur agencies should include in their evaluation of their awards programs the type of analysis recommended by the union comment. We also strongly encourage agencies to include checks and balances in the design and implementation of their incentive awards and recognition programs to further ensure openness and fairness.

Training for Rating Officials

We received eight comments (two unions, one agency, and five individuals) requesting additional training for managers and supervisors. Several comments state rating officials need more specific guidance and oversight in order to implement a fair and unbiased system. Other comments say the regulations are unclear regarding what procedure should be followed to ensure "meaningful distinction." One union comment recommends funding should be made available for performance management training and that legislation should be in place to make performance management training mandatory. Two comments concern the ability of supervisors who lack training in performance management to evaluate employees with special work assignments that cannot be compared to

the work assignments of their co-workers. Several comments, including those from the unions, recommend increasing training for managers and holding them accountable for implementing good management practices, including the skills to recognize and reward employee contributions to their agency.

We agree that everyone affected by agency awards programs, both those who administer them and those who might be eligible to participate in them, should understand the types of awards available and their eligibility criteria, i.e., the bases for the different types of awards. We encourage agencies to provide training to all managers and supervisors administering awards programs to ensure these programs are administered fairly. We also encourage agencies, as specified in existing regulations, to inform employees about the various agency awards programs so they understand what is required to be eligible for an award. However, we note again that there is no entitlement to an award.

Although these regulations do not amend the performance appraisal regulations, we agree that for rating-based awards programs to be applied in a way that makes meaningful distinctions based on differences in levels of performance, supervisors and managers must have the necessary skills to practice effective performance management. Agencies are responsible for seeing that their supervisors and managers receive the appropriate training to ensure they have these skills. Furthermore, we encourage agencies to hold supervisors responsible, through their own individual performance plans, for the effective management and appraisal of their employees.

Two-Level (Pass/Fail) Rating System

We received three comments (one union and two individuals) concerning the impact of these regulations on employees covered by a two-level performance appraisal system, commonly referred to as a pass/fail performance appraisal system. Two comments observe agencies still using a pass/fail system are unable to make meaningful distinctions because these systems do not make distinctions above "Fully Successful." One comment wants to know how these requirements for rating-based awards would affect an agency using a pass/fail system.

While at one time pass/fail appraisal programs covered nearly half of all non-Senior Executive Service employees, in recent years the trend has shifted. Under the President's Management Agenda and its performance culture initiative,

most agencies have returned to using appraisal systems that provide for differentiating multiple levels of performance. Also, agencies with pass/fail performance appraisal programs tend to "de-link" awards from ratings and, therefore, did not and do not use rating-based awards, which use the rating of record as the sole justification for the award. Instead, they commonly use other available award authorities to reward specific employee accomplishments rather than recognizing year-long performance based on their ratings of record, which do not provide differentiation among their successful performers. Therefore, even with these regulatory changes employees who may still be covered by pass/fail performance appraisal programs could be eligible for awards granted on other bases.

Funding and Budgetary Concerns

Four comments (one union and three individuals) raised concerns about the effect of lack of funding or other budgetary constraints on awards programs. The union comment notes that any changes involving the distribution of performance-based cash awards require extensive training for managers, supervisors, and employees and would require adequate funding for such training. The union also states OPM should mandate that awards budgets for bargaining unit and nonbargaining unit employees should be kept separate and distinct and developed based on an equitable formula. Individual comments express concerns about agency-specific awards funding issues, how award amounts are derived, and agencies' ability to operate an awards program with little or no money.

While training and retraining is always an agency concern and responsibility, as we have stated previously, many agencies have been using rating-based awards for many years. Where they are used and employees with higher ratings of record receive larger awards than those with lower ratings, these programs would not appear to need to be changed since they already would comply with these regulations. Agencies retain the flexibility for the design and application of these awards programs. OPM recognizes that there are various ways to meet these requirements and does not intend to restrict agency flexibility.

The changes in the award regulations do not directly impact agency award funding. Agency funding for awards programs has remained fairly constant, around 1 percent of payroll, for many years. Given the reality of funding and

budget constraint concerns, the judicious and effective use of limited funds is even more important. To support high performance cultures, agencies must ensure that the application of their rating-based awards programs makes meaningful distinctions based on differences in performance levels, thus reinforcing the message that performance matters. In addition, the appropriate use of the full complement of employee incentives and recognition can help achieve agencies' performance culture objectives, even in times of lean resources.

Making Meaningful Distinctions and Calculating Awards

While not as numerous as the comments on favoritism, perhaps the areas that generated the most confusion were the phrase, "making meaningful distinctions based on levels of performance," and the explanation that this could be exemplified by employees with higher ratings of record receiving larger awards, as a percentage of base pay, than those with lower ratings. We received a total of 15 comments regarding these two issues (1 union, 4 agencies, and 10 individuals). One comment said the terminology regarding meaningful distinctions is unnecessarily vague and subject to varying interpretation. Several comments inquire whether agencies have the discretion to make the distinctions in performance based on the dollar amount of the awards, rather than their percentage of base salary. Other comments make specific recommendations such as a suggested mathematical formula for determining award amounts, or requiring the same dollar amount for the same performance rating level by grade, or using a mid-point of the grade as the basis for the award rather than the individual employee's specific rate of pay. Other comments request additional guidance on what procedures agencies should put in place to ensure that managers are making meaningful distinctions in performance from one rating level to another and how to ensure that the highest awards are granted to the highest performers. The union comment suggests that lack of uniformity in awards for employees performing at the same high level will cause problems and trigger doubts about the credibility and validity of the system.

Current statute provides a specific authority to pay cash awards on the basis of an employee's most recent rating of record. Because this type of award requires no additional justification beyond the rating of record, these regulations require agencies using

this authority to ensure the amounts of these award payments reflect meaningful distinctions based on levels of performance. OPM is confident that agencies using ratings of record as the sole basis for granting cash awards are doing this already. The regulation codifies this practice to ensure that all agencies choosing to use this rating-based award authority do so appropriately. Because OPM views the concept of making meaningful distinctions as a principle and recognizes that there is more than one way to meet the requirement to make meaningful distinctions, we believe it is essential to retain Governmentwide flexibility in this area. Such flexibility is certainly not intended and is not expected to result in chaos at the agency level. Each agency program must determine how acting on those distinctions can be translated into agency procedures that are accurately described and applied fairly.

Furthermore, OPM does not intend to restrict how agencies calculate rating-based awards, whether as a lump-sum dollar amount or a percentage of base pay. We believe that expressing the award as a percentage of base pay is a common and easily understood way to explain that making meaningful distinctions in performance means employees with higher performance ratings who get rating-based awards receive larger awards than those with lower ratings. Our choice to use percentage of base pay in our explanation does not affect agencies' ability to make these distinctions by granting employees with higher ratings higher lump-sum dollar payments.

Performance Review Boards and Awards Committees

We received three comments on this issue (one union and two individuals). Two comments suggest the establishment of performance review boards would provide oversight of the process. In addition, the union recommends the use of award committees to assist in keeping the awards process open and transparent. The union states performance review boards and awards committees will counteract some of the perceived secrecy surrounding the awards process, including why specific employees receive awards.

While these regulations do not mandate review boards for awards (as required for the Senior Executive Service), agencies have the flexibility to establish such boards. OPM encourages agencies to have mechanisms in place to provide oversight of and to evaluate their awards programs. However, we do

not consider it appropriate to mandate the establishment of such boards and thus leave that decision to the discretion of the agency.

Opposition to Changing the Regulations

We received six comments (two unions, one agency, and three individuals) stating their opposition to the revisions. The agency comments that the regulation would result in unnecessarily rigid rules that would hinder making meaningful distinctions. One union comments that the regulations would undermine the merit principle of equal pay for equal work. Another union states there is no need for the regulation. Two comments recognize that while they consider the General Schedule system to be flawed, it is fair, and they express skepticism about the presence of fairness in the regulations. One comment opposes the change because it is seen as legislating awards.

Many of these comments confuse rating-based awards with position classification and with pay-for-performance systems that would affect the rate of basic pay. Much of the opposition expressed is more directly related to pay for performance than to the revisions in the awards regulations. The practical effect of these regulations does not restrict agency flexibility in its awards programs. Rather, the regulations codify a statutory threshold and ensure the appropriate use of a specific authority.

Base Pay and Other Awards

We also received four comments (three individuals and one agency) concerning what effect the regulations would have on time-off awards, within-grade increases, raises, and gainsharing programs.

The regulations affect only rating-based awards. Other agency incentive and recognition programs are not affected. Furthermore, agencies can continue to establish and use decision criteria that take into account other pay decisions made so that the total aggregation of all forms of compensation and additional recognition do not result in unintended, disproportionate rewards for the employee. While time-off awards are not direct additional payments to an employee, they do represent an expense to the agency and a valued form of recognition to the employee. As such, it may be appropriate to consider substantial time-off awards granted to recognize an employee's accomplishments that are reflected in a rating of record when contemplating the total "amount" of

compensation/recognition the agency is providing.

Miscellaneous Issues

One individual comment objects to the waiver of the 60-day comment period.

OPM provided a 30-day comment period in lieu of the 60-day comment period to enable issuance of final regulations when most agencies are making their awards decisions, which will give practical effect to these regulations.

A union comment expresses concern that the regulation violates the merit system principle. In addition, an agency observed that the legal citation for the merit system principle is incorrect. The union further questions the appropriateness of limiting the awards to employees with ratings of record of "Fully Successful" or higher since an employee with a lower rating may have accomplished something exemplary in a single aspect of the job.

The regulations clearly support the merit system principle that provides for appropriate incentives and recognition for excellence in performance. Regarding the limitation to employees rated "Fully Successful" or higher, this restriction applies only to rating-based awards and is the statutory threshold. Other authorities within 5 CFR part 451 permit agencies to provide recognition for other performance when appropriate. The rating-based award is only one way of providing recognition. Also, OPM acknowledges that the correct citation for the merit system principle referenced is 5 U.S.C. 2301(b)(3).

One comment questions if the regulations would lead employees rated at the "Fully Successful" level to feel entitled to a cash award. Others said requiring distinctions would result in the forced distribution of ratings.

As we have stated, and we believe most employees understand, awards are not an entitlement. Furthermore, the requirement for making distinctions in rating-based awards reflects and supports rather than drives those distinctions already made in the levels of performance.

One comment recommends that OPM require agencies to base cash awards programs on methodologies that have been shown through research to result in improved productivity or quality of performance in the entire organization.

OPM regulations set up broad frameworks within which individual agencies design and operate their own specific awards programs. To best support their own performance cultures, agencies have the flexibility to establish

and adapt awards policies and the criteria and conditions under which awards may be granted, as long as they do not violate regulation or statute.

One comment asks whether the rate used to compute a rating-based award includes locality pay.

Yes, a recent change in law removed a previous requirement to exclude locality pay from rating-based awards when computed as a percentage of base pay. These regulations do not change the regulations affecting when locality pay is considered to be basic pay.

Other comments are outside the scope and intent of these regulations and thus are not addressed here. These comments include concerns about the National Security Personnel System and the perceived possible adverse impact of pay for performance in the Federal Government, including a decrease in teamwork, low morale and competition among employees, and increased departure from Government service.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget as a significant regulatory action 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 451

Decorations, Medals, Awards, Government employees.

Office of Personnel Management.

Linda M. Springer,
Director.

■ Accordingly, the Office of Personnel Management is amending 5 CFR part 451 as follows:

PART 451—AWARDS

■ 1. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966–1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart A—Agency Awards

■ 2. In § 451.101, paragraph (e) is revised to read as follows:

§ 451.101 Authority and coverage.

* * * * *

(e) An agency may grant performance-based cash awards on the basis of a rating of record at the fully successful level (or equivalent) or above under the

authority of 5 U.S.C. 4505a and the provisions of this part to eligible non-GS employees who are covered by 5 U.S.C. chapter 45 and this part and who are not otherwise covered by an explicit statutory authority for the payment of such awards, including 5 U.S.C. 5384 (SES performance awards).

■ 3. In § 451.104, paragraph (a)(3) is revised and a new paragraph (h) is added to read as follows:

§ 451.104 Awards.

(a) * * *

(3) Performance as reflected in the employee's most recent rating of record (as defined in § 430.203 of this chapter), provided that the rating of record is at the fully successful level (or equivalent) or above, except that performance awards may be paid to SES members only under § 534.405 of this chapter and not on the basis of this subpart.

* * * * *

(h) Programs for granting performance-based cash awards on the basis of a rating of record at the fully successful level (or equivalent) or above, as designed and applied, must make meaningful distinctions based on levels of performance.

[FR Doc. E7–262 Filed 1–10–07; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

RIN 1904–AB54

Energy Conservation Standards for Certain Ceiling Fan Light Kits

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule; technical amendment.

SUMMARY: The Department of Energy (DOE) is publishing this technical amendment in order to place in the Code of Federal Regulations the energy conservation standards for ceiling fan light kits with sockets other than medium screw base or pin-based for fluorescent lamps that Congress prescribed in the Energy Policy Act of 2005.

DATES: *Effective Date:* January 11, 2007.

FOR FURTHER INFORMATION CONTACT: Linda Graves, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000