

Material Transmitted:

Department of Health and Human Services (HHS) Instruction 531-1, Setting Pay Based on Superior Qualifications and Special Needs, dated December 10, 2010.

Material Superseded:

This Instruction supersedes a HHS Transmittal issued on September 7, 2007 which deleted HHS Instruction 338-2, Appointments Above the Minimum Rate Because of Superior Qualifications, issued January 30, 1996 and January 30, 1998, in its entirety.

Background:

In September 2007, HHS deleted the existing HHS Instruction regarding setting pay at rates above step one (1) of the General Schedule based on superior qualifications and/or a special need. The HHS Instruction was deleted because the Instruction no longer complied with the regulatory requirements in 5 CFR 531.212 – Superior qualifications and special needs pay-setting authority.

This instruction provides guidance to Operating Divisions and Staff Divisions on criteria for setting pay for General Schedule employees at rates above step one (1) based on candidates' superior qualifications and/or because candidates meet a special need of the agency. Throughout the instruction, the use of the term OPDIV refers to both Operating Divisions and Staff Divisions.

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Department policy.

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SUBJECT: SETTING PAY BASED ON SUPERIOR QUALIFICATIONS AND SPECIAL NEEDS

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531-1-00 PURPOSE

This Instruction outlines the requirements for setting basic pay at rates above the minimum rate for a given grade level if a candidate has superior qualifications and/or fills a special agency need.

531-1-10 REFERENCES

- A. 5 USC, § 5333 (Minimum rate for new appointments)
- B. 5 CFR, § 531.212 (Superior qualifications and special needs pay-setting authority)

531-1-20 COVERAGE AND EXCLUSIONS

A. Coverage

This policy covers General Schedule (GS) employees.

The superior qualifications and special needs pay-setting authority may be used for –

1. A first appointment (regardless of tenure) as a civilian employee of the Federal Government; or
2. A reappointment that is considered a new appointment under the following conditions:
 - a. When an employee has had a break in service of at least 90 days from the last period of civilian employment with the Federal Government; or
 - b. When employment with the Federal Government during the 90-day period immediately preceding the appointment was limited to one or more of the following:

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- i. Employment under a time-limited appointment in the competitive or excepted service;
- ii. Employment under an appointment as an expert or consultant under 5 U.S.C. 3109 and 5 CFR part 304;
- iii. Employment under a provisional appointment designated under 5 CFR 316.403;
- iv. Employment under a non-permanent appointment (excluding a Schedule C appointment under 5 CFR part 213) in the competitive or excepted service; and/or,
- v. Employment under the Student Career Experience Program under 5 CFR 213.3202(b).

Note: The appointment of a former member of a uniformed service (including the Commissioned Corps of the Public Health Service) as a first time Federal civilian is considered a new appointment for the purpose of this Instruction. This is true without regard to the length of time between the former member's exit from the uniformed service and his or her appointment as a civilian employee to include those who may be appointed to a civilian position while on terminal leave pending retirement from the uniformed service.

B. Exclusions

This policy does not apply to employees whose pay plan is other than GS. HHS Instruction 532-1, Pay Setting – Federal Wage System (FWS), contains information regarding similar provisions for employees under the FWS.

531-1-30 RESPONSIBILITIES

- A. Office of Human Resources (OHR), Assistant Secretary for Administration (ASA), is responsible for:
 1. Updating and maintaining this policy;
 2. Advising operating Human Resources organizations on the administration of the authority to set pay based on superior qualifications and/or special needs; and,
 3. Coordinating any requested HHS reports to the Office of Personnel Management (OPM) on the administration of this authority.
- B. Operating Divisions and Staff Divisions (OPDIVs) are responsible for:
 1. Ensuring compliance with the requirements of this policy within their respective organizations;

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2. Establishing procedures to ensure that all requirements for authorizing pay based on superior qualifications and/or special needs are properly approved, recorded, and documented; and,
 3. Establishing documentation and record-keeping requirements that are sufficient to allow reconstruction of the action taken in each case. Records must be maintained for a minimum of three years. Each request must include: (1) a description of the superior qualifications of the individual or the special need of the agency; (2) an explanation of the factors used to justify the rate at which the employee's pay was set and how the factors directly relate to the rate approved; and, (3) the reasons for authorizing an advanced rate instead of (or in addition to) a recruitment incentive.
- C. Operating Human Resources Organizations (OHROs) are responsible for:
1. Advising and consulting with OPDIVs on the use of this authority and alternative incentives;
 2. Verifying that candidates are eligible to receive an advanced rate of pay under this authority; and
 3. Making official salary offers to candidates for appointment.
- D. Supervisors, managers, and other hiring officials are responsible for:
1. Maintaining the confidentiality of the pay setting process. Selecting officials must not initiate discussions of advanced rates of pay with candidates but may have a preliminary discussion of the subject when initiated by a candidate.
 2. Upon initial employment with the Federal Government, the starting salary for most employees is expected to be the rate for step one (1) on the applicable salary schedule for the grade level being filled. Initial salary offers must come from the OHRO.
 3. If a candidate indicates he or she wishes to negotiate the salary offer, the OHRO will contact the hiring official to determine if he or she is interested in requesting approval to set the candidate's pay at a higher rate.

531-1-40 GENERAL POLICY

- A. An OPDIV may determine that a candidate has superior qualifications based on:
1. The level, type, or quality of the candidate's skills or competencies demonstrated or obtained through experience and/or education;
 2. The quality of the candidate's accomplishments compared to others in the field; and/or

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3. Other factors that support a superior qualifications determination.
- B. When pay is set at an advanced rate based on superior qualifications, a candidate's skills, competencies, experience, education, and/or accomplishments must be relevant to the requirements of the position to be filled. These qualities must be significantly higher than that needed to be minimally qualified for the position and/or be of a more specialized quality compared to other candidates.
 - C. An OPDIV may determine that a candidate fills a special need if the type, level, or quality of skills and competencies or other qualities and experiences possessed by the candidate are relevant to the requirements of the position and are essential to accomplishing an important agency mission, goal, or program activity. A candidate also may meet the special need criteria by meeting agency workforce needs, as documented in the OPDIV's strategic human capital plan.
 - D. An OPDIV may consider one or more of the following factors to determine the step at which to set an employee's pay using this authority:
 1. The level, type, or quality of the candidate's skills or competencies;
 2. The candidate's existing salary, recent salary history, or salary documented in a competing job offer (taking into consideration the location where the salary was or would be earned and comparing the salary to Federal pay rates in the same location);
 3. Significant disparities between Federal and non-Federal salaries for the skills and competencies required in the position to be filled;
 4. Existing labor market conditions and employment trends, including the availability and quality of candidates for the same or similar positions;
 5. The success of recent efforts to recruit candidates for the same or similar positions;
 6. Significant turnover in the same or similar positions;
 7. The importance/criticality of the position to be filled and the effect on the agency if it is not filled or if there is a delay in filling it;
 8. The desirability of the geographic location, duties, and/or work environment associated with the position;
 9. OPDIV workforce needs, as documented in the OPDIV's strategic human capital plan; and/or
 10. Other relevant factors.

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- E. Approving officials should exercise judgment when a candidate's existing or recent salary is the basis for setting pay at an advanced rate. Salary claims must be documented to ensure that only actual earnings are considered.
1. Income from outside employment that forms a regular, continuing portion of the candidate's total income and that the candidate will not be able to continue as a Federal employee may be considered in setting the pay rate. A written statement signed and dated by the candidate stating that the compensation will be forfeited must be included with the request for approval of an advanced rate of pay. Income from other sources that will continue during Federal employment may not be considered.
 2. Although benefits comparisons are not typically required, it may be appropriate to consider the value of Federal fringe benefits when evidence exists that a candidate's current benefits are significantly less or greater than those offered to Federal employees. In general, the value of Federal benefits can be considered to be 38% of an employee's salary.
 3. Annual Federal salary rates are based on a full-time work schedule of 40 hours per week. The most meaningful comparisons between salaries are made between equalized conditions.
 - a. Normally, income earned from overtime work should not be considered when comparing salaries.
 - b. When considering the income of an individual who is employed on a part-time basis, comparing hourly rates of pay will provide a more accurate comparison of salaries.
 - c. Special care must be taken when considering bonuses and stock options so that only those amounts that can be adequately quantified and are a regular and recurring part of an individual's income are considered.
 4. Compensation of a former (retired or resigned) member of a uniformed service (including the Commissioned Corps of the Public Health Service) may serve as a basis for setting pay under this Instruction. Total pay, including regular allowances, may be included for salary comparison purposes.
- F. It is not appropriate to use the salary earned as a former expert or consultant for the Federal Government appointed under 5 USC 3109 to justify an advanced rate when an individual's last position is that of an expert or consultant for the Federal Government. Income forfeited at the time the individual became an expert or consultant may be used for determining the appropriate step.
- G. An advanced rate may be based on earnings as an expert or consultant outside the Federal government. The advanced rate should take into account average income earned by the candidate over the past two years and other legitimate and confirmed consulting offers the candidate may have. The value of Federal benefits should be considered when comparing Federal salary rates with the compensation of independent consultants. In

many instances, independent consultants do not receive benefits and must pay the full cost of Social Security.

- H. Due to the developmental nature of such programs, it is inappropriate to use the superior qualifications and special needs pay-setting authority for the appointment of individuals in programs such as the Federal Career Intern Program, the Emerging Leaders Program, the Presidential Management Fellows Program, the Student Career Experience Program, the Student Temporary Employment Program, or comparable entry level, developmental programs.
- I. Under a vacancy announcement that covers multiple grade levels, if a candidate is not within reach for selection consideration at a higher grade level due to a veterans' preference eligible, the OPDIV may only approve a limited advanced rate of pay if the candidate is selected at a lower grade level. In such instances, an OPDIV may authorize an advanced rate of pay that is no greater than 94% of the step one (1) rate of pay for the higher grade level.
- J. In determining whether to use the superior qualifications and special needs pay-setting authority and the level at which the employee's payable rate of basic pay should be set, an OPDIV must consider the possibility of authorizing a recruitment incentive under 5 CFR part 575, subpart A instead of, or in addition to, an advanced rate of pay.

531-1-50 DELEGATION OF AUTHORITY

- A. Authority to approve an advanced rate of pay under 5 USC 5333 based on the superior qualifications of the candidate or a special need of the agency for the candidate's services is delegated to the Heads of Operating and Staff Divisions for employees and positions within their authority. Further redelegation is authorized. In exercising this approval authority, Heads of Operating and Staff Divisions may not approve an advanced rate of pay unless the action complies with the provisions of this Instruction and Federal regulations regarding superior qualifications and special needs pay-setting authority found in 5 CFR §531.212.
- B. Authority to appoint individuals in the Federal service and to set pay is delegated to the Directors of OHROs. Further redelegation is authorized. In exercising this authority, Directors of OHROs may not establish pay for an employee under this Instruction unless the action complies with the provisions of this Instruction and Federal regulations regarding superior qualifications and special needs pay-setting authority found in 5 CFR §531.212

531-1-60 PROCEDURES

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- A. An official with delegated approval authority must approve each determination to use the superior qualifications and special needs pay-setting authority prior to the candidate entering on duty. Once an employee has entered on duty, an advanced rate of pay under these procedures cannot be made prospectively or retroactively.
- B. Each determination must be made in writing and reviewed and approved by an official of the OPDIV who is at least one level higher than the employee's supervisor, unless there is no official at a higher level in the OPDIV.

531-1-70 DOCUMENTATION AND ACCOUNTABILITY

A. Documentation

1. OPDIVs are required to ensure that each request to set pay at an advanced rate based on superior qualifications and/or a special need is properly approved, recorded, and documented.
2. OPDIVs must document all of the following for each determination to use the superior qualifications and special needs pay-setting authority sufficient to allow reconstruction of the action taken in each case:
 - a. The superior qualifications of the candidate and/or the special agency need for the candidate's services that justifies a higher than minimum rate;
 - b. An explanation of the factor(s) and supporting documentation which were used to justify the rate at which the employee's pay is set. The written documentation must explain how the factors directly relate to the rate approved; and,
 - c. The reasons for authorizing a higher than minimum rate instead of or in addition to a recruitment incentive under 5 CFR part 575, subpart A.

B. Accountability

The OHR, OHRO, and OPDIV will conduct such oversight activities as required to ensure that superior qualifications and special needs pay-setting authority is administered in accordance with law, regulations and HHS policies and procedures.