

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 351

RIN 3206-AJ14

#### Reduction in Force Retreat Rights

**AGENCY:** Office of Personnel Management.

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

**SUMMARY:** The Office of Personnel Management is issuing an interim retention regulation that clarifies a released employee's potential right to "Retreat" to another position in a reduction in force. This regulation states that an agency determines the potential grade range of a released employee's retreat right solely upon the position held by the employee on the effective date of the reduction in force rather than the grade range of the position to which the employee may have a right to retreat.

**DATES:** This regulation is effective on October 20, 2000. Written comments will be considered if received no later than December 19, 2000.

**ADDRESSES:** Send written comments to Carol J. Okin, Associate Director for Employment, Office of Personnel Management, Room 6F08, 1900 E Street, NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Glennon or Jacqueline R. Yeatman, 202-606-0960, FAX 202-606-2329.

#### SUPPLEMENTARY INFORMATION:

#### Purpose of This Interim Retreat Regulation

This interim regulation clarifies OPM's longstanding policy that an agency determines the grade or grade-interval range of a released employee's potential retreat rights solely on the basis of the official position of record

held by the employee on the effective date of the reduction in force. See 51 FR 319 (January 3, 1986). In determining an employee's potential retreat rights, an agency does not consider the grade or grade-interval range of the position to which the employee may have a retreat right.

OPM is publishing this interim regulation in response to a January 28, 2000, decision by the United States Court of Appeals for the Federal Circuit in *Henderson v. Department of the Interior*, 202 F.3d 1356 (Fed. Cir. 2000). In *Henderson*, the Court interpreted our regulations as meaning something different from what OPM had intended. As a result, the Court found that an agency determines an employee's potential retreat right, in part, on the basis of the grade or grade-interval range of the position to which the employee may have a right to retreat. This new interim regulation reinforces OPM's intent that an agency determines an employee's potential retreat rights only on the basis of the employee's current official position of record.

#### Employees' Retreat Rights

Section 351.603 of OPM's retention regulations provides that a permanent competitive service employee who is released from a competitive level as the result of reduction in force competition has a potential "Bump" or "Retreat" right to other continuing positions before involuntary separation. For reference, OPM published a comprehensive history and explanation of the retreat right in the Supplementary Information section of final regulations that were published in the **Federal Register** on June 15, 1998, at 63 FR 32593.

#### Consideration of Grade Limits in Determining Employees' Retreat Rights

OPM's reduction in force regulations generally limit the grade limits of an employee's potential bump and retreat rights to positions that are within, as appropriate, three grades or grade-intervals of the official position held on the effective date of the reduction in force. In addition, a preference eligible employee who competes under OPM's retention regulations in retention tenure subgroup I-AD on the basis of a service-connected compensable disability of 30% (or higher) has a potential retreat right to positions that are within, as appropriate, five grades or grade

intervals of the official position held on the effective date of the reduction in force.

#### Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking because it would be contrary to the public interest to delay access to benefits provided by law. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to waive the effective date and make this amendment effective in less than 30 days in order to provide eligible displaced employees with the full benefit of their retreat rights at the earliest practicable date.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain Federal employees.

#### 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 Part 351

Administrative practice and procedure, Government employees, Office of Personnel Management.

**Janice R. Lachance,**  
Director.

Accordingly, OPM is amending part 351 of title 5, Code of Federal Regulations, as follows:

#### PART 351—REDUCTION IN FORCE

1. The authority citation for part 351 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965.

2. Section 351.701(c) is revised to read as follows:

#### § 351.701 Assignment involving displacement.

\* \* \* \* \*

(c) *Same subgroup-retreating.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position that:

(1) Is held by another employee with lower retention standing in the same tenure group and subgroup; and

(2) Is not more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent). (The agency uses the grade progression of only the released employee's position of record to determine the applicable grades (or appropriate grade intervals or equivalent) of the employee's retreat right. The agency does not consider the grade progression of the position to which the employee has a retreat right.); and

(3) Is the same position, or an essentially identical position, formerly held by the released employee on a permanent basis as a competing employee in a Federal agency (i.e., when held by the released employee in an executive, legislative, or judicial branch agency, the position would have been placed in tenure groups I, II, or III, or equivalent). In determining whether a position is essentially identical, the determination is based on the competitive level criteria found in § 351.403, but not necessarily in regard to the respective grade, classification series, type of work schedule, or type of service, of the two positions.

\* \* \* \* \*

[FR Doc. 00-26945 Filed 10-19-00; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 932

[Docket No. FV00-932-3 FR]

#### Olives Grown in California; Modification to Handler Membership on the California Olive Committee

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

**ACTION:** Final rule.

**SUMMARY:** This rule modifies the handler membership on the California Olive Committee (Committee). The Committee locally administers the California olive marketing order (order) which regulates the handling of olives grown in California. The Committee is composed of 16 industry members of which 8 are producers and 8 are

handlers. Current handler representation on the Committee provides that the two handlers who handled the largest and second largest total volume of olives during the crop year in which nominations were made and in the preceding crop year shall be represented by three members and alternate members each, and that the remaining handler shall be represented by two members and alternate members. Recently, one of the handlers indicated that it was exiting the business, and no longer desired to serve on the Committee. This rule reallocates handler membership and enables the Committee to operate at full strength.

**EFFECTIVE DATE:** October 23, 2000.

**FOR FURTHER INFORMATION CONTACT:** Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906; 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 final rule is issued under Marketing Agreement No. 148 and Order No. 932, both as amended (7 CFR part 932), regulating the handling of olives grown in California, 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."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under

section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule modifies the order's administrative rules and regulations regarding the structure of handler membership on the Committee. The change in structure was unanimously recommended by the Committee.

Section 932.25 of the order provides for the establishment of the Committee to locally administer the terms and provisions of the order. The Committee is composed of 16 industry members, each with an alternate. Of the 16 industry members, 8 are producers and 8 are handlers. This section also specifies how the handler membership on the Committee is allocated. Authority is provided for the Committee, with the approval of the Secretary, to change the allocation of both producer and handler members as may be necessary to assure equitable representation.

Based on this authority, § 932.159 of the administrative rules and regulations currently provides that the two handlers who handled the largest and second largest total volume of olives during the crop year in which nominations were made and in the preceding crop year shall be represented by three members and alternate members each, and the remaining handler shall be represented by two members and alternate members. This reallocation was implemented in January of 1999 (64 FR 4286) with an interim final rule. Comments were invited until March 29, 1999. The interim final rule was adopted without change in a final rule in April of 1999 (64 FR 23009).

The structure of the olive industry has changed over the years and the number of handlers, both cooperative and independent (or handlers not affiliated with a cooperative marketing organization), has decreased. At one time, there were a number of cooperative marketing organizations and independent handlers and the