Senior Executives Association

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February 21, 2012

COMMENTS WITH RESPECT TO OPM'S PROPOSED RULES
REGARDING PAY FOR SENIOR-LEVEL AND SCIENTIFIC OR PROFESSIONAL POSITIONS (SLs and STs)

RIN 3206-AL 88

INTRODUCTION

The Senior Executives Association (SEA) is pleased that the Office of Personnel Management (OPM) has, after considerable deliberation, issued these Proposed Rules to effectuate the provisions of the Senior Professional Performance Act of 2008 (SPPA), Pub L. 110-372, October 8, 2008. They have been prepared with obvious care and attention to detail, in an effort to model SL/ST (herein referred to as Senior Professional [SP]) pay setting after that applicable to members of the Senior Executive Service (SES), insofar as possible, while also accommodating the desire and historical practice of various agencies and departments to treat these Senior Professionals as the special, world-class experts that they are. Regrettably, in our opinion, these somewhat conflicting goals have led to a set of Proposed Rules that are unusually difficult to read and understand. SEA respectfully requests that OPM, before issuing the Final Rules, attempt to rewrite them to make them less prolix and complicated, and easier to understand, insofar as is possible.

As a general matter, SEA commends OPM for incorporating in the proposed rules language that attempts to pattern the SP pay system after rules applicable to SES by including as one basis for setting and adjusting SP pay their "contribution to the agency's performance." At the same time, by recognizing the obvious fact that some SPs work on projects of a highly technical nature that, while they may be projects that ultimately have a great effect on their agency's performance, such long-term effect may not be apparent at the time of a particular year's appraisal. We therefore commend OPM for, in a number of places, making such "contributions to the agency's performance" as only one of several permissible bases for judging the worth of particular SPs' work efforts during that appraisal period, recognizing that "individual performance" may also be a basis for adjudging the year's work. This is done, commendably, by the use of "or" in such places as the first paragraph of the Summary ("based on individual performance, contribution to the agency's performance, or both.") See similar language at p. 80269 and elsewhere.

The Twelve Month Limitation

OPM notes, at p. 80269, that at one time, following the Federal Employees Pay Comparability Act of 1990 (FEPCA), 5 USC 5376, it initially planned to let each agency decide whether to impose the one-adjustment-per-twelve month period contained in the law for SES; it did this because, unlike the law for SES, the FEPCA imposed no such limitation. However, as OPM further notes, all agencies but one which it consulted recommended establishing the twelve-month limit by regulation, so it initially did as

the agencies requested. However, because SPPA once again did not contain a one-year limitation, OPM now declines to impose such a limitation in the new Proposed Rules. SEA offers no opinion on that subject, noting, however, the anomaly that, in sec. 534.507, it finds that "a determination by an authorized agency official to make a zero adjustment in pay … is considered to be a pay adjustment."

First, that is the opposite conclusion contained in OPM's rules for SES. [5 CFR 534.404(c)(3)(i).] Moreover, a determination that an action is an "adjustment" would seem to be irrelevant because OPM has also determined that the one-year limitation on adjustments is not applicable to SPs (though it is to SES.) However, OPM apparently thinks it necessary to do this because elsewhere it dictates a requirement that agencies "adjust" the pay of each SP "effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay in the General Schedule." The reason OPM requires such a yearly "adjustment," it says, is because the language of section 5376(b)(2) of FEPCA *requires* such a yearly adjustment as the agency head considers appropriate, "which [as OPM notes, at p. 80269] is not required for SES positions." See 5 CFR 534.404(c)(3)(i). In our opinion, this is an unnecessarily slavish focus on FEPCA's use of the word "adjustment," which leads to a difference in OPM's treatment of SES and SPs.

OPM could have simplified, and should now, in our opinion, simplify matters by requiring only that, pursuant to the statutory mandate, agency heads *consider* SPs for any compensation increases at this time. Doing so will make it unnecessary to make a distinction between SES and SPs so that a decision not to change pay is considered to be "an adjustment "for SPs, but is not "an adjustment" for SES. [Compare OPM's discussion at p. 80270, where on its own initiative OPM proposes to substitute "*increases* in a rate of basic pay" for the word "*adjustment*" when referring to Annual Increases in Basic Pay.]

<u>Centralized Review Process for Determining Certain Performance Appraisals</u>

The Proposed Rules require that "in an agency that employs ten or more senior professionals, these [administrative and management] controls must include *centralized review of ratings* (emphasis added) assigned under sec. 534.507 by a panel of individuals designated by the agency head …." SEA wonders why OPM thought it necessary to provide that agencies may use an alternative process for the review of SL and ST ratings <u>when, as it recognizes elsewhere, there is already an established procedure for reviewing ratings and compensation for Senior Executives</u>. Given OPM's new focus on consistency among agency appraisal systems, SEA recommends that OPM utilize agency Performance Review Boards (PRBs), which are already established and required for reviewing SES ratings, for performing the same function for SP ratings. OPM itself notes, in the last sentence of p. 80271, that some agencies already use PRBs for ratings and compensation determinations for SPs, and, if documented in the agency's written plan, that would satisfy the requirement of "central review."

Additionally, we recommend that the PRBs be expanded to include Senior Professionals when they are to review SP ratings. Given the different nature of SP positions, it would seem logical to have some PRB members with an understanding of their accomplishments. Title 5 contains no prohibition on an agency's using SPs on PRBs; in fact, the only requirement is that "in the case of an appraisal of a career appointee, more than one-half of the members of the performance review board shall consist of career appointees." 5 USC 4314(c). However, a minor revision would have to be made in OPM's Regulations for agencies like PBGC and several others whose statutes do not provide for career SES appointments;

senior executives in these agencies are appointed as SPs. 5 CFR 430.310 (a)(3) as it now reads states: "When appraising a career appointee's performance or recommending a career appointee for a performance award, more than one-half of the PRB's members must be SES career appointees." There should be added: "however, when an agency's statute does not authorize SES appointments, but that agency employs SPs, the requirement is only that "more than one-half of the PRB's members must be career SPs."

Written Procedures Required by the Proposed Rules

For the first time, to our knowledge, OPM not only states in this formal document "its view" that an SL or ST employee rated fully successful and properly positioned within the pay range "should at least receive an increase that helps preserve the economic value of his or her salary, " but also requires, under 5 CFR 534.507(h) that "in any year in which General Schedule pay rates are increased under 5 U.S.C. 5303, an agency head who decides on a 'zero' annual pay adjustment for a senior professional rated fully successful or above must communicate the reasons for that decision to the senior professional in writing …." We strongly agree with that new proposed requirement and also request that these requirements be clearly written and made available to all SPs. Finally, we would go even further and require, as does SEA's proposed but not yet introduced "SES Reform Act" legislation, that such an increase actually be given. An exception would of course have to be made when there are present extenuating circumstances, such as an imposed pay freeze, or a lack of funds sufficient to give the increase.

The proposed rules make the following exception: "… For a senior professional paid within the top 10% of the applicable pay range this communication would be required only if Executive Schedule pay rates are also increased under 5 U.S.C. 5318 and the senior professional is rated outstanding." It seems likely that OPM is making this exception only because employees at the top levels are bumping up against the pay cap, the likely reason for a zero adjustment. However, we see no reason for the exception. Moreover, we propose that OPM give strong consideration to removing the 10 percent division completely. It appears that this provision was put into place due to the pay cap – which SEA believes is artificially low. For consistency, we recommend that the head of the agency or his/her designee be required to advise these high-performing senior professionals of the reason no increase is given, whatever that reason is.

OPM further proposes to allow the head of an agency to delegate "authority for all pay actions within the Office of Inspector General (OIG)" to an Inspector General (IG). As noted in the proposed regulations, under the Inspector General Reform Act of 2008, an OIG was designated as a separate agency and the IG has authority as the head of that agency over its Senior Executives. We believe that allowing an agency head to delegate authority to an IG is confusing and duplicative of the authority granted under the IG Reform Act. OPM should instead include IGs in the definition of agency head for the purposes of these regulations, giving them the same authority over SPs as other agency heads.

Exemption from Performance Appraisal Requirements

In Section 534.511, the Proposed Rules state that "an agency responsible for setting and adjusting rates of basic pay for SL or ST employees or positions excluded from performance appraisal by or under statute is, with respect to those employees or positions, exempt from any provision of this subpart …." While in the Summary's Definition of Terms OPM explains why it has no authority to make rules for agencies whose employees are "not compensated under 5 USC 5376," we are unable to find anywhere

the identification of employees in the second category, i.e. "SL or ST employees or positions excluded from performance appraisal by or under statute …." One possibility is that OPM is here referring to such positions as Hearing Officer or Administrative Law Judge, or their equivalents, whose independence it is thought might be compromised if their performance [and hence their compensation] were to be appraised by their ruling organizations, who themselves may be parties to the controversies adjudged by these Hearing Officers or Administrative Law Judges. We believe that the Proposed Rules would benefit from OPM's giving examples, in the Summary, of SPs so excluded.

Tiers

We note with approval the requirement in the Proposed Rules that agencies which establish "pay ranges" applicable to different SL or ST positions (e.g. "tiers") must identify in their written plan any criteria used to establish these tiers. SEA's proposed SES Reform legislation would similarly require transparency as to how tiers are established and applied, so to that extent we are strongly in agreement with the Proposed Rules. However, we wonder, parenthetically, how applicable the establishment of tiers might be to the majority of SL and ST positions. It is commonly understood that tiers as they relate to SES are an acknowledgement of the reliance on "rank in position" rather than "rank in person," and often take into consideration primarily the size of the group supervised, the position's placement within the organization's hierarchy, and similar factors. With the exception of agencies, such as the Pension Benefit Guarantee Corporation, where SLs are essentially SES and would likely be characterized as such were it not for certain statutory limitations, SLs and STs are not permitted to supervise more than 25% of their time, so are unlikely to be in charge of organizations with large numbers of employees.

Furthermore, we propose that the regulations acknowledge that many SL employees in government corporations are actually Senior Executives, but are not covered by SES statutes or Chapter 43. These proposed regulations should encourage government corporations to closely follow these regulations and use them in managing their SL employees.

The Proposed Rules mention as possible factors for SLs and STs "the kinds or levels of contributions to agency performance for which those positions are accountable." We would add a cautionary note that in all likelihood, many SL and ST positions, because of the frequently unique and individual nature of the expertise and knowledge demanded of its occupants, would not seem classifiable into pay ranges or tiers, so it is especially critical that a full explanation of the tiers' applicability to the particular agency's or department's SPs must be contained in its written plan. We would also add, as with other written documents that the Rules will require, that copies of any written plan relating to tiers must be provided to all SLs and STs who may subject to, or affected by, them.

Respectfully submitted,

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