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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 831 and 842

RIN 3206-A166

#### Retirement Eligibility for Nuclear Materials Couriers Under CSRS and FERS

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules applicable to nuclear materials couriers employed under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). These interim rules are pursuant to the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 enacted on October 17, 1998. The Act provides early retirement and enhanced annuity benefits for nuclear materials couriers employed by the United States Department of Energy under CSRS and FERS; requires an increase in the percentage rate of withholdings from the basic pay of nuclear material couriers; and establishes mandatory retirement of nuclear materials couriers at age 57. These regulations are necessary to put the new retirement provisions into effect.

**DATES:** Interim rules effective January 18, 2000; comments must be received on or before March 20, 2000.

**ADDRESSES:** Send comments to Mary Ellen Wilson; Office of Personnel Management; RIS/RPD, Room 4351; 1900 E Street, N.W.; Washington, DC 20415-3200; or deliver to OPM, Room 4351, 1900 E Street, N.W., Washington, DC. Comments may also be submitted by electronic mail to [combox@opm.gov](mailto:combox@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Brown, (202) 606-0299.

**SUPPLEMENTARY INFORMATION:** Sections 8336(c) and 8412(d) of title 5, U.S. Code have been amended by section 3154 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261, 112 Stat. 1920, to authorize immediate retirement benefits at age 50 for Federal employees who have completed 20 years of Federal civilian service as a nuclear materials courier with the United States Department of Energy. Section 8412(d) of title 5, U.S. Code has also been amended by Public Law 105-261 to authorize immediate retirement at any age for Federal employees who have completed 25 years of service as a nuclear materials courier with the United States Department of Energy. These amendments apply only to individuals who are employed as a nuclear materials courier after October 17, 1998, the date of enactment of Public Law 105-261.

Under Public Law 105-261 the enhanced basic annuity computations provided by sections 8339(d) (CSRS) and 8415(d) (FERS) of title 5, U.S. Code are now applicable to nuclear materials couriers. Beginning with the first pay period that began after October 17, 1998, nuclear material couriers became subject to the same percentage rate of withholdings from basic pay applicable to law enforcement officers and firefighters. Effective October 17, 1999, nuclear materials couriers are also subject to the mandatory separation (at age 57) provisions of sections 8335(b) (CSRS) and 8425(b) (FERS) of title 5, U.S. Code.

For purposes of the Civil Service Retirement System and the Federal Employees' Retirement System, *nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security; and includes an employee who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing the above-described duties for at least 3 years.

Section 3154 of Public Law 105-261, 112 Stat. 1920, establishes a separate class of employees who can earn enhanced basic annuity computations provided by sections 8339(d) (CSRS) and 8415(d) (FERS) of title 5, U.S. Code. Although a "nuclear materials courier" is not a "law enforcement officer," the procedure that the Secretary of Energy must follow to make a "nuclear materials courier" coverage determination is similar to the procedures currently used by an agency head in a "law enforcement officer" coverage determination under 5 C.F.R. part 831, subpart I.

#### Waiver of General Notice of Proposed Rulemaking

Under 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking, and for making these rules effective in less than 30 days. These regulations will affect the eligibility for immediate retirement, the computation of annuity, employee deductions from basic pay, agency contributions, and mandatory separation for nuclear materials couriers under the Civil Service Retirement System and the Federal Employees' Retirement System on and after October 17, 1998. Publication of a general notice on proposed rulemaking would be contrary to the public interest because it would delay the retirement of nuclear materials couriers under the provisions of Public Law 105-261 and would hinder the Department of Energy's effective management of the nuclear materials courier workforce.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect retirement benefits of retired nuclear materials couriers and their survivors.

#### Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

#### List of Subjects in 5 CFR Parts 831 and 842

Administrative practice and procedure, Air traffic controllers, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental

relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

**Janice R. Lachance,**

*Director.*

Accordingly, OPM is amending 5 CFR parts 831 and 842 as follows:

## **PART 831—RETIREMENT**

1. The authority citation for part 831 is revised to read as follows:

**Authority:** 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.114 also issued under 5 U.S.C. 8336(d)(2) and section 7001 of Pub. L. 105–174, 112 Stat. 58, as amended by section 651 of Pub. L. 106–58, 113 Stat. 430; § 831.201(b)(1) also issued under 5 U.S.C. 8347(g); § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); § 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 831.201(g) also issued under sections 7(b) and 7(e) of Pub. L. 105–274, 112 Stat. 2419; § 831.201(i) also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; § 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; § 831.303 also issued under 5 U.S.C. 8334(d)(2); § 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp. p. 317; § 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); §§ 831.663 and 831.664 also issued under section 11004 (c)(2) of Pub. L. 103–66, 107 Stat. 412; § 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; subpart L also issued under 5 U.S.C. 8337; subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; § 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

2. Section 831.502 is amended by revising paragraph (b)(1) and the introductory text to paragraph (c) to read as follows:

### **§ 831.502 Automatic separation; exemption.**

\* \* \* \* \*

(b)(1) The head of the agency, when in his or her judgment the public interest so requires, may exempt a law enforcement officer, firefighter or nuclear materials courier from automatic separation until that employee becomes 60 years of age.

\* \* \* \* \*

(c) When a department or agency lacks authority and wishes to secure an exemption from automatic separation for one of its employees other than a Presidential appointee, beyond the age(s) provided by statute, *i.e.*, age 60 for a law enforcement officer, firefighter or nuclear materials courier, age 61 for an air traffic controller, and age 62 for

an employee of the Alaska Railroad in Alaska or an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Commission, the department or agency head shall submit a recommendation to that effect to OPM.

\* \* \* \* \*

3. Subpart H—is added to read as follows:

### **Subpart H—Nuclear Materials Couriers**

- 831.801 Applicability and purpose.
- 831.802 Definitions.
- 831.803 Conditions for coverage in primary positions.
- 831.804 Conditions for coverage in secondary positions.
- 831.805 Evidence.
- 831.806 Requests from individuals.
- 831.807 Withholdings and contributions.
- 831.808 Mandatory separation.
- 831.809 Reemployment.
- 831.810 Review of decisions.
- 831.811 Oversight of coverage determinations.

### **Subpart H—Nuclear Materials Couriers**

#### **§ 831.801 Applicability and purpose.**

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for nuclear materials couriers employed under the Civil Service Retirement System; 5 U.S.C. 8334(a)(1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to prescribe regulations to carry out 5 U.S.C., chapter 83, subchapter III, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies.

#### **§ 831.802 Definitions.**

In this subpart—

*Agency head* means the Secretary of Energy. For purposes of this subpart, *agency head* is also deemed to include the designated representative of the Secretary of Energy, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Energy, or to the Deputy Secretary of Energy, and who is the sole such representative for the entire department.

*Nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or

other materials related to national security, including an employee engaged in this activity who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing this activity for at least 3 years. (See 5 U.S.C. 8331(27).)

*Primary duties* are those duties of a position that—

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered *primary* even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position that is in an organization of the Department of Energy and whose primary duties are to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security.

*Secondary position* means a position that:

(1) Is clearly in the nuclear materials transportation field;

(2) Is in an organization of the Department of Energy having a nuclear materials transportation mission; and

(3) Is either—

(i) Supervisory; *i.e.*, a position whose primary duties are as a first-level supervisor of nuclear materials couriers in primary positions; or

(ii) Administrative; *i.e.*, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary nuclear materials courier position is a prerequisite.

#### **§ 831.803 Conditions for coverage in primary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8336(c).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a

primary position is not covered under the provisions of 5 U.S.C. 8336(c).

**§ 831.804 Conditions for coverage in secondary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a secondary nuclear materials courier position following 3 years of service in a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8336(c) if all of the following criteria are met:

(1) The employee is transferred directly (*i.e.*, without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8336(d)(1), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c).

**§ 831.805 Evidence.**

(a) The Secretary of Energy's determination under § 831.803 that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 831.802.

(b) A determination under § 831.804 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8334(a)(1), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the

employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

**§ 831.806 Requests from individuals.**

(a) An employee who requests credit for service under 5 U.S.C. 8336(c) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than December 31, 2000.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

**§ 831.807 Withholdings and contributions.**

(a) During the service covered under the conditions established by § 831.803 and § 831.804, the Department of Energy will deduct and withhold from the employee's base pay the amount required under 5 U.S.C. 8334(a) for such positions and submit that amount, together with agency contributions required by 5 U.S.C. 8334(a), to OPM in accordance with payroll office instructions issued by OPM.

(b) If the correct withholdings and/or Government contributions are not submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of

a current or former employee was subject to the higher deduction and Government contribution rates, the Department of Energy must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Energy waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM without delay as soon as possible.

(c) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Energy will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit or redeposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(d) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339(d).

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

**§ 831.808 Mandatory separation.**

(a) Effective on and after October 17, 1999, the mandatory separation provisions of 5 U.S.C. 8335(b) apply to all nuclear materials couriers in primary and secondary positions. A mandatory separation under 5 U.S.C. 8335(b) is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter. Section 831.502 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C.

8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

#### § 831.809 Reemployment.

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

#### § 831.810 Review of decisions.

The following decisions may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board:

(a) The final decision of the Department of Energy issued to an employee, former employee, or survivor as the result of a request for determination filed under § 831.806; and

(b) The final decision of the Department of Energy that a break in service referred to in § 831.804(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8336(d)(1).

#### § 831.811 Oversight of coverage determinations.

(a) Upon deciding that a position is a nuclear materials courier position, the agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position, or that an individual's service in any other position is creditable under 5 U.S.C. 8336(c).

(b) The Department of Energy must establish a file containing each coverage determination made by the agency head under § 831.803 and § 831.804, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Energy will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Energy must submit to OPM a list of all covered positions and any other pertinent information requested.

### PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

4. The authority citation for Part 842 is revised to read as follows:

**Authority:** 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.104 also issued under sections 3 and 7(c) of Pub. L. 105-274, 112 Stat. 2419; § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 102(e) of Pub. L. 104-8, 109 Stat. 102, as amended by section 153 of Pub. L. 104-134, 110 Stat. 1321; § 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105-33, 111 Stat. 251; § 842.107 also issued under section 7(b) of Pub. L. 105-274, 112 Stat. 2419; § 842.108 also issued under section 7(e) of Pub. L. 105-274, 112 Stat. 2419; § 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 7001 of Pub. L. 105-174, 112 Stat. 58, as amended by section 651 of Pub. L. 106-58, 113 Stat. 430; §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of Pub. L. 101-508, 104 Stat. 1388; § 842.707 also issued under section 6001 of Pub. L. 100-203, 101 Stat. 1300; § 842.708 also issued under section 4005 of Pub. L. 101-239, 103 Stat. 2106 and section 7001 of Pub. L. 101-508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104.

5. In section 842.208 the heading and paragraph (a) are revised to read as follows:

#### § 842.208 Firefighters, law enforcement officers, and nuclear materials couriers.

(a) An employee who separates from service, except by removal for cause on charges of delinquency or misconduct, is entitled to an annuity—

(1) After completing any combination of service as a firefighter, law enforcement officer or nuclear materials courier totaling 25 years; or

(2) After becoming age 50 and completing any combination of service as a firefighter, law enforcement officer or nuclear materials courier totaling 20 years.

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6. Section 842.405 is revised to read as follows:

#### § 842.405 Air traffic controllers, firefighters, law enforcement officers, and nuclear materials couriers.

The annuity of an air traffic controller retiring under § 842.207 or a law enforcement officer, firefighter or nuclear materials courier retiring under § 842.208 is—

(a) One and seven-tenths percent of average pay multiplied by 20 years; plus

(b) One percent of average pay multiplied by the years of service exceeding 20 years.

7. Subpart I is added to read as follows:

#### Subpart I—Nuclear Materials Couriers

- 842.901 Applicability and purpose.
- 842.902 Definitions.
- 842.903 Conditions for coverage in primary positions.
- 842.904 Conditions for coverage in secondary positions.
- 842.905 Evidence.
- 842.906 Requests from individuals.
- 842.907 Withholding and contributions.
- 842.908 Mandatory separation.
- 842.909 Review of decisions.
- 842.910 Oversight of coverage determinations.

#### Subpart I—Nuclear Materials Couriers

##### § 842.901 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, firefighters, air traffic controllers, and nuclear materials couriers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84 and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies.

##### § 842.902 Definitions.

*Agency head* means the Secretary of Energy. For purposes of this subpart, *agency head* is also deemed to include the designated representative of the Secretary of Energy, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Energy, or to the Deputy Secretary of Energy, and who is the sole such representative for the entire department.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*Nuclear materials courier* means an employee of the Department of Energy, the duties of whose position are primarily to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national

security, including an employee engaged in this activity who is transferred directly to a supervisory or administrative position within the same Department of Energy organization, after performing this activity for at least 3 years. (See 5 U.S.C. 8331(27).)

*Primary duties* means those duties of a position that—

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

(2) Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

*Primary position* means a position that is in an organization of the Department of Energy and whose primary duties are to transport, and provide armed escort and protection during transit of, nuclear weapons, nuclear weapon components, strategic quantities of special nuclear materials or other materials related to national security.

*Secondary position* means a position that—

(1) Is clearly in the nuclear materials transportation field;

(2) Is in an organization of the Department of Energy having a nuclear materials transportation mission; and

(3) Is either—

(i) Supervisory; that is, a position whose primary duties are as a first-level supervisor of nuclear materials couriers in primary positions; or

(ii) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary nuclear materials courier position is a prerequisite.

#### **§ 842.903 Conditions for coverage in primary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d).

#### **§ 842.904 Conditions for coverage in secondary positions.**

(a) An employee's service in a position that has been determined by the Secretary of the Department of Energy to be a secondary nuclear materials courier position following 3 years of service in a primary nuclear materials courier position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C.

8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

#### **§ 842.905 Evidence.**

(a) The Secretary of Energy's determination under § 842.903 that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.902.

(b) A determination under § 842.904 must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from

requesting that the official status be changed at the time the service was performed.

#### **§ 842.906 Requests from individuals.**

(a) An employee who requests credit for service under 5 U.S.C. 8412(d) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than December 31, 2000.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

#### **§ 842.907 Withholding and contributions.**

(a) During service covered under the conditions established by § 842.903 (a) or (b), the Department of Energy will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a)(3) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the employing agency must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholding and/or Government contributions are not timely submitted to OPM for any reason

whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the employing agency must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the agency waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, an employing agency or former employing agency will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or re-deposit, including the additional amount required for covered service, and the deposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

#### **§ 842.908 Mandatory separation.**

(a) Effective on and after October 17, 1999, the mandatory separation provisions of 5 U.S.C. 8425 apply to all nuclear materials couriers including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing

agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412 (d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

#### **§ 842.909 Review of decisions.**

The following decisions may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board:

(a) The final decision of the Department of Energy issued to an employee, former employee, or survivor as the result of a request for determination filed under § 842.906; and

(b) The final decision of the Department of Energy that a break in service referred to in § 842.904(a)(2) did not begin with an involuntary separation within the meaning of 5 U.S.C. 8414(b)(1)(A).

#### **§ 842.910 Oversight of coverage determinations.**

(a) Upon deciding that a position is a nuclear materials courier position, the agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position, or that an individual's service in any other position is creditable under 5 U.S.C. 8412(d).

(b) The Department of Energy must establish a file containing each coverage determination made by the agency head under § 842.903 and § 842.904, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Energy will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Energy must submit to OPM a list of all covered positions and any other pertinent information requested.

[FR Doc. 00-1051 Filed 1-14-00; 8:45 am]

**BILLING CODE 6325-01-P**

## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 959**

[Docket No. FV00-959-1 FR]

#### **Onions Grown in South Texas; Decreased Assessment Rate**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule decreases the assessment rate established for the South Texas Onion Committee (Committee) for the 1999-2000 and subsequent fiscal periods from \$0.05 to \$0.04 per 50-pound container or equivalent of onions handled. The Committee is responsible for local administration of the marketing order which regulates the handling of onions grown in South Texas. Authorization to assess onion handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** January 19, 2000.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Cavazos, Marketing Assistant, McAllen Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry; telephone: (956) 682-2833, Fax: (956) 682-5942; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491, Fax: (202) 720-5698, or E-mail: Jay.Guerber@usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 143 and Order No. 959, both as amended (7 CFR part 959), regulating the handling of onions grown in South Texas, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."