Restructuring Information Handbook
Module 3 (REDUCTION IN FORCE), Unit B (GUIDANCE)
June 1998

Restructuring Information Handbook Module 3 is developed by OPM's Workforce Restructuring Office to provide information on reduction in force procedures.

U.S. OFFICE OF PERSONNEL MANAGEMENT

WORKFORCE RESTRUCTURING OFFICE

RESTRUCTURING INFORMATION HANDBOOK

MODULE 3, REDUCTION IN FORCE (June 1998 version)

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UNIT B (GUIDANCE)

MODULE 3 (REDUCTION IN FORCE), MODULE B (GUIDANCE), SECTION 2. BASIC MANAGEMENT RIGHTS IN REDUCTION IN FORCE

2. BASIC RIGHT TO ORGANIZE WORKFORCE (reference 3-A-2-2). The agency has the responsibility to plan the work and to organize the workforce to accomplish agency objectives within available resources. (5 U.S.C. 7106; 5 CFR 351.201(a)(1))

(a) Section 5 U.S.C. 7106(a) covers basic management rights:

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency"; and
(2) in accordance with applicable laws--
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
(C) with respect to filling positions, to make selections for appointments from--
(i) among properly ranked and certified candidates for promotion; or
(ii) any other appropriate source; and
(D) to take whatever actions may be necessary to carry out the agency mission during emergencies."

(b) Section 5 U.S.C. 7106(b) covers the scope of collective bargaining to the application of basic management rights:

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

3. RIF DECISIONS (reference 3-A-2-3). Each agency is responsible for deciding what positions are abolished, whether a reduction in force is necessary, and when the reduction in force will take place. (5 U.S.C. 7106; 5 CFR 351.201(a)(1))

(a) The agency's internal delegations of authority evidence where authority to make these decisions is vested (e.g., in the headquarters, in the subagency, or in the component).

(b) On appeal, the Merit Systems Protection Board, and the United States Court of Appeals for the Federal Circuit, will review an agency's decision to conduct a reduction in force in order to determine that the reason for the action is based on an organizational situation (e.g., lack of work, shortage of funds, etc.) rather than for a reason personal to an employee (e.g., reprisal, nonperformance of assigned duties, etc.); for additional information, reference LOSURE v. ICC, 2 M.S.P.R. 195; and LIGUORI v. USMA, 4 M.S.P.R. 6.

o Neither the Board nor the Court will otherwise review the agency's decision in order to evaluate the merits of the agency's decision (e.g., there is no appellate review to consider whether the agency should or should not have conducted a reorganization). For additional information, reference GRIFFIN v. AGRICULTURE, 2 M.S.P.R. 168; GANDOLA v. FTC, 773 F.2d 271; HOLMES v. ARMY, 41 M.S.P.R. 612, 914 F.2d 271; and WINCHESTER v. TVA, 55 M.S.P.R. 485.

4. GENERAL RIGHT OF AGENCY TO CARRY OUT OTHER PERSONNEL ACTIONS (reference 3-A-2-4). An agency has the authority and responsibility to take other personnel actions before, during, and after a reduction in force.

(a) Any formally adopted limitation on management's right to take personnel actions (e.g., a freeze on personnel actions effective on a specified date prior to the issuance of reduction in force notices) is binding upon the agency and subject to review on appeal.

o For additional information on the appellate review of agencies' internal policies in downsizing situations, reference HERNANDEZ v. ARMY (general policies), 53 M.S.P.R. 199; SMITH v. OPM (freezing of personnel actions), 67 M.S.P.R. 29; and MONK v. NAVY (offers of vacant positions), 68 M.S.P.R. 560.

(d) A sample checklist for reduction in force decisions is available on the next page.

CHECKLIST - RIF NOTICES (GROUP I, II, AND III EMPLOYEES)

Required information for notices from reduction in force actions (select appropriate items for type of action involved):

A. Specific action (e.g., separation, demotion, reassignment involving displacement, furlough for more than 30 calendar days) that is planned.

B. Reasons for the reduction in force (e.g., lack of work, shortage of funds, reduction in manpower authorizations, reorganization, etc.).

- Include a statement that the action affecting the employee is due to application of reduction in force procedures.

C. Title, grade and salary of current official position (include retained grade and pay, if appropriate).

D. Description of competitive area.

E. Competitive level (including title or title of positions covered or code or symbol to identify retention register).

F. Retention subgroup.

G. Service computation date.

H. The three most recent performance ratings of record received during the applicable 4-year time period for crediting ratings.

I. The position title, grade, salary, and location of any position offered to the employee, or the reason why no offer can be made.

J. Reasons, if applicable, for retaining a lower standing employee.

K. Effective date of proposed action. Does the specific notice provide a full 60 (or 120 days, if applicable) days in duty status? (Do not count the date the employee receives notice in the 60-day advance notice period). The last day of the minimum notice period may not fall on a Saturday, Sunday or legal holiday.

L. Last day of active duty in current position.

M. Option of employees scheduled for separation to request any available extension to the notice period in annual leave or leave without pay status. In addition, if an agency cannot retain employees in an active duty status and the employee refuses consent to be placed in an annual leave or LWOP status, the agency must inform them that they will be placed in a nonpay or annual leave status.

N. Accessibility to each employee of retention registers, reduction in force regulations and records, and when, how, and where the employee may inspect them.

O. Name and location of personnel specialist to contact for counseling or additional information.

P. Appeal and grievance rights. Show how, where and time frame within which the employee may appeal the action or file a grievance under a negotiated grievance procedure, as appropriate.

The agency must, at the employee's request, provide the employee with a copy of OPM's 5 CFR Part 351 reduction in force regulations. The agency must also provide information on filing an appeal that is required by 5 CFR 1201.21 of the Merit System Protection Board's regulations.

Q. Enclosures. Enclosures cover information such as:

1. A form for acceptance or declination of an offer of assignment.

2. Severance pay eligibility, and an estimate of the amount payable (Note-the estimate is optional through September 30, 1998, but is mandatory beginning October 1, 1998).

3. Retirement annuity.

4. Lump sum payment of annual leave.

5. Grade and pay retention information.

- Eligible employees -- give grade, rate of pay, and duration of retention.

- Downgraded employees who are ineligible for grade and/or pay retention -- give reasons why employee are not entitled.

6. Unemployment Insurance benefits through State program.

7. Benefits available under the State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act. (Note-this information is optional through September 30, 1998, but is mandatory beginning October 1, 1998).

8. Additional information concerning eligibility of Group I and II employees scheduled for separation for priority placement consideration under the following programs:

- Reemployment Priority List.

- The Career Transition Assistance Plan.

- The Interagency Career Transition Plan.

- Any agency-specific priority placement programs (such as the Department of Defense's Priority Placement Program).

R. The employee must be given a release to authorize, at the employee's option, the release of the employee's resume and other relevant employment information for employment referral to State dislocated worker unit(s), and to potential public or private sector employers. (Note-this election is optional through September 30, 1998, but is mandatory beginning October 1, 1998).

S. Effect of resignation, or election of discontinued service retirement, on employees' eligibility for:

- The Career Transition Assistance Plan.

- The Interagency Career Transition Assistance Plan.

- The Reemployment Priority List.

T. Expression of appreciation for service rendered by employee.

MODULE 3 (REDUCTION IN FORCE), MODULE B (GUIDANCE), SECTION 3. COMPLIANCE WITH OPM'S RETENTION REGULATIONS

1. AGENCY RESPONSIBILITY (reference 3-A-3-1). Each agency must ensure that reduction in force actions are taken in compliance with applicable laws, regulations, and collective bargaining agreements. (5 CFR 351.204)

o In reviewing a reduction in force appeal, the Merit Systems Protection Board, and the United States Court of Appeals for the Federal Circuit, will enforce the provisions of a negotiated collective bargaining agreement. For additional information, reference GIESLER v. TRANSPORTATION, 3 M.S.P.R. 277, 686 F.2d 844; and MONK v. NAVY, 68 M.S.P.R. 560.

MODULE 3 (REDUCTION IN FORCE), MODULE B (GUIDANCE), SECTION 5. COVERAGE OF OPM'S REDUCTION IN FORCE REGULATIONS

1. OBLIGATION OF THE AGENCY TO USE RIF REGULATIONS (reference 3-A-5-1). An agency is required to use OPM's reduction in force regulations only if an employee is separated or downgraded for one of the reasons covered in 5 CFR 351.201(a)(2), and 3-A-5-4 (e.g., reorganization, lack of work, shortage of funds, reduction in personnel ceiling, etc.) (5 CFR 351.201(a)(2)).

o For additional information, reference BRUNJES v. ARMY, 2 M.S.P.R. 189; and AHO v. AGRICULTURE, 25 M.S.P.R. 569, 776 F.2d 1065.

2. AGENCY AUTHORITY TO REASSIGN (reference 3-A-5-2). An agency has the right to reassign an employee to a vacant position without regard to reduction in force procedures (5 CFR 335.102).

o For additional information, reference MACMURDO V. AGRICULTURE, 24 M.S.P.R. 388, 785 F.2d 322; HARPSTER v. ARMY, 39 M.S.P.R. 43; and COOKE v. POSTAL SERVICE, 67 M.S.P.R. 401, 73 F.3d 380.

o The position may be in the same or a different competitive level, competitive area, or local commuting area, as long as the agency finds it has a need for the employee in the vacant position (5 CFR 335.102); for additional information, reference MACMURDO V. AGRICULTURE, 24 M.S.P.R. 388, 785 F.2d 322; and COOKE v. POSTAL SERVICE, 67 M.S.P.R. 401.

o An agency may use 5 CFR 752 adverse action procedures to separate an employee who declines reassignment, even to a position in a different local commuting area; for additional information, reference KETTERER v. AGRICULTURE, 2 M.S.P.R. 294; MACMURDO V. AGRICULTURE, 24 M.S.P.R. 388, 785 F.2d 322; and COOKE v. POSTAL SERVICE, 67 M.S.P.R. 401.

4. RIF ACTIONS AND REASONS FOR A RIF (reference 3-A-5-4-(a) and (b). A personnel action must be effected under OPM's 5 CFR Part 351 reduction in force regulations when both the action to be taken (e.g., separation, downgrading, or furlough for more than 30 consecutive days), and the reason for the action, are covered by the retention regulations. (5 CFR 351.201(a)(1))

(a) The action to be taken for a reduction in force action covered by paragraph 5 CFR 351.201(a)(2) is the release of a competing employee from a competitive level by:

(1) Separation (for additional information, reference WAKSMAN v. COMMERCE, 37 M.S.P.R. 640, 878 F.2d 1447);

(2) Furlough for more than 30 days (for additional information, reference ALLEN v. LABOR, 19 M.S.P.R. 80; and CLERMAN v. ICC, 35 M.S.P.R. 190);

(3) Demotion (for additional information, reference CAMPBELL v. TREASURY, 61 M.S.P.R. 99; and ROBINSON v. POSTAL SERVICE, 63 M.S.P.R. 307); or

(4) Reassignment (or assignment) requiring displacement in first or second round reduction in force competition (for additional information, reference CARROLL v. ARMY, 64 M.S.P.R. 603; and DISNEY v. NAVY, 67 M.S.P.R. 563).

(b) Reasons for the reduction in force action covered by paragraph 5 CFR 351.201(a)(2) include:

(1) Lack of work (for additional information, reference ROSEN v. ICC, 20 M.S.P.R. 571; and WINCHESTER v. TVA, 55 M.S.P.R. 485);

(2) Shortage of funds (for additional information, reference SCHROEDER v. TRANSPORTATION, 60 M.S.P.R. 566; ARMSTRONG v. ITC, 74 M.S.P.R. 349; COOK v. INTERIOR, 74 M.S.P.R. 454; CROSS v. TRANSPORTATION, 127 F.3d 1493); and HELEEN v. COMMERCE, 75 M.S.P.R. 366);

(3) Insufficient personnel ceiling (for additional information, reference JONES v. VA, 4 M.S.P.R. 320; and NIELSON v. NAVY, 26 M.S.P.R. 92, 790 F.2d 92);

(4) Reorganization (for additional information, reference BACON v. HUD, 757 F.2d 265; and COOK v. INTERIOR, 74 M.S.P.R. 454);

(5) An individual's exercise of reemployment rights or restoration rights (for additional information, reference COLEMAN v. NAVY, 24 M.S.P.R. 426; and DANCY v. UNITED STATES, 668 F.2d 1224); or

(6) Reclassification (i.e., downgrading of an employee's position) due to erosion of duties (for additionl information, reference HARDY v. ARMY, 67 M.S.P.R. 292; GUBA v. ARMY, 70 M.S.P.R. 192; and BARRY v. FLRA, 74 M.S.P.R. 159) when this action--

(i) will take effect after an agency has formally announced a reduction in force in the employee's competitive area; and

(ii) when the reduction in force will take effect within 180 days.

5. ACTIONS EXCLUDED FROM RIF COVERAGE (reference 3-A-5-5-(a)-(f). OPM's retention regulations do not apply to:

(a)(i) The termination of a temporary promotion, a term promotion, or a detail (for all three situations, reference TESTAN v. UNITED STATES, 424 U.S. 392; JICHA v. NAVY, 65 M.S.P.R. 73; and TREESE v. POSTAL SERVICE, 77 M.S.P.R. 187), or

(a)(ii) The return of an employee to the position held before the temporary promotion, before the term promotion, or before the detail (for all three situations, reference TESTAN v. UNITED STATES, 424 U.S. 392; JICHA v. NAVY, 65 M.S.P.R. 73); and TREESE v. POSTAL SERVICE, 77 M.S.P.R. 187).

(b) A change to lower grade based on the reclassification (i.e., downgrading) of an employee's position due to the--

(i) application of new classification standards, or

(ii) correction of classification error;

(For both situations, reference ATWELL v. MSPB, 2 M.S.P.R. 484, 670 F.2d 272; and BARRY v. FLRA, 74 M.S.P.R. 159)

(c) A change to lower grade based on the reclassification (i.e., downgrading) of the employee's position due to erosion of duties (for additional information, reference HARDY v. ARMY, 67 M.S.P.R. 292; GUBA v. ARMY, 70 M.S.P.R. 192; and BARRY v. FLRA, 74 M.S.P.R. 159) (Note that paragraph 3-A-6-5 fully covers the job erosion exclusion);

(d) Placement in nonpay of an employee serving on an on-call basis (reference LOPEZ v. AIR FORCE, 26 M.S.P.R. 369) or seasonal basis (for both on-call and seasonal, reference SCHMIDT v. TREASURY, 19 M.S.P.R. 202; and STRICKLAND v. MSPB, 748 F.2d 681) in accordance with conditions established at the time of appointment;

(e) A change in an employee's work schedule from other-than-full-time to full-time (reference COBB v. LABOR, 774 F.2d 475); however, an involuntary change from full-time to other-than-full-time is covered by OPM's reduction in force regulations (reference RICCI v. VA, 40 M.S.P.R. 113, for change from full-time to part-time; and BENNALLY v. INTERIOR, 20 M.S.P.R. 713 for change from full-time to seasonal); and

(f) A reduction in the number of scheduled hours within a part-time tour of duty (reference TUCKER v. CPSC, 21 M.S.P.R. 621).

7. MODIFICATIONS TO GENERAL COVERAGE UNDER OPM'S RIF REGULATIONS.

(a) (Reference 7-A-5-7-(a)). Administrative law judges are subject to OPM's 5 CFR Part 351 reduction in force regulations, as modified under 5 CFR 930.215(a) and (b) to exclude consideration of performance as a retention factor. (Reference MAY v. ICC, 20 M.S.P.R. 557.)

(b) (Reference 7-A-5-7-(b)). Certain positions covered by Indian preference under authority of 25 U.S.C. 472a are subject to modified reduction in force procedures that recognize Indian preference as a fifth retention factor. (Reference ANTOINE v. INTERIOR, 63 M.S.P.R. 185.)

(c) (Reference 7-A-5-7-(c)). Preference eligible employees of the Postal Service are covered by OPM's 5 CFR Part 351 retention regulations under authority of 39 U.S.C. 1005(a)(2). (Reference ROBINSON v. POSTAL SERVICE, 63 M.S.P.R. 307.)

o Postal Service employees who are not eligible for veterans' preference are not covered by OPM's 5 CFR Part 351 retention regulations. (Reference MARCOUX v. POSTAL SERVICE, 63 M.S.P.R. 373; and LOVE v. POSTAL SERVICE, 72 M.S.P.R. 571.)

8. EMPLOYEES EXCLUDED FROM COVERAGE UNDER OPM'S RIF REGULATIONS (reference 3-A-5-8).

(e) (Reference 3-A-5-8-(e)) Under authority of 5 U.S.C. 3323(b)(1), a reemployed annuitant who is receiving benefits from the Civil Service Retirement System, or from the Federal Employees Retirement System, serves at the will of the appointing officer and may be separated at any time by the agency. (Reference SPIEGEL v. DoD, 33 M.S.P.R. 165, 828 F.2d 769.)

(g) (Reference 3-A-5-8-(g)) Under Title 38, U.S.C., there are a group of employees in the Department of Veteran Affairs (VA) designated as "hybrids." The "hybrids" are excepted service employees appointed either under 38 U.S.C. 7401(3) (i.e., full-time permanent employees), or under 38 U.S.C. 7405 (i.e., part-time permanent employees). These employees are advanced and paid in accordance with the provisions of Title 38, U.S.C., but are covered by Title 5 U.S.C. for other personnel actions.

Most VA employees appointed under Title 38 U.S.C. are not covered by OPM's 5 CFR part 351 reduction in force regulations, which are derived from Chapter 35 of Title 5, U.S.C. Instead, most VA employees under Title 38 are covered by a Department policy and procedure known as "staffing adjustment."

The excepted service "hybrid" employees serving under Title 38, U.S.C., include a group of health care employees such as licensed practical nurses, licensed vocational nurses, pharmacists, occupational-, physical-, and respiratory therapists, and technicians.

VA Personnel Manual MP-5, Part I, Chapter 351, recognizes the entitlement of "hybrids" to coverage under OPM's reduction in force regulations found in 5 CFR Part 351. VA has administratively extended reduction in force assignment rights to these "hybrid" excepted employees if they are released for release from their competitive levels under 5 CFR Part 351. VA's "hybrid" excepted employees have potential reduction in force "bump" and "retreat" rights to other positions held by lower-standing employees who are both in the same competitive area, and are serving under the same appointing authority.

MODULE 3 (REDUCTION IN FORCE), MODULE B (GUIDANCE), SECTION 6. REORGANIZATION AND JOB EROSION

1. DEFINITION (reference 3-A-6-1). "REORGANIZATION" is defined as the planned elimination, addition, or redistribution of functions or duties in an organization. (5 CFR 351.203)

(a) A reorganization may result from changes in the:

(1) Restructuring of one position;

(2) Restructuring of many positions;

(3) Delegations of authority within an agency;

(4) Span of control within an agency;

(5) Reporting relationships within an agency;

(6) Funding for an agency;

(7) Ceiling allocation for an agency;

(8) Quantity of work in the agency (i.e., more work or less work); or

(9) Other reasons.

(b) There is no minimum standard to quantify what constitutes a reorganization (e.g., a reorganization may involve only one position, or a reorganization may involve the establishment of an entire new agency or major subdivision of the agency); for additional information, reference KILLINGSWORTH v. HHS, 11 M.S.P.R. 273; and HARDY v. ARMY, 67 M.S.P.R. 292.

(c) The agency has broad latitude in conducting a reorganization; for additional information, reference BACON v. HUD, 757 F.2d 265.

(d) The agency always has the final burden of proof that a reorganization resulted from a program decision and not because of personal reasons (such as reprisal against an employee); for additional information, reference LOSURE v. ICC, 2 M.S.P.R. 195; and LIGUORI v. USMA, 4 M.S.P.R. 6.

(e) The appellate review of a reorganization by the Merit Systems Protection Board or the United States Court of Appeals for the Federal Circuit does not include a review of the merits of a reorganization (i.e., a review of whether the agency should have chosen a different course of action); for additional information, reference GRIFFIN v. AGRICULTURE, 2 M.S.P.R. 168; and GANDOLA v. FTC, 23 M.S.P.R. 383, 773 F.2d 308.

(f) A bona fide reorganization requires the actual abolishment of an employee's position; for additional information, reference CASSELLI v. ARMY, 27 M.S.P.R. 196.

(g) The bona fide abolishment of an employee's position does not always mean that the agency ceases to perform all duties and responsibilities associated with an abolished position. Instead, the redistribution of some or all of the duties and responsibilities of the abolished position that are added to other positions may evidence that a bona fide reorganization has taken place; for additional information, reference O'CONNELL v. HHS, 21 M.S.P.R. 257; and DEPASCALE v. AIR FORCE, 59 M.S.P.R. 186.

(h) An agency may not abolish an employee's position in a reorganization for the purpose of targeting the employee for separation or downgrading as a result of the employee's poor performance and effecting an action that should be processed under 5 CFR Part 432 (Performance Based Reduction in Grade and Removal Actions) or 5 CFR Part 752 (Adverse Actions); for additional information, reference MEAD v. JUSTICE, 9 M.S.P.R. 283, 687 F.2d 285; NICHOLS v. DOD, 19 M.S.P.R. 471; and BUCKLER v. FRITB, 73 M.S.P.R. 476.

(i) An agency may consider an employee's job performance in determining what positions to abolish (i.e., the employee is still included in first and second round reduction in force competition); for additional information, reference GANDOLA v. FTC, 23 M.S.P.R. 383, 773 F.2d 308; and ANDERSON v. DOD, 48 M.S.P.R. 388; and BUCKLER v. FRITB, 73 M.S.P.R. 476.

2. USE OF RIF PROCEDURES IN REORGANIZATION (reference 3-A-6-2). If a reorganization results in the separation or downgrading of a competing employee, the agency must apply OPM's reduction in force regulations at the time that the separation or downgrading will actually take place. (5 CFR 351.201(a)(2)) (Reference BRUNJES v. ARMY, 2 M.S.P.R. 189; and AHO v. AGRICULTURE, 25 M.S.P.R. 569, 776 F.2d 1065.)

o (Reference 3-A-6-2) The agency always has the right to reassign an employee to avoid a reduction in force action (see 3-A-5-2; 5 CFR 335.102). (For additional information, reference CAMHI v. ENERGY, 13 M.S.P.R. 465; MACMURDO v. AGRICULTURE, 24 M.S.P.R. 388, 785 F.2d 322; and THOMAS v. UNITED STATES, 709 F.2d 48)

o (Reference 3-A-6-2) An employee who would be separated under adverse action procedures as the result of refusing a directed reassignment to a position in a different local commuting does not have reduction in force rights in lieu of reassignment, regardless of the employee's retention standing relative to other employees. (5 CFR 335.102) (For additional information, reference MACMURDO v. AGRICULTURE, 24 M.S.P.R. 388, 785 F.2d 322; HARPSTER v. ARMY, 39 M.S.P.R. 43; and COOKE v. POSTAL SERVICE, 67 M.S.P.R. 401, 73 F.3d 380.

(a) The agency is required to use reduction in force procedures even if a significant time period results between the implementation of the reorganization and a subsequent separation or downgrading of employees; for additional information, reference SHIEFER v. LABOR, 39 M.S.P.R. 34; and BARRY v. FLRA, 74 M.S.P.R. 159.

(b) In carrying out the reorganization, the agency has the right to decide what positions are abolished, when the reorganization will take place, and whether a reduction in force is necessary. (5 CFR 351.201(a)(1)) (For additional information, reference BACON v. HUD, 757 F.2d 265.)

(c) Most reduction in force actions, including most of the actions set forth in 3-B-5-4-(b) (e.g., lack of work, shortage of funds, etc.) result from reorganizations. Other reasons for a reorganization include:

(1) A decision to contract out work is a reorganization subject to the same 5 CFR Part 351 retention procedures used for all reduction in force actions; for additional information, reference STREITFELD v. RAILROAD RETIREMENT BOARD, 20 M.S.P.R. 182.

(2) The abolishment of civilian positions and the subsequent redeployment of workload to similar positions staffed by members of the Armed Forces is a reorganization; for additional information, reference GURKIN v. AIR FORCE, 40 M.S.P.R. 95; and MORAN v. AIR FORCE, 64 M.S.P.R. 77.

(3) The redistribution of duties and responsibilities in an organization is a reorganization even if employees' position descriptions are not changed; for additional information, reference STECHLER v. ENERGY, 20 M.S.P.R. 23, 758 F.d 666.

(4) The downgrading of a supervisor is a reorganization if an organizational change results in a smaller number of employees being supervised by the supervisor; for additional information, reference STECHLER v. ENERGY, 20 M.S.P.R. 23, 758 F.d 666; and HOLMES v. AMRY, 41 M.S.P.R. 612, 914 F.2d 271.

3. RECLASSIFICATION DUE TO NEW CLASSIFICATION STANDARDS OR CORRECTION OF CLASSIFICATION ERROR (reference 3-A-6-3). The downgrading of an employee due to classification error is not covered by either the 5 CFR Part 351 reduction in force regulations, or the 5 CFR Part 752 adverse regulations. (5 CFR 351.202(c)(2)); (5 CFR 752.401(b)(8))

o Classification error results when the employee's official position of record does not support the grade of the position.

o When the employee's official position of record is overgraded because of the classification error, the agency may downgrade the employee without regard to reduction in force or adverse action procedures. (For additional information, reference ATWELL v. MSPB, 670 F.2d 272; SAUNDERS v. MSPB, 757 F.2d 1288; and BARRY v. FLRA, 74 M.S.P.R. 159.)

o In carrying out the downgrading to correct the classification error, there is no change to the duties and responsibilities in the employee's official position of record. (Downgrading with a change in duties is a reorganization; reference BARRY v. FLRA, 74 M.S.P.R. 159.)

o If the agency wishes to move the employee to a new official position of record with different duties and responsibilites than the overgraded position, a separate personnel action is required after the classification error has been corrected.

- Example 1: An employee holds a GS-12 position with duties 1 through 5. The agency conducts a job audit and finds that duties 1 through 5 in the employee's present official position description only support a GS-11. In the same job audit, the agency also finds that the employee is actually performing duties 2 through 6 at the GS-11 level.

To remedy the situation and move the employee to the GS-11 position that the employee is actually performing, the agency first downgrades the employee from a GS-12 to a GS-11 because of classification error in the position with duties 1 through 5. The agency then reassigns the employee from the correctly graded GS-11 position to a new correctly graded GS-11 position with duties 2 through 6.

4. RECLASSIFICATION DUE TO JOB EROSION (reference 3-A-6-4). "JOB EROSION" describes a situation where the grade of a position must be reduced because grade-controlling duties have gradually disappeared for no apparent reason or time frame. (5 CFR 351. 202(c)(2))

o Reference HARDY V. ARMY, 67 M.S.P.R. 292; and GUBA v. ARMY, 70 M.S.P.R. 192.

(a) There is no regulatory definition of "Job Erosion" in title 5 CFR.

(b) Agencies often discover a potential job erosion situation during a classification or audit review of an employee's position.

(c) A classifier or auditor should also be aware that what appears to be a job erosion situation may be something else:

(1) An employee may simply be working on duties other than those in the employee's official position description; the agency may solve the overgrading situation by returning the employee to the duties in the official position description.

(2) The agency may have officially or unofficially given the employee's grade-controlling duties to other employees because of a performance problem; this is a planned management action that changed the employee's official position rather than job erosion.

(3) The agency may have permitted the employee's grade-controlling duties to drift to other employees because of inadequate position management practices, leaving the overgraded employee with an outdated position description; this is a planned management action that changed the employee's official position rather than job erosion.

5. USE OF RIF PROCEDURES IN JOB EROSION SITUATIONS (reference 3-A-6-5). An agency may use reduction in force procedures to correct an overgraded position in a potential job erosion situation by abolishing the surplus position of record as a reorganization; for additional information, reference HARDY V. ARMY, 67 M.S.P.R. 292; and GUBA v. ARMY, 70 M.S.P.R. 192. (5 CFR 351.201(b))

(a)(b) (Reference 3-A-6-5-(a) and (b)) An agency must use reduction in force procedures to correct an actual job erosion reclassification situation when two conditions are met (see 3-A-6-5): (5 CFR 351.202(c)(3))

(1) The job erosion downgrading action will take effect after the agency has formally announced a reduction in force in the employee's competitive area; (5 CFR 351.202(c)(3)), and

(2) The reduction in force will occur within 180 days after the effective date of the downgrading action. (5 CFR 351.202(c)(3))

o For additional information, reference HARDY V. ARMY, 67 M.S.P.R. 292; and GUBA v. ARMY, 70 M.S.P.R. 192.

(c) As an alternative to reduction in force, the agency may reassign the employee to a different position at the same grade as the employee's official position of record (see 3-A-5-2 for additional information). (5 CFR 335.102)

o (Reference 3-A-6-4- and 3-A-6-5) As an alternative to reduction in force, the agency may use the job erosion provision to reduce the grade of the overgraded position where grade-controlling duties have gradually disappeared for no apparent reason or time frame (see 3-A-6-4); for additional information, reference HARDY V. ARMY, 67 M.S.P.R. 292; and GUBA v. ARMY, 70 M.S.P.R. 192. (5 CFR 351.202(c)(3))

o (Reference 3-A-6-5) In determining whether reduction in force procedures are required, under 3-A-6-(b)-1 the agency must consider whether the reduction in force is "announced." (5 CFR 351.202(c)(3))

o (Reference 3-A-6-5) "Announced" means that the agency has issued one or more specific reduction in force notices in the competitive area.

o (Reference 3-A-6-5) Many times reduction in force is a possibility that will not occur, so the agency may proceed with the downgrading due to erosion of duties without using reduction in force procedures unless the agency has made an actual decision to conduct a reduction in force, as evidenced by the issuance of reduction in force notices.

o The purpose of the 180-day rule referenced in 3-B-6-2 above is to preclude reclassifications based on job erosion when reduction in force actions are pending in the competitive area.

(d) An agency must use reduction in force procedures, rather than the job erosion provision, when an employee will be downgraded because the agency abolished or transfered the employee's grade-controlling duties elsewhere in the agency with no update to the employee's position description (see 3-B-6-4-c); for additional information, reference HARDY v. ARMY, 67 M.S.P.R. 292, and GUBA v. ARMY, 70 M.S.P.R. 192.

o (Reference 3-A-6-2, 3-A-6-4, and 3-A-6-5) Job erosion is not a substitute for the 5 CFR Part 351 reduction in force procedures because of a lag in implementing the reorganization. As covered in 3-B-6-2-(a) above, the agency is required to use reduction in force procedures even if a significant time period results between the implementation of the reorganization and a subsequent separation or downgrading of employees; for additional information, reference SHIEFER v. LABOR, 39 M.S.P.R. 34; and BARRY v. FLRA, 74 M.S.P.R. 159.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 7. COMPETITIVE AREA

2. BASIS FOR COMPETITIVE AREA (reference 3-A-7-2). An agency defines the competitive area only on the basis of organization and geography. (5 CFR 351.402(b))

o (Reference 3-A-7-2) An agency may not define a competitive area on the basis of other considerations (e.g., bargaining unit membership, grade, occupation, etc.).

o (Reference 3-A-7-2) Once defined by the agency, the competitive area includes all employees in the organization(s) and location(s) included in the competitive area definition (e.g., the agency may not make an exception to the competitive area definition based on bargaining unit membership, grade, occupation, etc). (5 CFR 351.402(b))

3. COMPETITIVE AREA STANDARD FOR HEADQUARTERS ACTIVITIES (reference 3-7-A-3). A minimum headquarters competitive area may consist of any organizational unit under separate administration within the local commuting area. (5 CFR 351.402(b))

o The same competitive area standard applies for both headquarters and field activities. (5 CFR 351.402(b))

o OPM published final retention regulations in the Federal Register on November 24, 1997, at 62 FR 62495, that on pages 62498 and 62499 clarified OPM's longstanding policy concerning the minimum standard for a reduction in force competitive area:

"To conduct a reduction in force, section 5 CFR 351.402(a) provides that the agency must establish the applicable competitive area that is the boundary within which employees compete for retention under reduction in force procedures.

Section 5 CFR 351.402(b) provides that employees in a competitive area compete for retention under OPM's reduction in force regulations only with other employees in the same competitive area. Employees do not compete for retention with employees of the agency in another competitive area.

Section 5 CFR 351.402(b) provides that the agency must define each competitive area solely in terms of organizational unit and geographical location. The competitive area then includes all employees within the organizational unit and geographical location that is included in the competitive area definition. Each employee competes with all other employees in the competitive area for positions under OPM's retention regulations. There is no minimum or maximum number of employees in a competitive area. Also, in any one reduction in force, an agency may not use one competitive area for the first round of competition and a different competitive area for second rounds of competition.

Section 5 CFR 351.402(b) clarifies that the minimum competitive area for any agency component is a subdivision of the agency within the local commuting area that is under separate administration. An agency may establish separate competitive areas for different components in the same local commuting area if each component is under separate administration, which includes that each is independent of the other in operation, work function, and staff.

As used for purposes of establishing a minimum competitive area consistent with section 5 CFR 351.402(b), 'separate administration' is the administrative authority to take or direct personnel actions (i.e., the authority to establish positions, abolish positions, assign duties, etc.) rather than the issuance or processing of the documents by which these decisions are effected. This separate administration is evidenced by the agency's organizational manual and delegations of authority that document where, in the organization, final authority rests to make these decisions. (The competitive area standard also recognizes that many agencies retain certain personnel-related actions such as classification authority or final approval of higher-graded positions to a central authority above the organizational standard required for a minimum competitive area).

The same standard is used for a minimum competitive area in a local commuting area in both a headquarters organization or field component. Former references in 5 CFR 351.402(b) to organizational units that could comprise a minimum competitive area in a headquarters organization or field component were examples of where separate administration is often found in agencies. These references were deleted in final 5 CFR 351.402(b) to clarify that the same minimum competitive area standard is applicable whether the organizational unit is headquarters, a field activity, a duty station, or other applicable organization.

Under 5 CFR 351.402(b), an agency may establish a competitive area that is larger than the minimum standard. However, a competitive area may not be smaller than the minimum standard.

The fact that several activities may be serviced by the same personnel office does not, of itself, require that they be placed in the same competitive area. The personnel office merely processes personnel actions rather than having final responsibility to make decisions on whether to establish positions, abolish positions, assign duties, etc."

4. COMPETITIVE AREA STANDARD FOR FIELD ACTIVITIES (reference 3-7-A-4, and 3-B-7-3 above). A minimum headquarters competitive area may consist of any organizational unit under separate administration within the local commuting area. (5 CFR 351.402(b))

o The same competitive area standard applies for both headquarters and field activities. (5 CFR 351.402(b))

6. SEPARATE ADMINISTRATIVE AUTHORITY IN COMPETITIVE AREA DETERMINATIONS (reference 3-A-7-6). As used for establishing a minimum competitive area, "SEPARATE ADMINISTRATIVE AUTHORITY STANDARD" is the final administrative authority to take or direct personnel actions, such as the authority to establish positions, abolish positions, assign duties, etc, rather than the personnel office that processes the actions. (5 CFR 351.402(b))

o (Reference 3-A-7-6) Many agencies or components reserve certain personnel authorities to a central and/or higher level (e.g., classification authority, final approval of appointments to higher-graded positions, and/or overall control of the agency's budget and ceiling allocation). These limitations do not impact on the basic standard for a minimum competitive area, provided that the organization can demonstrate overall final administrative authority, and this is evidenced in the applicable delegations of authority to the organization.

o (Reference 3-A-7-6) For additional information, reference YOUNG v. INTERIOR, 21 M.S.P.R. 568; COLEMAN v. EDUCATION, 21 M.S.P.R. 574; WEBB v. LABOR, 18 M.S.P.R. 13, 765 F.2d 161; COX v. TVA, 41 M.S.P.R. 686.

7. COMPETITIVE AREAS LARGER THAN THE MINIMUM STANDARD (reference 3-A-7-7). An agency may establish a competitive area larger than the minimum standard under OPM's retention regulations.

o (Reference 3-A-7-7) An agency is not required to establish a competitive area larger than the minimum standard; for additional information, reference GRIER v. HHS, 750 F.2d 844.

o (Reference 3-A-7-7) There is no maximim administrative limit on the size of a competitive area, which potentially could extend to the establishment of a nationwide competitive area; for additional information, reference ROSENSTIEL v. ATF, 19 M.S.P.R. 478.

o (Reference 3-A-7-7) A minimum competitive area potentially may include a one-person duty station; for additional information, reference GINNODO v. OPM, 753 F.2d 1061.

8. LOCAL COMMUTING AREA DEFINITION (reference 3-A-7-8). The "LOCAL COMMUTING AREA" must be consistent with the general definition (see 3-A-7-8-a) and is relative to a given location.

o The local commuting area standard is covered in BEARDMORE v. AGRICULTURE, 761 F.2d 677 (Fed. Cir., 1984), in which the United States Court of Appeals for the Federal Circuit stated that the agency has both the right and responsibility to define a local commuting area for competitive area purposes, but that the agency's definition must be consistent with OPM's regulations and must be reasonable rather than arbitrary.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 9. COMPETITIVE LEVEL

2. POSITION DESCRIPTIONS ARE USED TO ESTABLISH COMPETITIVE LEVELS (reference 3-A-9-2). The agency establishes competitive levels on the basis of each employee's official position of record. (5 CFR 351.403(a)(2))

o For additional information, reference GEORGE v. ICC, 29 M.S.P.R. 479, 758 F.2d 667; FOSTER v. COAST GUARD, 8 M.S.P.R. 240; KLINE v. TVA, 46 M.S.P.R. 193; SCHROEDER v. TRANSPORTATION, 60 M.S.P.R. 566; SALAZAR v. TRANSPORTATION, 60 M.S.P.R. 633; and ANDERSON v. TVA, 77 M.S.P.R. 271.

o (Reference 3-A-9-2) The agency's burden of proof on a competitive level issue remains with the employees' official positions of record even when an agency uses an automated system to assist in determining employees' reduction in force rights; for additional information, reference KITCHING v. HHS, 20 M.S.P.R. 579.

o (Reference 3-A-9-2) On appeal, the Merit Systems Protection Board can assert the right to consider evidence other than the employees' official position descriptions in adjudicating a competitive level issue; for additional information, reference BATEMAN v. NAVY, 64 M.S.P.R. 464; DISNEY v. NAVY, 67 M.S.P.R. 563; BENKERT v. NAVY, 72 M.S.P.R. 432; and ANDERSON v. TVA, 77 M.S.P.R. 271.

5. UNDUE INTERRUPTION EXPLAINED (reference 3-A-9-5). A competitive level includes positions that, after consideration of the other conditions covered in 5 CFR 351.403, are so similar "..that the agency may reassign the incumbent of one position to any other other positions in the competitive level without "Undue Interruption." (5 CFR 351.403(a)(1))

o "Undue Interruption" is defined in 5 CFR 351.203, and is also covered in 3-A-4-1-(v).

o For additional information on undue interruption in the establishment of competitive levels, reference SCHULTZ v. INTERIOR, 12 M.S.P.R. 394; KLINE v. TENNESSEE VALLEY AUTHORITY, 46 M.S.P.R. 193; and ANDERSON v. TVA, 77 M.S.P.R. 271..

6. SEPARATE COMPETITIVE LEVELS REQUIRED (reference 3-A-9-6).

o (Reference 3-A-9-6) Competitive levels for supervisors and managers

Effective with final retention regulations OPM published in the Federal Register on January 13, 1995, at 60 FR 3055, there is no requirement in 5 CFR Part 351 that agencies establish separate competitive levels for supervisors and nonsupervisors.

The requirement that the agency establish separate competitive levels for supervisors/managers versus nonsupervisors/nonmanagers was formerly contained in 5 CFR 351.403(b)(5). This paragraph was deleted by the retention regulations OPM published on January 13, 1995. (The former paragraph 5 CFR 351.403(b)(6) was renumbered 5 CFR 351.403(b)(5).)

Except for this change, agencies still establish competitive levels using each employee's official position under the provisions found in 5 CFR 351.403. In most cases, the deletion of the requirement that the agency establish separate competitive levels for supervisors/managers versus nonsupervisors/nonmanagers has no effect on the agency's competitive levels. For example, the duties and responsibilities of a supervisory position will generally preclude placement of the position in a competitive level that includes nonsupervisory position.

(e) (Reference 3-A-9-6-(e)) Competitive levels for trainee and developmental positions.

The agency establishes separate competitive levels for formally-designated trainee and developmental positions; for additional information, reference HARRIS v. TREASURY, 5 M.S.P.R. 545. (5 CFR 351.403(b))(5)).

o (Reference 3-A-9-6-(e)) A formally-designated trainee position must meet the four conditions covered in 5 CFR 351.702(e)(1) through -(4); these conditions are also covered in 3-A-26-2; for additional information, reference GILBERT v. TRANSPORTATION, 21 M.S.P.R. 108. (5 CFR 351.403(b))(5); 5 CFR 351.702(e)(1)).

o (Reference 3-A-9-6-(e)) Positions in positions that do not meet all four conditions are not considered formally-designated trainee positions for purposes of establishing competitive levels, or for assignment rights in second round competition; for additional information, reference GILBERT v. TRANSPORTATION, 21 M.S.P.R. 108. (5 CFR 351.403(b))(5); 5 CFR 351.702(e)(1)).

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 10. ESTABLISHING RETENTION REGISTERS

1. GENERAL (reference 3-A-10-1). The "RETENTION REGISTER" applies the four retention factors required in law by 5 U.S.C. 3502(a) to the competitive level. (5 CFR 351.404(a))

o (Reference 3-A-10-1) A "MASTER RETENTION LIST" (or "MASTER RETENTION REGISTER") combines individual retention registers; for additional information, reference HANKS v. FEMA, 776 F.2d 1060, in which the agency did not establish individual competitive levels because all positions in the competitive area were abolished.

2. EMPLOYEES LISTED ON THE RETENTION REGISTER (reference 3-A-10-2-(a)-(c)). The retention register includes the name of each competing employee who holds an official position of record in the competitive level; for additional information, reference BROCK V. NAVY 49 M.S.P.R. 564; SMITH v. OPM, 67 M.S.P.R. 29; and TESTAN v. UNITED STATES, 424 U.S. 392. (5 CFR 351.404(a))

o An employee competes under OPM's retention regulations only on the basis of the employee's official position of record held on the effective date of the reduction in force; reference SMITH v. OPM, 67 M.S.P.R. 29. (5 CFR 351.506(b))

o The agency must return an employee serving on a detail, temporary promotion, or term promotion to the employee's official position of record by the effective date of the reduction in force (e.g., the agency must return an employee on a detail to the employee's official position of record before reduction in force competition in either the competitive level for the employee's official position of record, or the competitive level to which the employee was detailed); reference CHANCE v. FAA, 5 M.S.P.R. 277; FRANKEL v. EDUCATION, 17 M.S.P.R. 453; and TESTAN v. UNITED STATES, 424 U.S. 392. (5 CFR 351.404(a))

4. EMPLOYEES LISTED APART FROM THE RETENTION REGISTER (reference 3-A-10-4-(1)). Employees holding certain positions in a competitive level do not compete for retention in that competitive level, including an employee who is serving in a time-limited appointment that is not covered by the reduction in force regulations. (5 CFR 351.404(b)(1))

o (Reference 3-A-10-4-(1)) An employee serving in a competitive service temporary position is not covered by OPM's retention regulations and is not listed on the retention register, except when the employee serves in a provisional appointment authorized by 5 CFR 316.401 or 5 CFR 316.403; for additional information, reference STARLING v. HUD, 14 M.S.P.R. 620, 757 F.2d 271. (5 CFR 351.404(b)(1); 5 CFR 351.501(b)(3))

o (Reference 3-A-10-4-(1)) An employee serving in a term position is covered by OPM's retention regulations and is listed on the retention register even though the position is time-limited; for additional information, reference SPEAKER v. EDUCATION, 13 M.S.P.R. 163; and PERLMAN v. ARMY, 23 M.S.P.R. 125. (5 CFR 351.501(b)(3))

o (Reference 3-A-10-4-(1)) An employee serving in an excepted service temporary position under an appointment with a time limitation of more than 1 year is covered by OPM's retention regulations and is listed on the retention register even though the position is time-limited. (5 CFR 351.502(b)(3)(ii))

o (Reference 3-A-10-4-(1)) An employee serving in an excepted service temporary position under an appointment with a time limitation of less than 1 year is covered by OPM's retention regulations and is listed on the retention register after the employee has completed at least 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more; for additional information, reference COLEMAN v. FDIC, 62 M.S.P.R. 187. (5 CFR 351.502(b)(3)(iii))

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 12. RETENTION TENURE GROUPS

2. TENURE GROUPS-COMPETITIVE SERVICE (reference 3-A-12-2-(c)(3)).

(c)(3) (Reference 3-A-12-2-(c)(3)) GROUP III. Competitive service tenure Group III includes each employee serving under a term appointment. (5 CFR 351.501(b)(3))

o (Reference 3-A-12-2-(c)(3)) An employee serving in a term position is covered by OPM's retention regulations; reference SPEAKER v. EDUCATION, 13 M.S.P.R. 163; and PERLMAN v. ARMY, 23 M.S.P.R. 125.

o (Reference 3-A-12-2-(c)(3)) In the final retention regulations that OPM published on November 24, 1997, at 62 FR 62495, OPM revised paragraph 5 CFR 351.501(b)(1) to clarify longstanding policy that term employees are covered by OPM's reduction in force regulations:

"Section 351.501(b)(3). Order of retention-competitive service. Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of a register, status quo appointments, TERM APPOINTMENTS, and any other nonstatus nontemporary appointments which meet the definition of provisional appointments contained in sections 5 CFR 316.401 and 316.403." (62 FR 62500-62501; emphasis added for reference)

o (Reference 3-A-12-2-(c)(3)) The separation or downgrading of a term employee before expiration of the term appointment is covered by OPM's reduction in force regulations if the action results from one of the reasons covered in 5 CFR 351.201(a)(2) (e.g., reorganization, lack of work, shortage of funds, etc.). This means that, before the reduction in force effective date, the term employee must be given a specific 60 days reduction in force notice under 5 CFR 351.801(a)(1), or a specific 120 days reduction in force notice under 5 CFR 351.801(a)(2) applicable when 50 or more employees are separated from a competitive area in the Department of Defense. Also, the agency must apply the other provisions of 5 CFR Part 351, such as establishing competitive levels under 5 CFR 351.403, which potentially provides the term employee with the opportunity to displace another Tenure Group III employee on the same retention register.

o (Reference 3-A-12-2-(c)(3)) The separation of a Tenure Group III employee because of expiration of a term appointment is not covered under 5 CFR 351.201(a)(2) of OPM's reduction in force regulations.

A Tenure Group I or II employee whose position is abolished has the right to displace a lower-standing employee before release from the competitive level, as provided in 5 CFR 351.601(a). This includes the right to displace a Tenure Group III term employee in the competitive level who holds a term position with an expiration date no sooner than 90 days past the reduction in force effective date. (The definition of "Undue Interruption" in 5 CFR 351.203 is keyed to a 90 day standard.) In any first round displacement under 5 CFR 351.601(a), the higher-standing employee retains the same status and tenure.

- Example 1: The names of two employees are listed on the retention register for GS-301-9 positions; one employee is in Subgroup IB, and the second employee is in Subgroup IIIB because the employee was appointed to a term position with an expiration date 6 months after the reduction in force effective date. The position of the IB employee is abolished. The IB employee then displaces the IIIB employee who holds the term position. However, the IB employee continues to retain the same status and tenure while the employee encumbers the term position (i.e., the employee holding the term position is still in Subgroup IB).

When the term position expires, the Subgroup IB employee has the right to compete under the RIF regulations, with the employee's rights and benefits based upon Subgroup IB (e.g., upon receipt of a RIF separation notice, the employee is eligibile for the agency's RPL and CTAP because of the Subgroup IB status and tenure). If actually separated, the separation action is under authority of 5 CFR Part 351, and the former employee is eligible for priority in applying for positions in other agencies under ICTAP, again based upon the Subgroup IB status and tenure.

o (Reference 3-A-12-2-(c)(3)) A Tenure Group III employee who is separated by reduction in force is not eligible for the agency's Reemployment Priority List (reference 5 CFR 330.203(a)(1)), or Career Transition Assistance Plan (reference 5 CFR 330.604(b)). Also, a Tenure Group III employee who is separated by reduction in force is not eligible for priority consideration for positions in other Federal agencies under the Interagency Career Transition Assistance Plan (reference 5 CFR 330.703(b)(1)).

o (Reference 3-A-12-2-(c)) An employee serving in a competitive service temporary position is not covered by OPM's retention regulations, except when the employee serves in a provisional appointment authorized by 5 CFR 316.401 or 5 CFR 316.403; reference STARLING v. HUD, 14 M.S.P.R. 620, 757 F.2d 271; and HUME v. NAVY, 29 M.S.P.R. 221. (5 CFR 351.404(b)(1); 5 CFR 351.501(b)(3))

3. TENURE GROUPS-EXCEPTED SERVICE (reference 3-A-12-3-(b) and (c)).

(b)(2) (Reference 3-A-12-3-(b)(2)) GROUP II. Excepted service tenure Group II includes each employee whose tenure is equivalent to a career-conditional appointment in the competitive service in agencies having these appointments. (5 CFR 351.502(b)(2)(ii))

o Participants in the Student Educational Employment Program, which is authorized under 5 CFR 213.3202, have the same retention rights as other excepted employees employed under a Schedule B appointing authority.

Student participants who have not completed the education requirements for graduation are placed in excepted service tenure group II under OPM's reduction in force procedures. Section 5 CFR 351.502(b)(2) that excepted service tenure group II includes employees whose tenure is equivalent to a career-condtional apppointment in the competitive service in agencies having similar excepted appointments. Excepted service tenure group II also students participating in the Student Educational Employment Program who have not completed the education requirements for graduation, but are being carried in a leave-without-pay status.

A student participant who has completed the education requirements for graduation and is within the 120-day period for optional conversion to a competitive service career or career-conditional appointment is not covered by OPM's reduction in force regulations. After the student participant completes the education requirements for graduation, the individual is no longer eligible to remain in the Student Educational Employment Program, has no vested right to remain employed, and has no mandatory right to conversion to a competitive service appointment.

For retention purposes, this means that after the student participant completes the education requirements for graduation, and during the 120-day period for optional conversion to a competitive service appointment, the agency may terminate the student participant without regard to OPM's reduction in force regulations.

(c)(2) (Reference 3-A-12-3-(c)(2)) GROUP III. Excepted service tenure Group III includes each employee serving under an appointment with a time limitation of more than 1 year; this includes an excepted service employee serving on a term appointment. (5 CFR 351.502(b)(3)(ii))

o The employee is covered by OPM's reduction in force regulations from the date of appointment.

(c)(3) (Reference 3-A-12-3-(c)(3)) Excepted service tenure Group III includes each employee serving under an appointment with a time limitation of less than 1 year after the employee has completed at least 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more; reference COLEMAN v. FDIC, 62 M.S.P.R. 187. (5 CFR 351.502(b)(3)(iii))

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 13. VETERANS' PREFERENCE IN REDUCTION IN FORCE

3. GENERAL ELIGIBILITY FOR VETERANS' PREFERENCE (reference 3-A-13-3). Veterans' preference Veterans' preference for civil service purposes is authorized by 5 U.S.C. 2108. (5 CFR Part 211)

(a) (Reference 3-A-13-(a)) The Dual Compensation Act of 1964, as codified in 5 U.S.C. 3501(a) and 3502(a)(A) and (B), places additional limitations upon retired members of the Armed Forces that restricts both eligibility for retention preference, and the crediting of service in the Armed Forces for retention.

o Except for employees who are retired members of the Armed Forces, an employee who is eligible for veterans' preference for purposes of initial appointment to the Federal service is also eligible for veterans' preference under OPM's reduction in force regulations.

(b) (Reference 3-A-13-(b)) Sections 3-A-13 and 3-B-13 of the Restructuring Information Handbook have basic information on the application of veterans' preference for retention. However, in making an official determination of whether an employee is entitled to veterans' preference for retention, or to determine whether an employee's service in the Armed Forces is creditable for retention, refer to the applicable OPM Operating Manual, "THE GUIDE TO PROCESSING PERSONNEL ACTIONS," (which was formerly Federal Personnel Manual Supplement 296-33):

- Chapter 6, "DETERMINING CREDITABLE SERVICE AND DETERMINING SERVICE COMPUTATION DATES";

- Chapter 7, "VETERANS' PREFERENCE"; and

- Chapter 8, "PROCESSING ACTIONS FOR CIVILIAN RETIREES AND FOR MEMBERS AND FORMER MEMBERS OF THE ARMED FORCES."

7. ELIGIBILITY FOR VETERANS' PREFERENCE BASED ON DERIVATIVE PREFERENCE (reference 3-A-13-7). Veterans' preference also extends to four types of employees who are eligible for derivative preference, which is retention subgroup "A". (5 CFR 211.102(c))

(a) (Reference 3-A-13-7-(a)) Derivative preference may cover the unmarried widow or widower of a veteran, as defined in 5 U.S.C. 2108(1)(A); (5 U.S.C. 2108(3)(D)),

o For purposes of derivative retention preference eligibility for an unmarried widow or widower of a veteran, the definition of "Veteran" under 5 U.S.C. 2108(1)(A) is:

"'veteran' means an individual who--
(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during a period beginning April 28, 1952, and ending July 1, 1955."

(b) (Reference 3-A-13-7-(b)) Derivative preference may cover the spouse of a service-connected disabled veteran, as defined in 5 U.S.C. 2108(2), who has been unable to qualify for a Federal position; (5 U.S.C. 2108(E)),

o For purposes of derivative retention preference eligibility for an the spouse of a service-connected disabled veteran, the definition of "Disabled Veteran" under 5 U.S.C. 2108(2) is:

"'disabled veteran' means an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department."

(c) (Reference 3-A-13-7-(c)) Derivative preference may cover the mother of a veteran who died in a war or campaign, provided that the mother also meets other statutory conditions:

(1) Her husband is totally and permanently disabled; (5 U.S.C. 2108(F)(i)),

(2) She is widowed, divorced, or separated from the father and has not remarried; (5 U.S.C. 2108(F)(ii)), or

(3) She has remarried, but is widowed, divorced, or legally separated from her husband when preference is claimed. (5 U.S.C. 2108(F)(iii))

(d) (Reference 3-A-13-7-(d)) Derivative preference may cover the mother of a service-connected permanently and totally disabled veteran, provided that the mother also meets other statutory conditions:

(1) Her husband is totally and permanently disabled; (5 U.S.C. 2108(G)(i)); (5 U.S.C. 2108(G)(i)),

(2) She is widowed, divorced, or separated from the father and has not remarried; (5 U.S.C. 2108(G)(ii)), or

(3) She has remarried, but is widowed, divorced, or legally separated from her husband when preference is claimed. (5 U.S.C. 2108(G)(iii))

8. ELIGIBILITY FOR VETERANS' PREFERENCE WHEN THE EMPLOYEE IS RETIRED FROM THE ARMED FORCES (reference 3-A-13-8). Public Law 88-448 (the Dual Compensation Act of 1964), as codified in 5 U.S.C. 3501(a)(3)(A), (B), and (C), specifically limits the conditions under which a retired member of the armed forces is entitled to veterans preference for purposes of reduction in force competition in the Federal service. (5 CFR 351.501(d)(1)-(3))

o (Reference 3-A-13-8-(b)) The Dual Compensation Act of 1964 limits the application of veterans' preference for reduction in force purposes if the employee is receiving an immediate retirement from the Armed Forces after receiving credit for at least 20 years of military service; for additional information, reference MONACO v. UNITED STATES, 523 F.2d 935; PARTON v. ARMY, 4 M.S.P.R. 74; BURROUGH v. TVA, 43 M.S.P.R. 117; and REYES v. NAVY, 70 M.S.P.R. 476. (5 U.S.C. 3501(a)(3)(B))

o (Reference 3-A-13-8-(b)) This restriction applies even if the individual is receiving certain disability benefits from the armed forces, and/or the employee is receiving a service-compensable disability from the Department of Veterans Affairs; for additional information, refefence KELLY v. OPM, 53 M.S.P.R. 511; and BROOKS v. OPM, 59 M.S.P.R. 207. (5 U.S.C. 3501(a))

o (Reference 3-A-13-8-(a)-(c)) Under the Dual Compensation Act, Congress permitted retirees of the Armed Forces to retain their veterans' preference for most purposes, including appointment to Federal positions. However, Congress also provided that an Armed Forces retiree would not retain veterans' preference in RIF competition after beginning a second career in the Federal service, unless the individual meets one of the three conditions in 5 U.S.C. 3501(a)(3), which are also covered in 3-A-13-8-(a)-(c), and in 3-B-13-8-(a)-(c) below. (5 U.S.C. 3501(a); 5 CFR 351.501(d)(1)-(4))

(a) (Reference 3-A-13-8-(a)) A retired member of the Armed Forces is eligible for veterans' preference in reduction in force if the employee's Armed Forces' retirement is based on a disability:

(i) resulting from injury or disease received in the line of duty as a direct result of armed conflict, (5 U.S.C. 3501(a)(3)(A)(i); (5 CFR 351.501(d)(1)(i)), or

(ii) caused by an instrumentality of war and incurred in the line of duty as defined by Sections 101 and 1101 of title 38, U.S.C. (5 U.S.C. 3501(a)(3)(A)(i); 5 CFR 351.501(d)(1)(ii))

- Example: A retired member of the Armed Forces is credited with 20 years of active military service. The employee is also receiving a service-compensable disability from the Department of Veterans Affairs, but believes that he should be entitled to disability benefits from the Armed Forces based upon an act of war situation that meets condition (1) above from the Dual Compensation Act. In order to potentially gain eligibility for retention preference, the employee must contact the office of corrections for the appropriate Armed Forces retired pay center and request a change in the basis of his Armed Forces retired pay; for additional information, reference KELLY v. OPM, 53 M.S.P.R. 511; and BROOKS v. OPM, 59 M.S.P.R. 207.

(b) (Reference 3-A-13-8-(b)) A retired member of the Armed Forces is eligible for veterans' preference in reduction in force if the employee's Armed Forces' retirement is based on less than 20 years of active service. (5 U.S.C. 3501(a)(3)(B); 5 CFR 351.501(d)(2))

o (Reference 3-A-13-8-(b)) An employee whose Armed Forces retirement is based on at least 20 years of active military service is considered to have 20 or more years of full-time active service even when the actual day-for-day service totals less than 20 years; for addition information, reference BURROUGH v. TVA, 43 M.S.P.R. (1990).

- Example: A retired member of the Armed Forces is credited with 20 years of active military service for purposes of eligibility for retired pay from the Armed Forces. As an enlisted person, the individual had transferred to the Navy Fleet Reserve after 19 years and 6 months actual service, so that the employee's actual service in the Armed Forces is less than 20 years. Because the retired member received credit for 20 years of military service for purposes of the Armed Forces retired pay, the individual is considered to have 20 years of full-time active service in the Armed Forces under the Dual Compensation Act for purposes of eligibility for retention preference. For additional information, reference BURROUGH v. TVA, 43 M.S.P.R. 117.

o (Reference 3-A-13-8-(b)) A period of active duty for training in the Armed Forces is considered the same as other active duty in the Armed Forces if the service is ultimately credited toward retirement from the Armed Forces based upon 20 or more years of active service. In this situation, the employee may not deduct the training service and qualify for veterans' preference for retention on the basis that the retired pay from the Armed Forces is based upon less than 20 years of active service in the Armed Force. (5 U.S.C. 3501(a)(3)(B))

(c) (Reference 3-A-13-8-(c)) A retired member of the Armed Forces is eligible for veterans' preference in reduction in force if the employee has been continuously employed since November 30, 1964, by the Federal Government in a position covered by OPM's retention regulations. (5 U.S.C. 3501(a)(3)(C); 5 CFR 351.501(d)(3))

o (Reference 3-A-13-8-(c)) An employee who is eligible for veterans' preference in reduction in force under the "grandfather provision" of 5 U.S.C. 3501(a)(3)(C), that is generally applicable to retired members of the Armed Forces who have worked continuously for the Federal government since November 30, 1964, does not apply if the individual: (5 CFR 351.501(d)(4))

(1) Retired at the rank of major or higher (or equivalent) (5 U.S.C. 2801(4)(A)), and

(2) Is not a disabled veteran as defined in 5 U.S.C.2108(2) (see 3-A-13-4). (5 U.S.C. 2801(4)(B))

9. ELIGIBILITY FOR VETERANS' PREFERENCE WHEN THE EMPLOYEE IS RETIRED FROM THE ARMED FORCES AS A TITLE 10 RESERVIST (reference 3-A-13-9). A veteran who becomes eligible for retired pay at age 60 as a reservist under authority of chapter 67 of title 10, United States Code, is not subject to the Dual Compensation Act of 1964 because the retirement from the Armed Forces is based on less than 20 years creditable active service. (5 CFR 351.501(d)(5))

(a) To retain retention preference at at age 60, the reservist must have either:

(1) Retired at the rank of major (or equivalent) or higher, and be a disabled veteran, as defined in 5 U.S.C. 2108(2); (5 U.S.C. 2108(4)(A)); 5 CFR 351.501(d)(5)), or

(2) Retired below the rank of major (or equivalent). (5 U.S.C. 2108(4)(B); 5 CFR 351.501(d)(5))

(b) The reservist is eligible for veterans' preference only if the employee meets the applicable Armed Forces service requirements; for additional information reference LOVE v. POSTAL SERVICE, 76 M.S.P.R. 490. (5 CFR 351.501(d)(5))

o If the employee meets the requirements for veterans' preference, the reservist is always eligible for veterans' preference in reduction in force until age 60 when the Armed Forces retirement pay commences. (5 CFR 351.501(d)(5))

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 14. SERVICE CREDIT IN RIF

3. CREDITABLE SERVICE FOR RETENTION (reference 3-A-14-3).

(a) (Reference 3-A-14-3-(a)). Employees received reduction in force service credit for all civilian service performed as a Federal employee, as defined in 5 U.S.C. 2105(a); (5 U.S.C. 3502(a)(3); 5 CFR 351.503(b))

o Generally, all service that is creditable toward civil service retirement is creditable for reduction in force, although certain service that is not creditable for retirement may also be creditable for retention purposes, including service specifically authorized by statute for this purpose.

o Reference HORNER v. ACOSTA, 803 F.2d 687; the United States Court of Appeals for the Federal Circuit held that an individual is eligible for benefits only for service as an employee which meets the criteria set forth in 5 U.S.C. 2105(a). In order to be a Federal employee, the first criteria set forth in 5 U.S.C. 2105(a) provides that an individual must have been "appointed in the civil service." The Court found that definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. 2105(a); this action is evidenced by an executed SF 50 or SF 52, and documentation of an administered oath of office.

o The requirement that a Federal employee be "appointed" excludes an individual whose services are retained merely by contract. In order to be a Federal employee, the individual must have been appointed in the civil service; reference WATTS v. OPM, 814 F.2d 1576 (Fed. Cir.), Cert Denied, 484 U.S. 913, 108 S.Ct. 258, 98 L.Ed. 2d 216.

4. DETERMINING THE EMPLOYEE'S SERVICE DATE (reference 3-A-14-4). A record of all creditable Government service (e.g., civilian, military, and merchant marine service) is needed to determine each employee's relative retention standing in a subgroup.

o For additional information on the records used to determine the retention standing of competing employees, refer to Section 3-B-16.

o Detailed information on determining service credit under the reduction in force regulations is found in "The Guide to Processing Personnel Actions," formerly Federal Personnel Manual Supplement 296-33.

5. DETERMINING THE SERVICE DATE OF RETIRED MEMBERS OF THE ARMED FORCES (reference 3-A-14-5).

(1) and (2) (Reference 3-A-14-5-(1) and (2)). The official beginning and ending dates for official "periods of war," "campaigns," and "expeditions," are covered in "The Guide to Processing Personnel Actions," formerly Federal Personnel Manual Supplement 296-33.

o The Merit Systems Protection Board considered the limitations of the Dual Compensation Act in addressing what constitutes a period of war (or campaign or expedition) during active service in the Armed Forces for purposes of retention; reference BROOKS v. OPM, 59 M.S.P.R. 207.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 15. CREDIT FOR PERFORMANCE.

4. RATINGS USED FOR RIF PURPOSES (Reference 3-A-15-4).

(b) MODAL RATING. (Reference 3-A-15-4-(b)) "MODAL RATING" is the summary rating level assigned most frequently among the actual ratings of record that are:

(1) Assigned under the summary level pattern that applies to the employee's position of record on the date of the reduction in force; (5 CFR 351.203), and

(2) Given, as determined by the agency, within the same competitive area, or within a larger subdivision of the agency, or agencywide; (5 CFR 351.203; 5 CFR 351.504(c)(1)), and

(3) On record for the most recently completed appraisal period prior to the date of issuance of reduction in force notices, or the cutoff date the agency specifies prior to the issuance of notices after which no new ratings will be put on record. (5 CFR 351.203)

o Paragraphs 3-A-15-8 and 3-B-15-8 cover the conditions under which a rating is considered "On Record" and available for use by the office responsible for establishing the retention register. (5 CFR 351.504(b)(3)).

(4) (Reference 3-A-15-4-(b)) Modal ratings are used only when the competitive area undergoing a reduction in force contains an employee (or employees) who has no rating of record within the applicable 4 year period for crediting ratings. (Paragraph 3-A-15-3 covers the applicable 4-year time period for crediting ratings of record in reduction in force. (5 CFR 351.504(b)(1) and 5 CFR 351.504(b)(2)(e)).

o For example, an employee may not have received a rating of record because of a long-term absence from the job of record (e.g., active military duty, injury compensation, an assignment under the Intergovernmental Personnel Act, work on behalf of a collective bargaining unit, or assignment of duties outside management's control to appraise.

o (Reference 3-A-15-4-(b)) There is no requirement for an agency to either determine or to use modal ratings when every employee in the competitive area has at least one rating of record (including any performance evaluation determined to be an "Equivalent Rating of Record") during the applicable 4-year time period.

(5) (Reference 3-A-15-4-(b)) Modal ratings are specific to a pattern of summary levels, which are covered in 5 CFR 430.208(d). (5 CFR 351.203)

o Each summary pattern has its own modal rating.

o The agency will have more than one modal rating when more than one summary pattern is used in a competitive area, or in different competitive areas, undergoing the reduction in force.

(6) (Reference 3-A-15-4-(b)) Time period to determine modal ratings: Options 1 and 2.

- Option 1. An agency may determine modal ratings in advance of an actual reduction in force.

o An agency may decide to review the actual available ratings of record for the most recently completed appraisal period as soon as the agency anticipates a need to conduct a reduction in force.
o The agency may also review the actual available ratings of record at any time without regard to any immediate plans for downsizing. Either approach allows the agency to determine the various modal ratings for each of the summary level patterns used by the agency's appraisal programs.

- Option 2: An agency must determine modal ratings when required to prepare retention records for an actual reduction in force.

o An agency must determine modal ratings to provide additional retention service credit for performance when the agency finds employees in a competitive area who have no ratings of record during the applicable 4-year period. (5 CFR 351.504(c)(1))

(7) (Reference 3-A-15-4-(b)) The agency may determine modal ratings on the appraisal programs and patterns within the competitive area, a larger organizational unit (or units) within a subagency, a subagency, or agencywide. (5 CFR 351.203; 5 CFR 351.504(c)(1))

(8) (Reference 3-A-15-4-(b)) The agency determines the modal rating on the basis of the summary level pattern used by the applicable appraisal program. (5 CFR 351.504(c)(1))

o (Reference 3-A-15-4-(b)) For each employee with no rating of record, the agency must determine the following: (5 CFR 351.504(c)(1))

- What is the employee's position of record?

- What performance appraisal program covers that position?

- Which summary level pattern applies to that program on the date of the reduction in force?

(9) (Reference 3-A-15-4-(b)) The agency must use the same modal rating for all employees in the competitive area who:

- Have no ratings of record within the 4-year period preceding the reduction in force notice or the cutoff date, (5 CFR 351.504(c)(1)), and

- Are in positions of record covered by appraisal programs that use the same summary pattern. (5 CFR 351.203)

(10) (Reference 3-A-15-4-(b)) As applicable, the agency determines separate modal ratings for each of the (up to) eight different summary level patterns used by the agency's appraisal programs. (5 CFR 351.203; 5 CFR 351.504(c)(1))

o The agency may find that more than one pattern has the same modal rating. (For example, based on the agency's performance records, the agency may find that Level 3 ("Fully Successful," or equivalent) is the modal rating for both Pattern B and Pattern H).

o The agency should document the results of its decisions on modal ratings in a table, which is covered in the examples found in 3-B-5-4-(b)-(11) below.

(11) (Reference 3-A-15-4-(b)) In order to determine the modal rating for a particular summary level pattern, the agency should complete the following four steps included in Example 1: (5 CFR 351.203; 5 CFR 351.504(c)(1))

- Example 1:

- Step 1, Action: For the most recently completed appraisal period, the agency reviews the ratings of record within the competitive area (or a larger organization, if applicable) that are on record. The agency then sorts the ratings of record given under that summary pattern by summary level.

Situation: There is a single competitive area with a single performance appraisal program, and all ratings of record were assigned under Pattern H (which has 5 levels). The latest appraisal period ended September 30. The cut-off date to put ratings on record was December 1. The agency reviews the ratings of record that were given for the latest appraisal period, and that are on record, before the cutoff date:

o 10 employees received a Level 5
o 20 employees received a Level 4
o 15 employees received a Level 3
o 4 employees received a Level 2
o 2 employees received a Level 1

- Step 2, Action: Look at the number of ratings of record given for each summary level.

Situation:

o 10 employees received a Level 5
o 20 employees received a Level 4
o 15 employees received a Level 3
o 4 employees received a Level 2
o 2 employees received a Level 1

- Step 3, Action: The summary level with the highest count is the modal rating for the pattern.

Situation: 20 is the highest number, so Level 4 (e.g., "Exceeds Fully Successful," or equivalent) is the modal rating for Pattern H in this competitive area.

- Step 4, Providing Retention Credit for Performance on the Basis of a Modal Rating

Situation: In this situation, an employee with an actual Level 4 rating of record (e.g., "Exceeds Fully Successful," or equivalent) receives 16 years additional retention service credit for performance. The employee who has no rating of record receives 16 years additional retention service credit for performance based on the Level 4 modal rating.

(12) (Reference 3-A-15-4-(b)) Additional examples of the "Modal Rating", as defined in 5 CFR 351.203:

- Example 2: The Sports Agency

The Sports Agency is preparing for a reduction in force in two of its five bureaus. Each bureau is a separate competitive area, and each has a different performance appraisal program that uses a different summary level pattern. The last appraisal period, which is the same for the entire agency, ended September 30. The Sports Agency's Personnel Office issued notices to all employees in the affected bureaus that the cutoff date for putting ratings of record on record was November 1; after that date no new ratings of record would be accepted for crediting in the reduction in force.

On November 15, the personnel office's Reduction In Force Task Force examined the ratings of record on record for each employee in the separate competitive areas undergoing a reduction in force. The Task Force found that 5 of the 60 employees in the Golf Bureau and 3 of the 20 employees in the Tennis Bureau have had no ratings of record during the last 4 years. (Of these employees, 2 are on extended leave without pay while on active military duty, 3 are on injury compensation, 1 is a bargaining unit representative working on union duties, 1 is on an Intergovernmental Personnel Assignment, and 1 is a reinstated career employee who has not worked long enough after reemployment to receive a rating of record.)

The Golf Bureau's appraisal program uses Pattern E (Levels 1, 3, 4, and 5). The Tennis Bureau's appraisal program uses Pattern B (Levels 1, 3, and 5). The Task Force reviewed the ratings of record for each bureau and sorted the ratings by summary level, with the following results:

Example 2 (continued)

THE GOLF BUREAU

Pattern E

- Level 1 (Unacceptable),	3 employees
- Level 2 (Minimally Successful),	N/A
- Level 3 (Fully Successful),	21 employees
- Level 4 (Exceeds Fully Successful),	22 employees *
- Level 5 (Outstanding),	9 employees

The results of the Task Force's review finds that Level 4 was the summary level assigned most frequently (22 employees) for the latest appraisal period in the Golf Bureau. Level 4 is the modal rating for Pattern E. The Task Force will provide the same additional service credit to each of the 5 employees in the Golf Bureau who have no rating of record as the value provided to a rating of record of Level 4 in pattern E.

THE TENNIS BUREAU

Pattern B

- Level 1 (Unacceptable),	0 employees
- Level 2 (Minimally Satisfactory),	N/A
- Level 3 (Fully Satisfactory),	9 employees *
- Level 4 (Exceeds),	N/A
- Level 5 (Outstanding)	8 employees

The results of the Task Force's review finds that Level 3 was the summary level assigned most frequently (9 employees) for the latest appraisal period in the Tennis Bureau. Level 3 is the modal rating for Pattern B. The Task Force will provide the same additional service credit to each of the 3 employees in the Tennis Bureau who have no rating of record as the value provided to a rating of record of Level 3 in pattern B.

The Sports Agency may need to run reductions in force in some of its other Bureaus in the near future. While the Task Force is reviewing employee ratings of records for the two Bureaus where a reduction in force will be run, it will conduct a similar review for each of the agency's other Bureaus with its separate appraisal program and summary pattern. In order to be prepared for any additional reductions in force actions, the Sports Agency developed a table showing the modal rating for each of its Bureaus.

Example 2 (continued)

THE SPORTS AGENCY

	Level 1	Level 2	Level 3	Level 4	Level 5
Aquatics Bureau Pattern A-	1	N/A	7*	N/A	N / A
Baseball Bureau Pattern H-	1	1	6	8*	7
Golf Bureau Pattern E-	3	N/A	21	22*	9
Soccer Bureau Pattern G-	0	1	9*	6	N/A
Tennis Bureau Pattern B-	0	N/A	9*	N/A	8

- Example 3: International Business Agency

On January 3, the International Business Agency (IBA) announced an agencywide reduction in force resulting from a massive reorganization. All of the agency's seven Bureaus are included in a single competitive area. Although each Bureau has its own performance appraisal program, some of the programs use the same summary pattern. As part of the reduction in force process, the personnel office issued a memorandum advising that the cutoff date for all ratings of record to be on record is January 31.

On February 15, the personnel office reviewed all the recorded ratings of record and sorted them by appraisal program pattern and Bureau, resulting in the chart below. The personnel office found there were 15 employees who had no ratings of record for any of the 4 years prior to the cutoff date. (Of these employees, 6 are on injury compensation, 3 are on detail to Congress, 2 are bargaining unit representatives working on official union business, 1 is on extended sick leave, 1 just returned from an unappraisable Intergovernmental Personnel Assignment, and 2 are new hires.)

Example 3 (continued)

THE INTERNATIONAL BUSINESS AGENCY

	Level 1	Level 2	Level 3	Level 4	Level 5
o European Bureau o Asian Bureau o North American Bureau Pattern A-	2	N/A	105*	N/A	N/A
o African Bureau Pattern B-	0	N/A	28*	N/A	17
o Australian Bureau Pattern E-	3	N/A	21	30*	14
o South American Bureau o Caribbean Bureau Pattern H-	1	1	43	60*	40

Based on the results of the review, each of the 15 employees who have no ratings of record are assigned additional service credit for the applicable modal rating (referenced above with "*") for the appraisal program that corresponds to the employee's position of record:

- Employees in positions of record covered by appraisal programs using Pattern A receive additional service credit for retention on the basis of Level 3, Pattern A;
- Employees in positions of record covered by appraisal programs using Pattern B receive additional service credit for retention on the basis of Level 3, Pattern B;
- Employees in positions of record covered by appraisal programs using Pattern E receive additional service credit for retention on the basis of Level 4, Pattern E; and
- Employees in positions of record covered by appraisal programs using Pattern H receive additional service credit for retention on the basis of Level 4, Pattern H.

- Example 4: The Music Department

On July 1, the Music Department announced a reduction in force effective August 31 for its Jazz Division with a cut-off date for ratings of record of July 15. The Music Department's Human Resources (HR) Office advised all Division Chiefs that only the Jazz Division will be required to take an actual reduction in number of positions. Nonetheless, because the entire Department is a single competitive area, all Divisions may experience personnel changes as the reduction in force is run. The Music Department also uses a single, agencywide performance appraisal program with summary pattern H (5 levels). The HR Office reviewed the ratings of record to be credited for the reduction in force and found 15 employees with no ratings of record. (Of these employees, 5 recently transferred from the Legislative Branch, 3 are on extended sick leave, 2 are on injury compensation, 4 are on detail to various intelligence agencies, and 1 is on extended leave without pay while on active military duty.) On August 5, the HR Office tabulated its modal rating for the competitive area. The results of that review are:

THE MUSIC DEPARTMENT

	Level 1	Level 2	Level 3	Level 4	Level 5
Classical Division	0	0	12	21	70
Country Division	2	0	39	26	12
Jazz Division	3	3	35	41	21
Rock Division	2	2	28	20	3
Departmentwide Totals-	7	5	114*	108	106

As a result of the review, the modal rating for the competitive area (i.e., the entire Department) is Level 3, Pattern H. Since all creditable ratings of record were assigned under the same summary level pattern, the HR Office will provide each of the 15 employees who have no ratings of record 12 years of additional service credit (i.e., the amount provided under 5 CFR 351.504(d) for a rating of record of Level 3, Pattern H).

5. RATINGS IN OTHER AGENCIES (reference 3-A-15-5). An agency is required to consider employees' ratings of record earned in different agencies if the rating occurred within the applicable 4-year period. (5 CFR 351.504(b)(1))

(1) (Reference 3-A-15-5) The agency must accept an employee's copies of performance ratings of record in a different agency if the prior ratings are not available in the employee's official records, and the agency determines that the employee's copies of the ratings are valid. (5 CFR 351.504(b)(1) and 5 CFR 351.504(b)(2))

(2) (Reference 3-A-15-5) In reviewing the official records of an employee's ratings of record in a different agency, the agency must also determine the applicable summary level pattern of the rating. (5 CFR 351.203))

o When the agency finds multiple patterns of summary levels within a competitive area, the agency is not required to provide an employee with the same amount of retention service credit for performance that the employee would have received for the same rating in the former agency. (5 CFR 351.504(c)(1))

o Paragraphs 3-A-15-12 and 3-B-15-12 cover additional retention service credit for performance with multiple rating patterns.

7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430 (reference 3-A-15-7).

o (Reference 3-A-15-7) AGENCIES EXCLUDED--Certain agencies are excluded from the performance appraisal provisions authorized by 5 U.S.C. 4301(1), including:

- Architect of the Capitol
- Botanical Gardens
- Central Intelligence Agency
- Congressional Budget Office
- Copyright Royalty Tribunal
- Corporation for National Service
- DC Government
- Defense Intelligence Agency
- Export-Import Bank of the United States
- Federal Deposit Insurance Corporation
- Federal Home Loan Mortgage Corporation
- Federal Savings and Loan Insurance Corporation
- Federal Reserve Board
- General Accounting Office

(Continued-3-B-15-7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430)

- House of Representatives - Members
- House of Representatives - Sergeant at Arms
- Inter-American Foundation
- Legal Services Corporation
- Library of Congress
- National Imagery and Mapping Agency
- National Security Agency
- National Security Council
- Office of Technical Assistance
- Overseas Private Investment Corporation
- Panama Canal Commission
- Peace Corps
- Pennsylvania Avenue Development Corporation
- Pension Benefit Guaranty Corporation
- Postal Rate Commission
- Supreme Court
- Tennessee Valley Administration
- US Postal Service

o EMPLOYEES EXCLUDED--Certain employees are excluded from the performance appraisal provisions authorized by 5 U.S.C. 4301(1), including:

- Employees outside the US who are paid in accordance with local native prevailing wage rates for the area in which employed.

- Individuals in the Foreign Service of the United States.

- Physicians, dentists, nurses, or other employees in the Veterans Health Administration of the Department of Veterans Affairs whose pay is fixed under chapter 73 of title 38 U.S.C.

- Administrative Law Judges appointed under section 3105 of title 5 U.S.C.

- Employees in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service.

- Individuals appointed by the President.

- Employees not in the competitive service excluded by OPM regulation.

(Continued-3-B-15-7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430)

- Employees in temporary appointments not to exceed one year who agree to serve without a performance evaluation and who will not be considered for a reappointment or for an increase in pay based in whole or in part on performance.

o (Reference 3-A-15-7) As provided in 5 CFR 430.202(c), certain positions are excluded from the performance appraisal provisions authorized by 5 U.S.C. 4301(1), including:

- Employees in excepted service positions for which employment is not reasonably expected to exceed the minimum period established by the agency (under 5 CFR 207(a)) in a consecutive 12-month period.

o (Reference 3-A-15-7) POSITIONS EXCLUDED--As provided in 5 CFR 430.202(d) for OPM- approved agency requests for exclusions, certain positions are excluded from the performance appraisal provisions of 5 CFR Part 430, including:

- AGRICULTURE (1981) (Updated 1996).

-- Temporary positions filled under 5 CFR 213.3113(e)(3) when occupied by individuals whose principal duties involve making and servicing natural disaster emergency loans.

-- Positions filled under 5 CFR 213.3102(g).

-- Positions filled under 5 CFR 213.3102(k) when occupied by employees to whom no compensation is paid.

-- Positions filled under 5 CFR 213.3102(l) when occupied by scientific, professional, or technical experts for consultation purposes.

-- Positions filled under 5 CFR 213.3102(o) when occupied by faculty members.

-- Positions filled under 5 CFR 213.3202(c) when occupied by students under the Student Temporary Employment program.

(Continued-3-B-15-7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430)

-- Positions filled under 5 CFR 213.3313(a)(5) when occupied by State performance assistants, field assistants, or agricultural helpers, except that this exclusion applies for up to 220 working days in a service year when positions are occupied by individuals providing emergency services.

-- Positions filled under 5 CFR 213.3113(d)(2) when occupied by members of State Committees under the Farm Service Agency.

-- Positions filled under 5 CFR 213.3313(l)(3) when occupied by food inspectors or veterinarians.

-- Positions filled under 5 CFR 213.3113(f)(l) when occupied by Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids in the tobacco, dairy, and poultry commodities, Meat Acceptance Specialists, Clerks, and Laborers under the Prevailing Rate System.

-- Positions filled under 5 CFR 213.3313(f)(2) when occupied by Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids in the cotton, raisin, and processed fruit and vegetable commodities.

-- Positions filled under 5 CFR 213.3102(m) when occupied by custodians or general laborers.

-- Positions in Schedule A of 5 CFR 213.3113(a)(1) encumbered by employees who serve without compensation to the Federal Government and who also hold appointment with a State Cooperative Extension Service.

- COMMERCE.

-- Schedule A employees for 2000 Decennial Census (1996).

- EDUCATION.

-- Experts and Consultants under 5 U.S.C. 3109 (1995).

- ENERGY.

-- Experts & Consultants, Temporary and Intermittent (1980).

(Continued-3-B-15-7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430)

- FEDERAL EMERGENCY MANAGEMENT AGENCY.
  -- Employees hired under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93-288 (1996).

- GENERAL SERVICES ADMINISTRATION.

  -- Board of Contract Appeals (1981).

- HOUSING AND URBAN DEVELOPMENT.
  -- Members, Board of Contract Appeals (1997).
  -- Experts and Consultants (1997).

- INTERIOR, National Park Service.
  -- Seasonal part-time employees with appointments expected to last for more than 120 days but less than 180 days (1984).

- JUSTICE, FBI.
  -- Employees furnished on a reimbursable basis to various legislative committees (1980).
  -- Special Agents detailed to CIA (1981 and 1982).
  -- Special Agent detailed to GAO (1984).
  -- High school cooperative students (1987).

- JUSTICE, INS
  -- Members, Board of Immigration Appeals (1980).
  -- Immigration Judges, Executive Office for Immigration Review (1991).

- LABOR
  -- Members, Benefits Review Board (1985).
  -- Members & Alternates, Employees' Compensation Appeals Board (1985).
  -- Chairman & Member, Wage Appeals Board (1985).
  -- Chairman & Members, Labor Administrative Review Board (1997).

- NAVY
  -- Mariner Employees, Military Sealift Command (1981).

- STATE
  --Experts and Consultants under 5 U.S.C. 3109 (1996).

- U.S. ARMS CONTROL AND DISARMAMENT AGENCY
  -- Experts and Consultants under 5 U.S.C. 3109 (1996).

- VETERANS AFFAIRS
  -- Associate Members, Board of Veterans Appeals (1982).
  -- Members, Board of Contract Appeals (1996).

(Continued-3-B-15-7. RATING OF RECORD-EMPLOYEES NOT COVERED BY 5 U.S.C. CHAPTER 43 OR 5 CFR PART 430)

(a) (Reference 3-A-15-7-(a)-(e)). Employees who received ratings of record while not covered by 5 U.S.C. chapter 43, and 5 CFR Subpart 430-B, receive additional retention service credit based upon those ratings only if the agency determines that the ratings are "EQUIVALENT RATINGS OF RECORD," as defined in 5 CFR 430.201(c). (Also, 5 CFR 351.203)

o BACKGROUND: Some agencies and organizations within the Federal government are not covered by the performance appraisal provisions found in 5 U.S.C. Chapter 43 and in 5 CFR Part 430. However, many of these agencies have developed similar procedures to evaluate the performance of their employees.

The January 1997 reduction in force regulations limit the awarding of additional service credit for retention based on performance only to ratings given under authority of 5 U.S.C. Chapter 43 and 5 CFR Part 430. (For reference, this includes ratings of record given to employees while they are members of the Senior Executive Service). When employees moved from an agency (or organization) that is not covered by the appraisal provisions authorized by 5 U.S.C. Chapter 43 and 5 CFR Part 430 the appraisal law and regulations to an agency (or organization) that is covered, there was no authority for the employees to receive additional retention credit for performance based on the noncovered appraisal given, as applicable in the employee's former agency or former organization in the same agency.

o (For additional information on the performance provisions of OPM's January 1997 retention regulations, refer to Appendix B of Restructuring Information Handbook Module 3, Unit A.)

OPM's November 24, 1997, revised retention regulations provide that an agency may determine that an employee's performance evaluation from an agency not subject to 5 U.S.C. Chapter 43 and 5 CFR Part 430 meets the criteria for an "Equivalent Rating of Record," as defined in 5 CFR 430.201(c). The agency then awards additional retention service credit based upon the performance evaluations of competing employees. The agency conducting the reduction in force has the right to make this decision. (5 CFR 351.204)

o (A complete information copy of OPM's 5 CFR Part 351 reduction in force regulations, updated to January 1998, is found in Appendix D of Restructuring Information Handbook Module 3, Unit A.)

Paragraphs 5 CFR 351.504(b)(1) and (2) of OPM's reduction in force regulations provide that employees receive additional retention service credit based upon the employees' three most recent ratings of record of Level 3 (i.e., "Fully Successful" or equivalent), or higher, during the 4 years prior to the date (as applicable) the agency either issues specific reduction in force notices or freezes ratings by use of a cutoff date.

If any employees in the competitive area have performance evaluations or ratings during the applicable 4-year period that are not based on 5 U.S.C. Chapter 43 and 5 CFR Part 430, the agency may award additional performance credit for retention only if the agency determines that the performance evaluations meet the criteria for "Equivalent Ratings of Record," as defined in 5 CFR 430.201(c).

(d) (Reference 3-A-15-7-(d)). An "Equivalent Rating of Record" is a performance evaluation that meets requirements set forth in 5 CFR 430.201(c). The rating was issued by a Federal agency (or organization) that is not subject to 5 U.S.C. Chapter 43 and 5 CFR Part 430. Paragraph 5 CFR 430.201(c)(2) provides that an "Equivalent Rating of Record" must have:

(1) Been issued as an officially designated performance evaluation under the employing agency's performance evaluation system;

(2) Been derived from the appraisal of performance against expectations that are established and communicated in advance, and that are work related; and

(3) Identified whether the employee performed acceptably.

o An agency should determine whether a performance evaluation is an "Equivalent Rating of Record" when an employee first transfers from another agency (or organization), when the necessary information is still available from the former employer. In any situation, an agency may determine whether a performance evaluation is an "Equivalent Rating of Record" by answering the questions in the following two steps:

STEP 1. Examine the employee's performance evaluation from the other agency or organization and see if any of the following questions is answered "YES":

(1) Does the performance evaluation come from an agency not subject to the appraisal law and regulations?

[Refer to the "Agency Exclusion List" found in paragraph 3-B-15-7 for agencies that are excluded from 5 U.S.C. Chapter 43 and 5 CFR Part 430.]

(2) Did the employee occupy a position that was excluded from the appraisal law and regulations?

[Refer to the "Agency Exclusion List" found in paragraph 3-B-15-7 above for agencies that are excluded from 5 U.S.C. Chapter 43 and 5 CFR Part 430.]

(3) Does the performance evaluation come from an agency that requested specific exclusion from the Office of Personnel Management (OPM) for the position occupied by the employee?

[Refer to the "Agency Exclusion List" found in paragraph 3-B-15-7 for agencies that are excluded from 5 U.S.C. Chapter 43 and 5 CFR Part 430.]

STEP 2. If the answer to any of the previous questions in Step 1 is "YES," then the agency should review each employee's performance evaluation to determine:

(1) Was the performance evaluation issued as an officially designated evaluation under the employing agency's performance evaluation system?

(2) Was the performance evaluation derived from the appraisal of performance against expectations established and communicated in advance that were work related?

(3) Does the performance evaluation identify whether the employee performed acceptably?

(4) Is there a summary level that could fit into one of the patterns established at 5 CFR 430.208(d)? (When the performance evaluation does not include a summary level designator or rating pattern, the agency may identify a comparable level and pattern based on the information provided in the performance evaluation or information about the evaluation system under which it was given from the originating agency or organization.)

If the answers to all the questions in STEP TWO are "YES," then the performance evaluation meets the criteria for an "Equivalent Rating of Record" and is used to grant additional retention service credit for performance in a reduction in force.

o (Reference 3-A-15-7-(a)-(e)) For granting additional retention service credit in a reduction in force, the agency considers an "Equivalent Rating of Record" the same as a rating of record given under authority of 5 U.S.C. Chapter 43 and 5 CFR Part 430. The agency then awards the appropriate number of years of additional service. (For reference, paragraph 3-A-15-11 covers the longstanding 12/16/20 crediting procedure under a single rating pattern, while paragraph 3-A-15-12 covers alternative crediting options if the agency finds that the competitive area includes multiple rating patterns.)

8. AVAILABILITY OF RATINGS (reference 3-A-15-8).

(a) (Reference 3-A-15-8-(a)) To be creditable under OPM's reduction in force regulations, the agency must have issued the rating(s) to the employee, completed all appropriate reviews and signatures, and placed the rating on record. (5 CFR 351.504(b)(3))

o (Reference 3-A-15-8-(a)) Section 5 CFR 351.504 of the final retention regulations that OPM published on November 24, 1997, does not specifically cover what date should be used as the effective date of a rating of record for purposes of reduction in force competition. Part 5 CFR 430 also does not cover this issue. However, in related Supplementary Information published in the Federal Register at 62 FR 62498, OPM stated:

"Several comments asked what date should be used as the effective date of a rating of record (i.e., for purposes of OPM's reduction in force regulations)...It is OPM's view that the ending date of the applicable appraisal period is the effective date of the rating of record, and this date should be used to determine whether or not a rating of record falls within the 4-year 'look-back' period."

o (Reference 3-A-15-8-(c)) Consistent with the requirement set forth in 5 CFR 351.504(b)(4)(i), the agency should state its policy on what date is used as the effective date of a rating of record in the issuance(s) that implement the agency's performance management policies.

o For additional information on documenting agency policies implementing performance management issues, refer to 3-A-15-8-(d)-(1), and 3-A-15-8-(d)-(2).

(c)(1) (Reference 3-A-15-8-(c)-(1)): To ensure proper application under OPM's reduction in force regulations, each agency must specify its internal policy for processing ratings and putting them on record for reduction in force purposes. This policy must be included in the agency's appropriate issuances that implement its performance management policies. (5 CFR 351.504(b)(4))

o For additional information, reference HAATAJA v. LABOR, 25 M.S.P.R. 594, in which the Merit Systems Protection Board references the agency's issuances in reviewing whether the agency provided competing employees with proper retention credit.

(d)(1) (Reference 3-A-15-8-d-(1)): To ensure proper application under OPM's reduction in force regulations, each agency must specify in its internal policy for processing ratings and putting them on record for reduction in force purposes the conditions under which a rating is considered to have been received for purposes of determining an employee's retention standing.

o For additional information, reference MAZZOLA v. LABOR, 25 M.S.P.R. 682, in which the Merit Systems Protection Board first references HAATAJA v. LABOR, 25 M.S.P.R. 594, and then refers to the agency's issuances in reviewing whether the agency properly determined which ratings of record were available for retention purposes.

o The agency should state its policy on what date is used as the effective date of a rating of record in the issuance(s) that implement the agency's performance management policies. (Refer to 3-B-15-8-(a) above for additional information on this issue.)

(d)(2) (Reference 3-A-15-8-d-(2)):

- Example One: If the agency has no policy providing for a cutoff date for ratings of record and issues specific reduction in force notices on August 31, 1998, each employee is entitled to credit for ratings of record issued during the 4-year period from August 31, 1994 through August 30, 1998.

- Example Two: If the agency has a policy providing for the cutoff of ratings of record 30 days before it issues specific reduction in force notices on August 31, 1998, each employee is entitled to credit for performance during the 4-year period extending from August 1, 1994, through July 31, 1998.

9. FREEZING RATINGS (reference 3-A-15-9-(a)). The agency may establish a policy providing for a rating of record cutoff date a specific number of days prior to the date the agency issues specific reduction in force notices. (5 CFR 351.504(b)(2); 5 CFR 351.504(b)(4)(ii))

o (Reference 3-A-15-9-(a)) After the cutoff date, the agency may not put ratings of record on record and subsequently use those ratings for the purpose of determining employees' retention standing. (5 CFR 351.504(b)(2); 5 CFR 351.504(b)(4)(ii))

o (Reference 3-A-15-9) There is no authority for an agency to simply establish a fixed date for the freezing of employees' ratings of record for purposes of 5 CFR Part 351. Instead, 5 CFR 351.504(b)(4)(ii) states that:

"Each agency must specify in its appropriate issuance(s): If the agency elects to use a cutoff date, THE NUMBER OF DAYS prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart." (Emphasis added for reference.)

o (Reference 3-A-15-9-) Having established a cutoff date based on the number of days prior to the expected date that the agency will issue reduction in force notices, the agency may then retain that date if the planned effective date of the reduction in force is subsequently changed to a later date.

10. MISSING RATINGS (reference 3-A-15-10).

(a) (Reference 3-A-15-10-(a)) An employee who has not received any rating of record during the applicable 4-year period receives additional service credit for retention on the basis of a "Modal Rating." (5 CFR 351.203; 5 CFR 351.504(c)(1))

o Paragraphs 3-A-15-4-(b) and 3-B-15-4-(b) cover "Modal Ratings."

(b)(1) (Reference 3-A-15-10-(b)(1)) An employee who has received only two actual ratings of record during the applicable 4-year period receives additional service credit for retention by adding together the value of the two ratings, dividing by two, and rounding to the next higher whole number if the result is a fraction. (5 CFR 351.504(c)(2))

o Paragraphs 3-A-15-11 and 3-B-15-11 cover additional retention service credit for performance when the competitive area includes only a single pattern of summary levels. The two paragraphs also cover the amount of additional service credit for retention in a situation with a single pattern of summary levels. (5 CFR 351.504(d))

- Example 1: Two ratings of record under a single rating pattern:

All employees in the competitive area received ratings of record only under a single pattern of summary levels, which in this example is Pattern H (five-levels).

During the applicable 4-year period for considering ratings of record to be used for retention purposes, the employee in this example received only two actual ratings of record as the result of being called to active duty in the Armed Forces. The employee's actual ratings of record were Level 5 ("Outstanding") and Level 4 ("Exceeds Fully Successful"). Because the competitive area includes only competing employees covered by a single rating pattern, the employee received additional service credit for retention on the following basis: (5 CFR 351.504(c)(2))

Rating 1: Level 5 = 20 additional years of service
Rating 2: Level 4 = 16 additional years of service
+_____
gross sum = 36 additional years of service

Net additional service credit is computed by dividing the gross sum of 36 additional years of service by the two actual ratings, which results in 18 additional years of retention service credit for the employee.

(b)(2) (Reference 3-A-15-10-(b)(2)) An employee who has received only one actual rating of record during the applicable 4-year period receives additional service credit for retention on the basis of that single rating. (5 CFR 351.504(c)(2))

- Example 2: -One rating of record under a single rating pattern:

All employees in the competitive area received ratings of record only under a single pattern of summary levels, which in this example is Pattern H (five-levels).

During the applicable 4-year period for considering ratings of record to be used for retention purposes, the employee in this example received only one actual rating of record as the result of being called to active duty in the Armed Forces. The employee's actual rating of record was Level 5 ("Outstanding"). Because the competitive area includes only competing employees covered by a single rating pattern, the employee received additional service credit for retention on the following basis: (5 CFR 351.504(c)(2))

Rating 1: Level 5 = 20 additional years of service

Net additional service credit is computed by the amount of the additional service credit from the single rating, which results in 20 additional years of retention service credit for the employee.

11. AMOUNT OF CREDIT-SINGLE RATING PATTERN (reference 3-A-15-11). If all employees in the competitive area received ratings of record only under a single pattern of summary levels, the agency provides additional retention service credit for performance on the following basis:

- Level 5 ("Outstanding" or equivalent) = 20 additional years of service (5 CFR 351.504(d)(1))
- Level 4 ("Exceeds Fully Successful" or equivalent) = 16 additional years of service (5 CFR 351.504(d)(2))
- Level 3 ("Fully Successful" or equivalent) = 12 additional years of service (5 CFR 351.504(d)(3))
- Level 2 = ("Minimally Successful" or equivalent) = 0 additional years of service (5 CFR 351.504(d))
- Level 1 = ("Unsuccessful" or equivalent) = 0 additional years of service (5 CFR 351.504(d))

- Example 1: three ratings of record under a single rating pattern:

All employees in the competitive area received ratings of record only under a single pattern of summary levels, which in this example is Pattern H (five-levels).

During the applicable 4-year period for considering ratings of record to be used for retention purposes, the employee in this example received three actual ratings of record. The employee's three actual ratings of record were Level 5 ("Outstanding"), Level 5 ("Outstanding"), and Level 4 ("Exceeds Fully Successful"). Because the competitive area includes only competing employees covered by a single rating pattern, the employee received additional retention service credit on the following basis: (5 CFR 351.504(d))

Rating 1: Level 5 = 20 additional years of service
Rating 2: Level 5 = 20 additional years of service
Rating 3: Level 4 = 16 additional years of service
+_____
gross sum = 56 additional years of service

Net additional service credit is computed by dividing the gross sum of 56 additional years of service by the three ratings of record (i.e., 18.7), which after rounding up results in 19 additional years of retention service credit for the employee.

- Example 2: three ratings of record under a single rating pattern:

In computing additional years of retention service credit based on performance, the agency always rounds up a fraction to the next higher whole number.

All employees in the competitive area received ratings of record only under a single pattern of summary levels, which in this example is Pattern H (five-levels).

During the applicable 4-year period for considering ratings of record to be used for retention purposes, the employee in this example received three actual ratings of record. The employee's three actual ratings of record were Level 4 ("Exceeds Fully Successful"), Level 5 ("Outstanding"), and Level 4 ("Exceeds Fully Successful"). Because the competitive area includes only competing employees covered by a single rating pattern, the employee received additional retention service credit on the following basis: (5 CFR 351.504(d))

Rating 1: Level 4 = 16 additional years of service
Rating 2: Level 5 = 20 additional years of service
Rating 3: Level 4 = 16 additional years of service
+_____
gross sum = 52 additional years of service

Net additional service credit is computed by dividing the gross sum of 52 additional years of service by the three ratings of record (i.e., 17.3), which after rounding up results in 18 additional years of retention service credit for the employee.

12. AMOUNT OF CREDIT-MULTIPLE RATING PATTERNS (reference 3-A-15-12). Paragraph 5 CFR 351.504(e) provides that if an agency determines that employees in a competitive area have ratings of record under more than one pattern of summary levels (as covered in 5 CFR 430.208(d)), the agency must consider the mix of patterns in providing competing employees with additional retention service credit for performance.

(1) (Reference 3-A-15-12) "Mixed Patterns" exist when one or more ratings of record within a competitive area that are now being credited for retention under 5 CFR 351.504 were given to competing employees under a different summary level pattern than other ratings of record in the same competitive area.

o (Reference 3-A-15-12) Different situations may result in mixed patterns of summary level patterns:

- Example 1: An agency changes its performance appraisal program, going from one summary level pattern to another (e.g., from a traditional five-level pattern to a two-level "Pass/Fail" pattern). After a new rating cycle is completed, the employees will have ratings of record given under two different types of summary level patterns.

- Example 2: Different components of an agency use different appraisal programs with different summary level patterns. An employee moves from one component to another. After a new rating cycle is completed, the employee will have ratings of record given under two different types of summary level patterns.

- Example 3: An agency uses only a single appraisal program and a single summary level pattern. Employees transfer to the agency from other Federal agencies, where the employees received one or more ratings of record under a different pattern. The employees will have ratings of record given under two different types of summary level patterns.

(2) (Reference 3-A-15-12) To determine whether or not a mix of patterns exists, the agency must first refer to the applicable definition of competitive area. (Reference Section 3-A-7 for additional information on competitive areas.)

The agency must then list all ratings of record that will be credited to competing employees in the reduction in force. This includes any "Equivalent Ratings of Record" (reference 3-A-15-7 and 3-B-15-7).

The agency then compares the patterns of the ratings. As provided in 5 CFR 351.504(b)(1) and (b)(2) (reference 3-A-15-3), this requires the agency to review up to three ratings of record for every employee in the reduction in force competitive area.

If more than one pattern is represented (even if there is just one rating that differs from a predominant pattern), then a mix of patterns exists in that competitive area.

(3) (Reference 3-A-15-12) If a mix of patterns exists, 5 CFR 351.504(e) requires the agency to (i) consider the mix of patterns, and (ii) provide additional retention service credit for performance consistent with 5 CFR 351.504(e)(1)-(8).

o (For additional information on the requirements in 5 CFR 351.504(e)(1)-(8), reference 3-A-15-12.)

(4) (Reference 3-A-15-12) Note that 5 CFR 351.504(e)(8) of OPM's November 24, 1997, revised reduction in force regulations provides that an agency may modify retention service for performance only on the basis of ratings of record that are put on record on or after October 1, 1997. An agency must credit all ratings of record that were put on record prior to October 1, 1997, under January 1997 retention regulations (i.e., additional service credit for retention based on performance is credited only on the basis of 12, 16, or 20 additional years of service.)

o For additional information on the performance provisions of OPM's January 1997 retention regulations, refer to Appendix B of Restructuring Information Handbook Module 3, Unit A.

(h) (Reference 3-A-15-12-(h)). Section 5 CFR 351.504(e)(7) requires that each agency specify the number(s) of years additional retention service credit for performance that the agency will establish for summary levels under different patterns. (For reference, "Patterns of Summary Levels" are defined in 5 CFR 430.208(d)).

(1) (Reference 3-A-15-12-(h)) In determining the amount of additional service credit for retention in a situation where the competitive area includes multiple rating patterns, the agency may consider issues such as:

- How many different summary level patterns are there in the mix?

- Is there a predominant summary level pattern?

- How many employees have ratings of record under each of the different patterns?

- How many ratings of record are from summary level patterns that differ from the predominant pattern?

- What effect would it have on employees if the agency applied the default (and longstanding) 12/16/20 crediting procedure?

- What summary level was assigned most frequently to employees in each pattern?

- What types of performance distinctions have already been made in the rating process, and how can those distinctions be preserved?

(2) (Reference 3-A-15-12-(h)) AGENCY OPTIONS FOR DETERMINING RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS. Agency options include, but are not limited to:

(i) (Reference 5 CFR 351.504(e)(4), and 3-A-15-12-(e)). The agency may establish the same number of years of credit for different summary levels in the same pattern.

- Example 4: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings. Under 5 CFR 351.504(e)(4), the agency, at its discretion, could decide to provide the employees (for example) who have ratings under the five-level Pattern H that were put on record on or after October 1, 1997, with the same 16 years of additional retention credit for each applicable Level 3 rating ("Fully Successful" or equivalent), and each applicable Level 4 rating ("Exceeds Fully Successful" or equivalent).

(ii) (Reference 5 CFR 351.504(e)(3), and 3-A-15-12-(d)) The agency may establish different amounts of retention service credit for the same level in different patterns. (Reference 5 CFR 351.504(e)(6), and 3-A-15-12-(g).) The amount of additional retention service credit for performance may be any whole number between 12 years and 20 years of additional retention credit.

- Example 5: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings. Under 5 CFR 351.504(e)(6), the agency, at its discretion, could (for example) decide to provide employees who have applicable Level 3 ratings ("Fully Successful" or equivalent) under the five-level Pattern H, that were put on record on or after October 1, 1997, with 14 years of additional retention credit, while providing employees with applicable Level 3 ratings under Pattern A (two-level) with (for example) 16 years of additional credit.

(iii) (Reference 5 CFR 351.504(b)(4), and 3-A-15-8-(c)) The agency may establish an agencywide policy that sets the amount of additional retention credit applicable to each different summary level within its applicable rating pattern found within the agency, and then apply this policy to all competitive areas and reduction in force actions throughout the agency.

(iv) The agency may modify an established agencywide policy that sets the amount of additional retention credit applicable to each different summary level within its applicable rating pattern found within the agency, and then apply this modified policy to all competitive areas and reduction in force actions throughout the agency. (Reference 5 CFR 351.504(b)(4), and 3-A-15-8-(c).)

(v) The agency may allow subagencies and/or activities to establish their own policy on the amount of additional retention credit applicable to each different summary level within its applicable rating pattern found within a particular competitive area. The subagency and/or activity may subsequently modify the policy for a different competitive area (or areas), and/or a different reduction in force action (or actions). (Reference 5 CFR 351.504(b)(4), and 3-A-15-8-(c).)

(vi) (Reference 5 CFR 351.504(e)(2) and (e)(3), and 3-A-15-12-(c) and (d).) The agency may establish, and use, the longstanding (and default) 12/16/20 crediting procedure to assign additional retention service credit for all ratings of record regardless of individual summary level patterns.

- Example 6: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings. Under 5 CFR 351.504(e)(2) and (e)(3), the agency, at its discretion, could decide to provide the employees who have applicable ratings under the five-level Pattern H, that were put on record on or after October 1, 1997, with the default amounts of 12 years of additional retention service credit for each applicable Level 3 rating ("Fully Successful" or equivalent), 16 years for each applicable Level 4 rating ("Exceeds Fully Successful" or equivalent), and 20 years for each applicable Level 5 rating ("Outstanding" or equivalent). The agency could also decide to provide employees under the two-level Pattern A with only 12 years of additional retention service credit for each applicable Level 3 rating ("Fully Successful" or equivalent).

(3) AGENCY OPTIONS FOR DETERMINING RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS. Agency options do not include, in part:

(i) (Reference 5 CFR 351.504(e)(8), and 3-A-15-12-(i)) The agency may not modify the amount of additional service credit for retention that is applicable to any ratings of record put on record before October 1, 1997.

- Example 7: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings that were put on record before October 1, 1997. Under 5 CFR 351.504(e)(8), the agency may not modify the 12/16/20 crediting procedure authorized in OPM's January 1997 retention regulations if all of the ratings were put on record before October 1, 1997.

(ii) (Reference 5 CFR 351.504(e)(5), and 3-A-15-12-(f).) The agency may not establish different amounts of additional retention service credit for the same level of performance in a single rating pattern.

- Example 8: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings. Under 5 CFR 351.504(e)(5), the agency (for example) must establish the same number of years of additional retention service credit for all employees with applicable Pattern A ratings of Level 3 ("Fully Successful" or equivalent).

(4) AGENCY REQUIREMENTS FOR DETERMINING RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS. Agency requirements include:

(i) (Reference 5 CFR 351.504(e)(1), and 3-A-15-12.) The agency must determine if a competitive area includes employees who have ratings of record under more than one pattern of summary rating levels.

(5) EXAMPLES OF RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS.

(ii) (Reference 5 CFR 351.504(e)(1)-(8), and 3-A-15-12). If a competitive area includes more than one pattern of summary rating levels, the agency must consider the mix of patterns and provide additional retention service credit for performance consistent with 5 CFR 351.504(e)(1)-(8).

- Example 9: The agency finds that a competitive area includes some employees with Pattern A (two-level) ratings of record, and other employees with Pattern H (five-level) ratings. Under 5 CFR 351.504(e), the agency (for example) must determine whether employees with applicable Pattern A ratings of Level 3 ("Fully Successful" or equivalent), and employees with applicable Pattern H ratings of Level 3, receive the same or different amounts of retention service credit based on performance.

(iii) (Reference 5 CFR 351.504(e)(7), and 3-A-15-12-(h).) If a competitive area includes more than one pattern of summary rating levels, the agency must specify the number of years additional retention service credit that it will establish for summary rating levels within their applicable patterns, and make this information readily available for review.

(5) EXAMPLES OF RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS (continued).

- Example 10: The agency is planning for a June 1, 1998, reduction in force in a single competitive area (e.g., the entire agency headquarters is a single competitive area). Beginning October 1, 1995, the entire agency changed from a Pattern H (five-level) summary pattern to a Pattern A (two-level) summary pattern. The agency now finds a mix of ratings of record with two different summary level patterns in the competitive area.

The ratings of record for the rating years ending September 30, 1994, and September 30, 1995, were given under Pattern H (five-levels). The ratings of record for the rating years ending September 30, 1996, and September 30, 1997, were given under Pattern A (two-levels). Paragraph 5 CFR 351.504(e) of OPM's November 24, 1997, retention regulations provides that the agency may establish retention credit for performance under an alternative crediting procedure applicable to multiple rating patterns only for ratings of record that were put on record on or after October 1, 1997.

All the employees were rated under the same number of summary levels in any given year. Two of the three most recent ratings of record being credited must be assigned credit under the longstanding 12/16/20 crediting procedure authorized in OPM's January 1997 retention regulations.

In this example, the agency decided to use the default 12/16/20 crediting procedure for all of the employees' ratings of record that were put on record on or after October 1, 1997. The agency then provided additional retention service credit, for ratings that were put on record on or after October 1, 1997, on the following basis:

	Level 1	Level 2	Level 3	Level 4	Level 5
Pattern H	0	0	12	16	20
Pattern A	0	NA	12	NA	NA

- Example 11: The activity (i.e., a component of an agency) is planning for a June 1, 1998, reduction in force in a single competitive area comprised of 100 employees. Beginning October 1, 1995, the agency changed from a Pattern H (five-level) summary pattern to a Pattern A (two-level) summary pattern. In addition, 35 of the 100 employees in the competitive area transferred with their function from a different activity that uses only five-level Pattern H summary ratings.

(5) EXAMPLES OF RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS (continued).

The activity then reviews all ratings of record of employees in the competitive area, and finds a mix of ratings of record, consisting of two different summary level patterns in the competitive area. In preparing for the reduction in force, the activity reviews the employees' ratings of record and finds that, of the ratings put on record on or after October 1, 1997, 65 employees have two-level ratings under Pattern A, and 35 employees have five-level ratings under Pattern H.

The dominant pattern is Pattern A (two-level), where the highest possible rating is Level 3 ("Fully Successful"). The most frequent rating of record given to the Pattern H (five-level) employees was Level 4 ("Exceeds Fully Successful").

Paragraph 5 CFR 351.504(e) of OPM's November 24, 1997, retention regulations provides that the agency may establish retention credit for performance under an alternative crediting procedure applicable to multiple rating patterns only for ratings of record that were put on record on or after October 1, 1997.

In this example, the agency decided to use Level 4, which was the most common rating level for the 35 employees with current ratings of record under Pattern H (which has five summary levels), as the basis for providing credit to the 65 employees with current ratings of record (all of which were put on record on or after October 1, 1997) under Pattern A (which has two summary levels).

The goal of the agency was to minimize the potential disadvantage that would result if the 65 employees under Pattern A received a maximum of 12 years additional retention credit for performance based upon Level 3 ratings put on record on or after October 1, 1997, while most of the 35 employees under Pattern H would receive 16 years additional retention credit for performance based upon Level 4 ratings put on record on or after October 1, 1997.

The agency then provided additional retention service credit on the following basis:

	Level 1	Level 2	Level 3	Level 4	Level 5
Pattern H	0	0	12	16	20
Pattern A	0	NA	16	NA	NA

(5) EXAMPLES OF RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS (continued).

- Example 12: The activity is planning for a June 1, 1998, reduction in force in a single competitive area comprised of 100 employees. Beginning October 1, 1995, the agency changed from a Pattern H (five-level) summary pattern to a Pattern A (two-level) summary pattern. In addition, 20 of the 100 employees in the competitive area transferred with their function from a different activity that uses only five-level Pattern H summary ratings.

The activity now finds a mix of ratings of record with two different summary level patterns in the competitive area. Specifically, 80 employees have Pattern A (two-level) ratings that were put on record on or after October 1, 1997, while the 20 employees who transferred from a different activity have Pattern H (five-level) ratings that were put on record on or after October 1, 1997.

The dominant pattern is Pattern A (two-level), where the highest possible rating is Level 3 ("Fully Successful"). The most frequent rating of record given to the Pattern H (five-level) employees was Level 4 ("Exceeds Fully Successful").

One option the agency considered for providing retention credit based upon ratings put on record on or after October 1, 1997, was assigning 20 years of additional credit to every level in both patterns, which would in effect wipe out all performance distinctions above Level 3 (Fully Successful or equivalent) that affect the RIF process. Instead, the agency decided to honor the performance distinctions already made, but wanted to manage the amount of advantage or disadvantage between the employees who had access to the higher summary levels and those who did not by assigning alternative credit as follows:

In this example, the agency decided to use Level 4, which was the most common rating level for the 35 employees with current ratings of record under Pattern H (which has five summary levels), as the basis for providing credit to the 65 employees with current ratings of record under Pattern A (which has two summary levels). The goal of the agency was to minimize the potential disadvantage that would result if the 65 employees under Pattern A received a maximum of 12 years additional retention credit for performance based upon Level 3 ratings put on record after September 1997, while most of the 35 employees under Pattern H would receive 16 years additional retention credit for performance based upon Level 4 ratings put on record after September 1997. The agency then provided additional retention service credit on the following basis:

(5) EXAMPLES OF RETENTION CREDIT BASED UPON PERFORMANCE USING MULTIPLE RATING PATTERNS (continued).

	Level 1	Level 2	Level 3	Level 4	Level 5
Pattern H	0	0	14	16	18
Pattern A	0	NA	16	NA	NA

- Example 13: The activity (i.e., a component of an agency) is planning for a June 1, 1998, reduction in force in a single competitive area comprised of 100 employees. Beginning October 1, 1995, the activity changed from a Pattern H (five-level) summary pattern to a Pattern A (two-level) summary pattern. However, 5 employees were hired from other activities in November 1996 after receiving ratings of record under the five-level Pattern H summary pattern.

The overall agency has multiple competitive areas, uses a variety of appraisal programs, and has a high rate of employee mobility both within its organizations and with other agencies. Therefore, the agency decided to construct an alternative crediting table to be used in the event any of its activities must conduct a reduction in force and finds a mix of patterns within the competitive area undergoing the reduction in force. To construct the alternative crediting table, the agency put together a working group consisting of representatives from its various components. The workgroup looked at the historic distribution of rating levels in its various organizations and assigned values to the various levels within the patterns based on what it found. The workgroup's goal was to provide varying credit for distinctions in performance above Level 3 ("Fully Successful" or equivalent), when evidenced by applicable ratings. The workgroup's review of the agencywide ratings distribution covering the last 5 years revealed the following:

Organization	Level 3	Level 4	Level 5
Blue Bureau (Pat.A)	127	0	0
Brown Bureau (Pat. H)	250	175	93
Gold Bureau (Pat. C)	110	315	0
Green Bureau (Pat. H)	25	324	122
Grey Bureau (Pat. A)	413	0	0
Orange Bureau (Pat. A)	62	0	0
Purple Bureau (Pat. H)	6	22	76
Red Bureau (Pat C)	59	115	0
Silver Bureau (Pat. H)	15	103	127
Agencywide Totals	1070	1058	423

Where certain patterns have not been used within the agency, the workgroup assigned credit to those levels, using values the workgroup believed would appear reasonable when compared to the levels in the patterns actually used. The workgroup assigned values to the various levels within their patterns as follows:

	Level 1	Level 2	Level 3	Level 4	Level 5
Pattern A	0	NA	16	NA	NA
Pattern B	0	NA	13	NA	17
Pattern C	0	NA	13	17	NA
Pattern D	0	0	17	NA	NA
Pattern E	0	NA	12	15	18
Pattern F	0	0	14	NA	18
Pattern G	0	0	14	17	NA
Pattern H	0	0	14	16	18

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 16. PERSONNEL RECORDS IN RIF

1. RESPONSIBILITY OF AGENCY TO MAINTAIN PERSONNEL RECORDS (reference 3-A-16-1). The agency is responsible for maintaining accurate personnel records that are used to determine each competing employee's retention in reduction in force competition (5 CFR 351.505); for additional information, reference SAHNI v. DC GOVT, 4 M.S.P.R. 170; MAZZOLA v. LABOR, 25 M.S.P.R. 682; and SCHROEDER v. TRANSPORTATION, 60 M.S.P.R. 566.

o The agency's burden of proof in a reduction in force appeal to the Merit Systems Protection Board remains with the employees' official positions of record even when an agency uses an automated system to assist in determining employees' reduction in force rights; reference KITCHING v. HHS, 20 M.S.P.R. 579 (which specifically deals with automated systems and records used to establish competitive levels); and FLORES v. POSTAL SERVICE, 75 M.S.P.R. 546, (which specifically deals with automated systems and records used to determine employees' assignment rights to other positions).

(a) Paragraph 3-B-16-1-b below lists the basic information that agencies use to determine employees' retention standing.

o The service record card (Standard Form 7), or appropriate automated record, is the principal source of needed information about an employee.

o Other necessary information comes from information in each employee's Official Personnel Folder and, if applicable, other agency records.

(b) The agency uses the following information to determine employees' retention rights:

(1) NAME OF EMPLOYEE. The employee's name should be recorded as it appears on the payroll.

(2) DATE OF BIRTH.

(3) IDENTITY OF POSITION. It is necessary to identify the employee's position to determine the employee's retention rights, including the competitive level and assignment rights.

(4) OFFICIAL POSITION. The employee's official position is the position in which he or she is carried on the rolls and paid, or the one from which the employee has been temporarily promoted; reference BROCK V. NAVY 49 M.S.P.R. 564; SMITH v. OPM, 67 M.S.P.R. 29; and TESTAN v. UNITED STATES, 424 U.S. 392. (5 CFR 351.404(a))

o To identify the employee's official position, the title, classification series, and grade and pay schedule are taken from the employee's Official Personnel Folder.

(5) POSITION DESCRIPTION. An up-to-date position description (Optional Form 8 or its equivalent) also is needed to determine the employee's competitive level.

(6) ORGANIZATIONAL LOCATION OF POSITION. The division, branch, section, or office in which the employee's position is located is needed to determine his or her competitive area.

(7) SERVICE. It is necessary to identify whether the employee is in the competitive or excepted service.

(8) TYPE OF WORK SCHEDULE. This is necessary because separate competitive levels are established for full-time, part-time, intermittent, seasonal, and on-call positions.

(9) TENURE OF EMPLOYMENT. The record should show the employee's current tenure Group I, Group II, or Group III.

o The record also should show whether an employee has completed probation.

o This information is needed to determine the employee's tenure group.

(10) VETERANS' PREFERENCE. The records should show whether the employee is entitled to veterans' preference.

o Section 3-A-13 covers veterans' preference in reduction in force competition.

(11) SPECIAL RETENTION PROTECTIONS (e.g. employees with mandatory restoration rights following completion of military duty).

o Paragraph 3-A-17-5 covers the use of a mandatory exception to the regular order of release in a reduction in force.

(12) PERFORMANCE RATINGS. The records must list each compting employee's three most recent performance ratings of record.

o Section 3-A-15 covers credit for performance in reduction in force competition.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 17. RELEASE FROM THE COMPETITIVE LEVEL

1. DATE USED TO DETERMINE AN EMPLOYEE'S RETENTION STANDING (reference 3-A-17-1). The agency determines each employee's retention standing as of the effective date of the reduction in force. (5 CFR 351.506(a))

o Reference SMITH v. OPM, 67 M.S.P.R. 29.

(a) Except for new performance ratings of record, the agency must consider any changes in each employee's retention standing factors that take place during the time that the agency issues reduction in force notices and the actions are actually carried out (e.g., an employee's tenure may change from career-conditional to career, or an employee may be eligible for a change in veterans' preference status). (5 CFR 351.506(a))

o Performance credit for retention is based on each employee's performance ratings that are on record for the most recently completed appraisal period prior to the date of issuance of reduction in force notices, or the cutoff date the agency specifies prior to the issuance of notices after which no new ratings will be put on record. (5 CFR 351.203)

o Reference 3-A-15-4 for additional information on the use of performance ratings of record used for reduction in force competition.

(b) When an agency uses an exception to the regular order of release from the competitive level (see 3-A-17-5 through 3-A-17-18 covering mandatory, continuing, and discretionary exceptions), the agency determines the retention standing of the temporarily retained employee as of the date the employee would have been released from the competitive level had the agency not used the exception. (5 CFR 351.506(b))

o The retention standing of the retained employee remains fixed as of the day the employee would have been released until the agency completes the reduction in force action that resulted in the temporary retention of the released employee. (5 CFR 351.506(b))

(c) The separation of one released employee effective at the end of a day and the subsequent action assigning the employee to another position effective at the beginning of the next day, or in the context of a RIF without a break in service of 1 workday, are considered simultaneous effective dates; for additional information, reference KLEGMAN v. HHS, 16 M.S.P.R. 455. (5 CFR 351.506(a))

2. RELEASE OF NONCOMPETING EMPLOYEES (reference 3-A-17-2-(c) and (d)). When an employee has a pending notice of proposed removal or demotion under authority of 5 CFR Part 430 because of poor performance, or under authority of 5 CFR Part 752 because of adverse action, and the final decision on the proposal is due before the effective date of the reduction in force, the agency cannot determine the employee's retention standing until the final decision is given to the employee. (5 CFR 351.602(c))

o (Reference 3-A-17-2-(c)-(d)) If the agency's final decision is to separate the employee from the position, the employee is not a competing employee in that competitive level. (5 CFR 351.602(c))

o (Reference 3-A-17-2-(c)-(d)) If the agency's final decision is to demote the employee because of poor performance to a position in a different competitive level, the employee competes for retention from the position to which the employee has been, or will be, demoted. (5 CFR 351.405)

3. ORDER OF RELEASING EMPLOYEES FROM THE COMPETITIVE LEVEL (reference 3-A-17-3). When an employee's position is abolished, the employee is not automatically released from his or her competitive level.

(a) At its option, the agency may reassign:

(1) An employee holding an abolished position to a continuing position in the same competitive level; (5 CFR 335.102), or

(2) Any employee in the competitive level to a vacant job at the same grade in the same or a different competitive level (see 5-A-2). (5 CFR 335.102)

o These options may make the release of a competing employee by reduction in force unnecessary.

(b) The agency must first release noncompeting employees from the competitive level (see 3-A-17-2.) (5 CFR 351.602)

(c) An employee in an abolished position has a right to a position held by a lower-standing employee in the same competitive level rather than being released from the level. (5 CFR 351.601)

o If the employee in the abolished position has the lowest standing, the employee is always the one released from the competitive level.

(d) When satisfying an assignment right of an employee from a different competitive level, an agency is not required to offer the job of the lowest-standing employee.

o Instead, the agency may reassign employee to another position in the same competitive level, and offer the employee any position in the level as long as the agency meets the employee's right to assignment is met and the agency follows proper order of release from the competitive level (e.g., the lowest-standing employee is the individual ultimately released from the competitive level).

o Paragraphs 3-A-17-5 through 3-A-17-20 covers exceptions to usual order of release from the competitive level.

(e) After an agency has released all noncompeting employees from a competitive level, it selects competing employees for release in the inverse order of their retention standing beginning with the employee having the lowest standing: (5 CFR 351.601(a))

(1) All employees in tenure Group III are released before any employee in Group II is released, and all employees in Group II are released before any employee in Group I is released.

(2) Within each tenure Group, all employee in subgroup B are released before any employee in subgroup A is released, and all employees in subgroup A are released before any in subgroup AD.

(3) Within each subgroup, employees are released in the order of their service dates beginning with the most recent service date (i.e., the employee with the least service in the lowest Group and subgroup is the first employee released from the competitive level).

6. EXCEPTIONS TO THE REGULAR ORDER OF RELEASE-MANDATORY EXCEPTION AND THE USE OF ANNUAL LEAVE TO OBTAIN RETIREMENT BENEFITS AND/OR TO CONTINUE HEALTH BENEFITS (Reference 3-A-17-6).

Background-Section 634 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208, approved September 30, 1996), provides that an employee who is being involuntarily separated from an agency due to reduction in force, or due to transfer of function, may elect to use annual leave and remain on the agency's rolls after the effective date the employee would otherwise have been separated in order to establish initial eligibility for immediate retirement, including discontinued service or voluntary early retirement. The same option is also available to acquire eligibility to continue health benefits into retirement. These provisions were codified in new 5 U.S.C. 6302(g).

The new 5 U.S.C. 6302(g) required two major changes to OPM's regulatory provisions: (1) an employee who is being involuntarily separated now has a right to use annual leave to achieve initial eligibility for retirement and/or continued health benefits coverage; and (2) this right extends to transfer of function and other relocation situations.

To implement 5 U.S.C. 6302(g), OPM revised section 5 CFR 351.606 covering mandatory exceptions to the regular order of release by adding a new paragraph 351.606(b), which also includes much of the material formerly found in 5 CFR 351.608(d)(2) that was applicable to certain permissive temporary exceptions.

(f) (Reference 3-A-17-6-(f)). Section 5 CFR 630.212 defines annual leave that is available for purposes of a mandatory exception under authority of 5 CFR 351.606(b).

Section 630.212 states that all accumulated, accrued, and restored annual leave to an employee's credit prior to the effective date of a reduction in force or relocation and annual leave earned by an employee while in a paid leave status after the effective date of the reduction in force or relocation may be used for these purposes. However, annual leave that is advanced to an employee under 5 U.S.C. 6302(d) may not be used for these purposes. In addition, an employing agency may permit an approved leave recipient to use for these purposes any or all annual leave donated under 5 CFR part 630, subpart I, or made available under 5 CFR part 630, subpart J, as of the effective of the reduction in force or relocation.

15. EXCEPTIONS TO THE REGULAR ORDER OF RELEASE-PERMISSIVE TEMPORARY EXCEPTION AND THE USE OF ANNUAL LEAVE TO OBTAIN RETIREMENT BENEFITS AND/OR TO CONTINUE HEALTH BENEFITS (reference 3-A-17-15). Section 5 CFR 351.608(e) provides that an employee who is not covered by chapter 63 of title 5, United States Code, but who is being involuntarily separated from an agency because of reduction in force under part 5 CFR 351, may, at the agency's discretion, elect to use annual leave past the date that the employee would otherwise have been separated for the purpose of establishing initial eligibility under sections 5 U.S.C. 8336, 8412, or 8414 (or other authority) for immediate retirement, including discontinued service or voluntary early retirement, and/or establishing eligibility under 5 U.S.C. 8905 (or other authority) to continue health benefits coverage into retirement.
19. EXCEPTIONS TO THE REGULAR ORDER OF RELEASE-LIQUIDATION EXCEPTION (reference 3-A-17-19). When an agency will abolish all positions in a competitive area within 90 days, it must release employees in subgroup order, but the agency is not required to use the employees' relative service dates within the subgroup. (5 CFR 351.605)

- Example: The liquidation provision provides that in the final stages of closing an activity, the agency may release employees in retention subgroup I-B from the competitive level without regard to their individual retention service dates. However, all the employees in retention subgroup I-B must be released before any employees in retention subgroups I-A or I-AD are released from the competitive level, and all the employees in subgroup IA must be released before any employees in retention subgroup I-AD are released from the competitive level.

o An agency may use also use mandatory, discretionary continuing exceptions, and permissive temporary exceptions during a liquidation, provided that the use is consistent with the controlling regulations found, respectively, in 5 CFR 351.606, 5 CFR 351.607, and 5 CFR 351.608.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 18. ACTIONS FOLLOWING RELEASE FROM THE COMPETITIVE LEVEL

2. SEPARATION OR FURLOUGH (reference 3-A-18-2). An agency may use reduction in force procedures to separate or furlough a released employee only if the employee:

(a) Has no assignment right to another position; (5 CFR 351.603), or,

(b) Declines an offer of assignment to another position that would have satisfied the employee's assignment right. (5 CFR 351.603)

(c) At its option, an agency may offer additional rights to a released employee, including:

(1) Extending additional administrative assignment rights to certain employees (see Section 3-A-28); (5 CFR 351.705)

(2) Offering an employee a vacant position in the same competitive area as an offer of assignment under the reduction in force regulations (see Section 3-A-21);

(3) Offering an employee a vacant position in lieu of reduction in force separation or other reduction in force action (see 3-A-21-5 and 3-A-21-6);

(4) Using a discretionary continuing exception to the regular reduction in force order of release (see 3-A-17-6 and 3-A-17-7); (5 CFR 351.607), or

(5) Using a discretionary temporary exception to the regular reduction in force order of release (see 3-A-17-8 and 3-A-17-9). (5 CFR 351.608)

5. POSITIONS OCCUPIED BY TEMPORARY EMPLOYEES (reference 3-A-19-5). A competing employee released from a competitive level by reduction in force does not have assignment rights to a position in a different competitive level that is held by a temporary (tenure group 0) employee; for additional information, reference STARLING v. HUD, 14 M.S.P.R. 620; 757 F.2d 271. (5 CFR 351.701(a))

o Sections 3-A-22 and 3-B-22 cover "USING VACANT TEMPORARY POSITIONS AS PLACEMENT OFFERS.

6. LIMITATIONS IN OFFERING EMPLOYEES ASSIGNMENT TO OTHER POSITIONS (reference 3-A-19-6).

(a) (Reference 3-A-19-6-(a)) An agency may not offer a released employee reduction in force assignment to a position with a representative rate that is higher than the representative rate of the employee's current position; for additional information, reference GREEN v. DLA, 26 M.S.P.R. 649; DUBE v. NAVY, 72 M.S.P.R. 394; and SPERLING v. POSTAL SERVICE, 75 M.S.P.R. 629. (5 CFR 351.704(b)(1))

(d) (Reference 3-A-19-6-(d)) An agency may not offer a released employee reduction in force assignment to a temporary position (i.e., a position under an appointment not to exceed 1 year), except as an offer of assignment in lieu of separation by reduction in force when the employee has no other right of assignment to a continuing position; for additional information, reference JONES v. ARMY, 42 M.S.P.R. 680. (5 CFR 351.704(b)(4))

(f) (Reference 3-A-19-6-(f)) An agency may not make an offer of reduction in force assignment from the competitive service to the excepted service; for additional information, reference HUTCHISON v. DLI, 26 M.S.P.R. 521. (5 CFR 351.705(b)(5))

(g) (Reference 3-A-19-6-(g)) An agency may not make an offer of reduction in force assignment from the excepted service to the competitive service; for additional information, reference KILLINGSWORTH v. HHS, 11 M.S.P.R. 273. (5 CFR 351.705(b)(6))

7. MORE THAN ONE AVAILABLE POSITION FOR ASSIGNMENT (reference 3-A-19-7). When an employee has a potential right of assignment to two or more positions with the same representative rate, the agency may satisfy the employee's right of assignment by offering any one of the positions.

o An employee has no right to choose among positions with the same representative rate; for additional information, reference EDLIN v. NASA, 18 M.S.P.R. 654; JORGENSON v. AGRICULTURE, 22 M.S.P.R. 207; and ENDSLEY v. ARMY, 46 M.S.P.R. 46.

9. REQUIREMENT TO MAKE AN ADDITIONAL OFFER OF ASSIGNMENT (reference 3-A-19-9). The agency must make a better offer of assignment to a released employee if a position with a higher representative rate becomes available before, or on, the effective date of the reduction in force. (5 CFR 351.506(a); 5 CFR 351.805(c))

o The released employee is entitled to any better offers of assignment to available positions regardless of whether the employee previously accepted or decline a previous offer of assignment. (5 CFR 351.506(a); 5 CFR 351.805(c))

o A better position of assignment may become available when another employee rejects an offer or vacates a position by resignation, retirement, etc.

-Example 1: A GS-11 employee receives a specific reduction in force notice on May 1 stating that he will be released from his competitive level on July 5 because his position will be abolished. The notice also offers the employee a best offer of assignment to a GS-7 position. On June 15, the agency finds that because of the outplacement of other employees to positions in different competitive areas, the GS-11 employee now has an assignment right to a GS-9 position.

The agency must offer the GS-9 position to GS-11 employee regardless of whether or not the GS-11 employee previously accepted or declined the offer of assignment to the GS-7 position (provided that the GS-11 employee had not separated from the competitive area before the better offer became available).

11. EMPLOYEES' STATUS AND TENURE AFTER ACCEPTING AN OFFER OF ASSIGNMENT (reference 3-A-19-11-(b)).

(b) (Reference 3-A-19-11-(b)) A released employee retains the same status and tenure in the new position after displacing a lower-standing employee through reduction in force assignment rights. (5 CFR 351.701(a))

o (Reference 3-A-19-11-(b)) A retention tenure subgroup Group I or II employee who is released from the competitive level by reduction in force has the potential right to displace a lower-standing employee in a different competitive level through bump and retreat rights. This includes the right to displace a Tenure Group III term employee in a different competitive level who holds a term position with an expiration date no sooner than 90 days past the reduction in force effective date. (Paragraph 3-A-19-4-(c)) notes that an "Available Position" must last at least 90 days.)

o (Reference 3-A-19-11-(b)) In any second round displacement (including Group III employees), 5 CFR 351.701(a) provides that the higher-standing employee retains the same status and tenure:

- Example 1: The position of a GS-301-9 employee in retention subgroup I-B in a one-person competitive level is abolished, and the employee is released from the competitive level by reduction in force. The IB employee qualifies to bump a GS-326-7 retention subgroup III-B employee, who holds a term position with an expiration date 6 months after the reduction in force effective date. Without the offer of the GS-7 term position, the released GS-301-9 employee could retreat to a GS-301-5 position without time limitation.

The released GS-9 employee's reduction in force assignment right is to the GS-326-7 term position because the position is encumbered by a competing employee, and the GS-7 representative rate of the term position is the least reduction in the representative rate of the employee's present GS-9 position (i.e., the offer of the GS-5 position without time limitation is a worse offer because the GS-5 has a lower representative rate than the GS-7 term position).

- Example 2: After entering the GS-326-7 term position, the retention subgroup I-B employee continues to retain the same status and tenure while the employee encumbers the term position (i.e., the employee holding the term position is still in retention subgroup I-B).

When the term position expires, the retention subgroup I-B employee again has the right to compete under the reduction in force regulations before separation or downgrading, with the employee's rights and benefits based upon retention subgroup I-B. (Upon receipt of a reduction in force notice of separation, the employee is eligible for the agency's Reemployment Priority List and Career Transition Assistance Program because of the retention subgroup I-B status and tenure). If actually separated, the separation action is under authority of 5 CFR Part 351 reduction in force regulations, and the former employee is eligible for priority in applying for positions in other agencies under the Interagency Career Transition Assistance Program, again based upon retention subgroup I-B status and tenure.

12. PROMOTION POTENTIAL OF A POSITION OFFERED FOR ASSIGNMENT (reference 3-A-19-12). The promotion potential of a position is not a consideration in determining an employee's assignment rights in second round reduction in force competition; reference GILBERT v. TRANSPORTATION, 21 M.S.P.R. 108. (5 CFR 351.701(a))

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 20.
USING BUMP AND RETREAT IN MEETING EMPLOYEES' ASSIGNMENT RIGHTS

1. BUMP RIGHTS (reference 3-A-20-1-(a)). "SUBGROUP SUPERIORITY" in bumping means that a higher-standing employee who is released has the right to displace an employee who holds an available position in a different competitive level if the higher-standing employee is in a higher tenure Group, or higher tenure Group within the same tenure Group: (5 CFR 351.701(b(1))

o Refer to paragraph 3-A-19-4 for the definition of "AVAILABLE POSITION."

o Examples of "BUMPING" include:

(1) An eligible employee in subgroup I-AD has the right to bump employees in subgroups I-A and I-B, and has the right to bump employees in Group II and Group III.

(2) An eligible employee in subgroup I-A employee has the right to bump employees in subgroup I-B, and has the right to bump employees in Group II and and Group III.

(3) An eligible employee in subgroup I-B has the right to bumping employees in Group II and Group III.

(4) An eligible employee in subgroup II-AD has the right to bumping employees in subgroups II-A and II-B, and has the right to bump employees in Group III.

(5) An eligible employee in subgroup II-A has the right to bump employees in subgroups II-B, and and has the right to bump employees in Group III.

(6) An eligible employee in subgroup II-B employee has the right to bump employees in Group III.

o An agency is not required to consider employees' respective retention service dates in determining bumping rights; reference HARRIS v. UNITED STATES, 153 Ct. Cl. 425; and BERRY v. ENERGY, 21 M.S.P.R. 95).

o In determining bumping rights among employees in the same subgroup, the agency must also consider whether a displaced employee with more service could, as a retreat action, displace an employee in the same subgroup who has less service.

- Example 1: Two GS-11 employees in retention tenure subgroup I-B are reached for release from their competitive level. The higher-standing employee has a retention service date of 03-08-72, and the lower-standing employee has a retention service date of 08-02-75. Both have the potential right to bump a GS-9 employee in retention tenure subgroup II-B.

OPM's reduction in force regulations allow the agency to offer either employee the right to bump the GS-9 subgroup II-B employee, provided that neither employee formerly held a position essentially identical to the GS-9. (Note that an agency may, at its discretion, adopt a policy requiring that the position be offered to the employee with the most service.)

If the GS-11 subgroup I-B employee with the earlier retention service date of 03-08-72 formerly held a position that was essentially identical to the GS-9 position, then that employee would be offered a bump right to the position. If the agency offered the GS-9 position to the GS-11 subgroup I-B employee with the lesser retention service date of 08-02-75, the GS-11 subgroup I-B employee could assert a retreat right to the GS-9 position (i.e., both GS-11 employees were in the same subgroup, but the employee with the greater amount of service had formerly held an essentially identical position).

2. RETREAT RIGHTS-GENERAL (reference 3-A-20-2). "LOWER STANDING IN SAME SUBGROUP" means that a released employee has the right to displace an employee in the same retention subgroup with less service who holds a position that is essentially identical to a position formerly held by the released employee: (5 CFR 351.701(c))

- Example 2: A GS-12 subgroup I-B employee may retreat to a position held by a subgroup I-B with less service, provided that the employee with the greater service (i.e., the GS-12 subgroup I-B employee) meets the other conditions for a retreat right (refer to paragraphs 3-A-20-2, 3-A-20-3, and 3-A-20-4).

- Example 3: The GS-12 subgroup I-B employee may not retreat to a position held by a GS-7 subgroup II-B employee; assignment to position held by an employee in a lower retention subgroup, or in a lower tenure Group (i.e., tenure Group II), is a bump (refer to paragraph 3-B-20-1 above for additional information on the bump right.)

3. RETREAT RIGHTS-ESSENTIALLY IDENTICAL POSITION (reference 3-A-20-4). A position is considered to be "Essentially Identical" for the purpose of determining a released employee's retreat rights if:

(a) The released employee formerly held the position as a competing employee (or equivalent); (5 CFR 351.701(c)(3)), and

(b) The employee's former Federal position, and the position of a lower-standing employee in the present competitive area, would be placed in the same competitive level based on duties, responsibilities, and qualifications, but not necessarily in regard to the two positions' respective grade, classification series, work schedule, or type of service. (5 CFR 351.701(c)(3))

o (Reference 3-A-20-4-(a)) An employee has no right to retreat to a position that the employee formerly held only on detail, term or temporary promotion, or on a temporary appointment with no status and tenure. (5 CFR 351.701(c)(3))

o (Reference 3-A-20-4-(a)) An employee's right to retreat is based on positions formerly held in both the employee's current agency, and in a different agenies. (5 CFR 351.701(c)(3))

o (Reference 3-A-20-4-(a)) An employee may have the right to retreat based on former Federal positions that are not covered by title 5 U.S.C. (i.e., when held by the released employee, the position would have been placed in tenure group I, II, or III, or equivalent). (5 CFR 351.701(c)(3))

- Example 1: A GS-9 employee formerly held an Office Automation position in a legislative branch component with positions that were not covered by title 5 U.S.C. If the agency determines that the released employee held the legislative branch position as a Federal employee on a permanent basis that is equivalent to the tenure of a "Competing Employee" as defined in 5 CFR 351.203, then the employee has the potential right to retreat to an Office Automation position in the present reduction in force.

o (Reference 3-A-20-4-(a)) "Competing Employee" is defined in 5 CFR 351.203 as "..an employee in tenure Group I, II, or III." "Competing Employee" is also included in the definitions found in 3-A-4-1-(d).

o (Reference 3-A-20-4-(b)) A modified standard for a reduction in force competitive level (see 3-A-20-4) is used in determining an employee's retreat rights; for additional information, for additional information, reference SIMONTON v. ARMY, 62 M.S.P.R. 30; EVANS v. NAVY, 64 M.S.P.R. 492; MARKHAM v. NAVY, 66 M.S.P.R. 559; PARKHURST v. TRANSPORTATION, 70 M.S.P.R. 309; and PIGFORD v. INTERIOR, 75 M.S.P.R. 251. (5 CFR 351.701(c)(3))

o (Reference 3-A-20-4-(b)) On August 25, 1995, OPM published interim retention regulations (60 FR 44254) that clarified the procedures agencies use to determine employees' rights to "retreat" to positions during a reduction in force.

These interim regulations provide that an employee has the right to retreat to the same position, or an essentially identical position, held by released employee on a permanent basis in a Federal agency. Specifically, the agency determines an employee's retreat right based only on former positions in any Federal agency that the released employee held as a competing employee, or equivalent (i.e., when held by the released employee, the position would have been placed in tenure group I, II, or III, or equivalent).

In defining what constitutes "an essentially identical position" for this purpose, interim section 5 CFR 351.701(c)(3) provides that in determining whether a position is essentially identical, the agency uses the competitive level criteria found in section 5 CFR 351.403, but without regard to the respective grade, classification series, type of work schedule, or type of service, of the two positions:

- Example 2 - retreat based upon different classification series: A GS-7 employee formerly held a GS-322-5 position. Because of a new classification standard, the GS-322-5 is reclassified to a GS-326-5 with no change in duties, responsibilities, and qualifications. This regulation clarifies that the GS-7 employee would have a right to retreat to the GS-326-5 position held by a lower-standing employee if the agency determines that the employee's former GS-322-5 position and the GS-326-5 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

- Example 3 - retreat based upon different grade: A WG-4204-10 employee formerly held a WG-4204-7 position. Because of classification error, the WG-4204-7 position is reclassified to a WG-4204-8 with no change in duties, responsibilities, and qualifications. This regulation clarifies that the WG-4204-10 employee would have a right to retreat to the WG-4204-8 position held by a lower-standing employee if the agency determines that the employee's former WG-4204-7 position and the WG-4204-8 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

- Example 4 - retreat based upon different work schedule: A full-time GS-343-11 employee formerly held a part-time GS-343-7 position. This regulation clarifies that the full-time GS-343-11 employee would have a right to retreat to a full-time GS-343-7 held by a lower-standing employee if the agency determines that the employee's former part-time GS-343-7 position and the GS-343-7 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

- Example 5 - retreat based upon different status and tenure: A GS-334-11 competitive service employee formerly held a GS-334-7 position under an excepted service Veterans Readjustment Appointment (VRA). This regulation clarifies that the GS-343-11 employee would have a right to retreat to a GS-343-7 position held by a lower-standing competitive service employee if the agency determines that the employee's former GS-334-7 VRA position and the GS-334-7 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

o (Reference 3-A-20-4-(b)) The retreat right is based upon the assumption that a released employee who was so successful in performing a prior position that the employee was promoted to another position should be allowed to return to the former position if (1) the former position was substantially the same, and (2) because of higher same subgroup retention standing than the present incumbent of the position, the released employee would not be released from the retention register that includes the former position.

These final retention regulations intend that agencies use a narrow modified competitive level standard set forth in section 5 CFR 351.701(c)(3) to determine an employee's retreat rights to an essentially identical position. This is consistent with OPM's, as well as the former Commission's, longstanding definition of the competitive level as the basic standard for retreat rights.

At its discretion, an agency may provide expanded same subgroup bumping to released employees that is primarily based upon the personal qualifications standard set forth in section 5 CFR 351.702(a) as an option under the administrative assignment provisions permitted in section 5 CFR 351.705(a)(1). However, this broad-based alternative is not applicable to the determination of employees' retreat rights under authority of section 5 CFR 351.701(c).

o For additional information on this administrative assignment option of same subgroup bumping, refer to paragraph 3-A-28-2.

3. CONSIDERATION OF RETENTION STANDING IN OFFERING VACANT POSITIONS (reference 3-A-21-3-(a)-(d)). When an agency chooses to fill a vacant position with a released employee under authority of OPM's reduction in force regulations, the agency must follow the same procedures covering employees' bump and retreat rights in deciding which of several employees is entitled to the offer: (5 CFR 351.201(c))

- Example 1: If an employee is released from a competitive level and a vacancy exists within the three-grade (interval) limits, the agency may offer that vacancy as an offer of assignment under the reduction in force regulations, provided that the vacant position has a representative rate equal to the representative rate of a position to which the released employee would have bump or retreat rights; for additional information, reference PETRANEK v. ARMY, 4 M.S.P.R. 419; and SPARTIN v. GPO, 46 M.S.P.R. 119, 937 F.2d 623. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

- Example 2: If an employee is released from a competitive level and there are several vacancies at different grades that the agency chooses to fill within the three-grade (interval) limits, the employee is entitled to the vacancy with a representative rate equal to the representative rate of a position to which the released employee would have bump or retreat rights; for additional information, reference PETRANEK v. ARMY, 4 M.S.P.R. 419. (5 CFR 351.201(c); 5 CFR 351.701(a); 5 CFR 351.704(a)(1))

o (Reference 3-A-21-3-(a)-(d)) If two employees in different retention subgroups within the same Group are released from their competitive levels, the employee in the highest subgroup is entitled to the better offer; for additional information, reference BERRY v. ENERGY, 21 M.S.P.R. 95. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

- Example 3: A GS-9 employee in subgroup I-A with an adjusted retention service date of 06-02-64, and a GS-11 employee in subgroup I-B with an adjusted service retention date of 05-04-59, are released from their respective competitive levels by reduction in force. The agency has two available vacant positions at GS-9 and GS-7, and elects to offer both positions in the reduction in force. Both employees meet the qualifications for both the GS-9 and the GS-7 vacant positions. If the agency offers the GS-9 vacacy, the GS-9 employee in subgroup I-A is entitled to the GS-9 vacancy because of subgroup superiority even thoough the GS-11 employee has an earlier adjusted retention service date.

o (Reference 3-A-21-3-(a)-(d)) When more than two or more vacancies have the same representative rate, the agency may offer the employee reduction in force assignment to any one of the positions; for additional information, reference MELLO v. ENERGY, 20 M.S.P.R. 45; GREEN v. DLA, 26 M.S.P.R. 649. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

o (Reference 3-A-21-3-(a)-(d)) A released employee has no right to choose among positions with the same representative rate (5 CFR 351.701(a)); for additional information, reference EDLIN v. NASA, 18 M.S.P.R. 654; JORGENSON v. AGRICULTURE, 22 M.S.P.R. 207; and ENDSLEY v. ARMY, 46 M.S.P.R. 46. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

o (Reference 3-A-21-3-(a)-(d)) If all of the released employees are in the same retention Group and subgroup, and none of the released employees previously held the offered vacant position (or an essentially identical position), the employees' individual adjusted service retention dates are not a consideration in making the offer, unless the agency chooses to use the service date (5 CFR 351.201(c)); for additional information, reference BERRY v. ENERGY, 21 M.S.P.R. 95. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

o (Reference 3-A-21-3-(a)-(d)) If several employees, all in the same retention tenure Group and subgroup, are released from their competitive levels and several vacancies exist within the three-grade (interval) limits, the agency may offer any vacancy to any employee, unless this would violate an employee's retreat right (5 CFR 351.704(a)(1)); for additional information, reference BERRY v. ENERGY, 21 M.S.P.R. 95. (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

- Example 4: The agency releases two GS-13 employees in the same retention Group and subgroup (e.g., subgroup I-B) with Level 3 (e.g., "Fully Successful") performance ratings of record. Employee A has an earlier adjusted retention service date (07-11-56) than Employee B (08-15-62). Neither employee formerly held the GS-13 vacancy. Also, the agency does not have a formal policy of considering employees' respective service dates in making reduction in force offers of vacant positions.

The agency may offer either vacancy to either employee because Employee A would not have a retreat right to the position under these circumstances (e.g., the agency could offer the GS-12 position to Employee A, and offer the GS-13 position to Employee B even though Employee B has less service than Employee A); reference BERRY v. ENERGY, 21 M.S.P.R. 95.

- Example 5: The agency releases two GS-13 employees in the same retention Group and subgroup (e.g., subgroup I-B) with Level 3 (e.g., "Fully Successful") performance ratings of record. Employee A has an earlier adjusted retention service date (07-11-56) than Employee B (08-15-62). The agency has two available vacancies: a GS-13 and a GS-12. Also, Employee A previously held a position that is essentially identical to the GS-13 vacancy.

Employee A is entitled to the GS-13 vacancy because Employee A would have a retreat right to the position if the position was offered to Employee B. (Reference 3-A-21-3-(a), which notes that a vacant position that is filled after the effective date of the reduction in force, or immediately after the effective date, is an available position for purposes of determining employees' assignment rights; reference KLEGMAN v. HHS, 16, M.S.P.R. 455.) (5 CFR 351.201(c); 5 CFR 351.701(a)(1)); 5 CFR 351.704(a)(1))

- Example 6: The agency releases two GS-13 employees in the same retention Group and subgroup (e.g., subgroup I-B) with Level 3 (e.g., "Fully Successful") performance ratings of record. Employee A has a later adjusted retention service date (02-21-58) than Employee B (07-11-56). The agency has two available vacancies: a GS-13 and a GS-12. Also, Employee A previously held a position that is essentially identical to the GS-13 vacancy.

The agency may offer either vacancy to either employee because Employee A would not have a retreat right to the position in this situation (i.e., in order to establish a right to a position over another employee in the same retention Group and subgroup based on retreat, the employee who previously held an essentially identical position must also have greater service than the second employee.

4. CONSIDERATION OF UNDUE INTERRUPTION IN DETERMINING QUALIFICATIONS FOR ASSIGNMENT TO VACANT POSITIONS (reference 3-A-21-4 for additional information). An employee released from a competitive level by reduction in force has an assignment right to another position (through bump, retreat, or an offer of a vacant position) held by an employee with lower retention standing only if the released employee is qualified for assignment. (5 CFR 351.701(a); 5 CFR 351.702(a))

(b) (Reference 3-A-21-4-(b) "UNDUE INTERRUPTION" is defined in 5 CFR 351.203 of the reduction in force regulations.

o The definition of "Undue Interruption" is also covered in paragraph 3-A-5-1-(v).

o In order to have a right of assignment to an occupied position through bump or retreat rights, an otherwise qualified employee must be able to perform the duties of the position within 90 days; for additional information, reference NARCISSE v. TRANSPORTATION, 32 M.S.P.R. 232; BUCKLER v. FRITB, 73 M.S.P.R. 476; and TENGERES v. POSTAL SERVICE, 75 M.S.P.R. 537. (5 CFR 351.702(a)(4))

o The 90-day standard for undue interruption is generally not applicable to offers of assignment to vacant positions; the definition in 5 CFR 351.203 states that "The 90-day standard may be extended if placement is made under this part to a low priority program or to a vacant position"; for additional information, reference JAMISON v. TRANSPORTATION, 20 M.S.P.R. 513; and LEWELLEN v. AIR FORCE, 25 M.S.P.R. 525. (5 CFR 351.203))

5. WAIVER OF QUALIFICATIONS REQUIREMENTS IN OFFERING RIF ASSIGNMENT TO VACANT POSITIONS (reference 3-A-21-5). At its option, an agency may waive OPM's qualifications standards and requirements in offering a released employee reduction in force assignment to a vacant position; for additional information, reference TAYLOR v. HUD, 6 M.S.P.R. 177; PATTERSON v. NAVY, 6 M.S.P.R. 500; and MANESCALCHI v. POSTAL SERVICE, 74 M.S.P.R. 479. (5 CFR 351.703)

(a) There is no authority for an agency to waive any minimum education requirements in waiving qualifications for assignment to a vacant position. (5 CFR 351.703(a))

(b) In order to waive qualifications for assignment to a vacant position, the agency must determine that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position. (5 CFR 351.703(a))

6. OFFERING VACANT POSITIONS AS NON-RIF OFFERS TO PLACE EMPLOYEES IN LIEU OF RIF SEPARATION OR OTHER RIF ACTIONS (reference 3-A-21-6). The agency has the right to offer vacant positions as offers apart from the retention regulations to employees who would otherwise be reached for separation or downgrading by reduction in force; for additional information, reference SPARTIN v. GPO, 46 M.S.P.R. 119, 937 F.2d 623; and WILBURN v. TRANSPORTATION, 757 F.2d 260.

o Paragraphs 3-A-21-5 and 3-A-21-6 cover the conditions for making these offers to employees.

o The agency could use this option to allow an employee to continue working in the same commuting area rather than displacing a lower-standing employee at a different duty station within the competitive area.

o The agency could also use this option to allow a released employee to remain in the same line of work rather than displacing a lower-standing employee who works in a different program within the competitive area.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 22. USING VACANT TEMPORARY POSITIONS AS PLACEMENT OFFERS

1. TEMPORARY POSITIONS ARE NOT AVAILABLE POSITIONS (reference 3-A-22-1). A competing employee released from a competitive level by reduction in force does not have assignment rights to a position in a different competitive level that is held by a temporary (tenure group 0) employee. (5 CFR 351.701(a))

o (Reference 3-A-22-1) An employee serving in a competitive service temporary position (except when the employee serves in a provisional appointment authorized by 5 CFR 316.401 or -.403) is not covered by OPM's retention regulations, is not listed on the retention register, and is not subject to displacement by a competing employee through bump or retreat rights; reference STARLING v. HUD, 14 M.S.P.R. 620, 757 F.2d 271. (5 CFR 351.404(b)(1); 5 CFR 351.501(b)(3)); 5 CFR 351.701(a))

o (Reference 3-A-22-1) An employee serving in an excepted service temporary position under an appointment with a time limitation of more than 1 year is covered by OPM's retention regulations, is listed on the retention register (even though the position is time-limited), and is subject to displacement by a competing excepted service employee who is administratively provided bump or retreat rights by the agency under authority of 5 CFR 351.705(a)(3)). (Refer to 3-A-28-1-4 for additional information on optional assignment rights for excepted service employees.) (5 CFR 351.502(b)(3)(ii); 5 CFR 351.701(a))

o (Reference 3-A-22-1) An employee serving in an excepted service temporary position under an appointment with a time limitation of less than 1 year is covered by OPM's retention regulations, is listed on the retention register after the employee has completed at least 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more (reference COLEMAN v. FDIC, 62 M.S.P.R. 187), and is subject to displacement by a competing excepted service employee who is administratively provided bump or retreat rights by the agency under authority of 5 CFR 351.705(a)(3)). (Refer to 3-A-28-1-4 for additional information on optional assignment rights for excepted service employees.) (5 CFR 351.502(b)(3)(iii); 5 CFR 351.701(a))

o (Reference 3-A-22-1) Paragraph 3-A-16-2-(a) provides that an agency must separate all temporary employees from a competitive level before a competing employee is released from that level by reduction in force; reference STARLING v. HUD, 14 M.S.P.R. 620, 757 F.2d 271. (5 CFR 351.602(a))

2. USING A TEMPORARY POSITION AS A RIF OFFER OF ASSIGNMENT (reference 3-A-22-2). At its option, an agency may offer a vacant temporary position as a reduction in force offer of assignment to a competing employee who has no right of assignment to another position (5 CFR 351.704(b)(4)); reference JONES V. ARMY, 42 M.S.P.R. 680.

o (Reference 3-A-22-2) An agency may not offer a competing assignment under authority of OPM's reduction in force regulations to a temporary (i.e., tenure group 0) position if the released employee has the right to bump or retreat to an encumbered position held by another competing employee, or if the released employee has a right under the reduction in force regulations to a vacant position that is not in tenure group 0; reference JONES V. ARMY, 42 M.S.P.R. 680.

o (Reference 3-A-22-2) When an employee accepts a temporary position as a reduction in force offer of assignment, the employee retains the same status and tenure (5 CFR 351.701(a)); for additional information, reference JONES V. ARMY, 42 M.S.P.R. 680. (5 CFR 351.701(a))

- Example 1: If an employee in subgroup I-A receives a reduction in force notice of separation and subsequently accepts an offer of assignment to a temporary position, the employee retains the I-A status and tenure. The action is processed as a position change, reassigment, or change to a lower grade, as appropriate, and no change is made in the employee's appointment. When the temporary position expires or is abolished, the employee is again entitled to compete under the reduction in force regulations based on the employee's personal I-A status and tenure.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 23. CONSIDERATION OF GRADES IN MEETING EMPLOYEES' ASSIGNMENT RIGHTS

2. EMPLOYEE'S POSITION OF RECORD DETERMINES GRADE AND GRADE-INTERVAL RANGE. The agency uses the grade progression of the position held by the released employee on the effective date of the reduction in force to determine the grade limits of the employee's assignment rights. (5 CFR 351.701(b)(2)); 5 CFR 351.701(c)(2))

(a) The lowest grade to which an employee may bump or retreat is based on the position from which the employee is released regardless of how the employee actually progressed to that position.

o For example, an employee may have been reassigned from a one-grade interval job to the employee present two-grade-interval position of record, but the agency only the considers the two-grade-interval position in determining the employee's assignment rights.

(b) Once the agency determines the lowest grade to which an employee is entitled to assignment, the agency then determines whether the any available positions actually exist within these grade limits.

Example: The normal line of progression for a WG-12 in a particular series is determined by an agency to be WG-5-8-10-12. In this case, a WG-12 employee in the series has bump and retreat rights to positions as low as WG-5.

Example: The normal line of progression for a WS-10 is determined to be WG-5-8-10-WS-10. In this case, the WS-10 employee has bump and retreat rights to positions as low as WG-5.

Example: An employee released from a GS-11 position that progresses GS-5-7-9-11 has potential bump and retreat rights to positions at GS-6, -8, and -10 even though those grades are not part of the two-grade progression.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 24. CONSIDERATION OF REPRESENTATIVE RATES WHEN DETERMINING EMPLOYEES' ASSIGNMENT RIGHTS.

2. PAY SCHEDULE DEFINITION (reference 3-A-24-2). "PAY SCHEDULE" means any one set of pay rates identified by statute or by an agency as applying to a group of occupations.

- Example 1: The General Schedule (GS) is one pay schedule regardless of special rates or premium rates. For this purpose, merit pay positions are considered to be under the General Schedule and have the same representative rates as GS positions at the same grade level.

Other examples of pay schedules are the regular nonsupervisory, leader, and supervisory schedules of the Federal Wage System which are considered to be separate pay schedules regardless of special rates.

o (Reference 3-A-24-2) Agency special wage schedules for positions not under the regular schedules of the Federal Wage System are also considered to be separate pay schedules.

3. REPRESENTATIVE RATE-DEFINITION (reference 3-A-24-3). Representative rate is:

(a) The fourth step of the grade for a position under the General Schedule); (5 CFR 351.203),

(b) The prevailing rate for a position under the Federal Wage System or similar wage-determining procedure; (5 CFR 351.203), and

(c) For other positions, the rate designated by the agency as representative of the position. (5 CFR 351.203)

o For additional information on determining the representative rate for other positions under 3-B-24-3-(c), reference PEELE v. HHS, 6 M.S.P.R. 296, which covers the determination of representative rates in an unclassified pay system; CAMPBELL v. TREASURY, 61 M.S.P.R. 99, which covers the determination of representative rates in a pay banding situation; ROBINSON v. POSTAL SERVICE, 63 M.S.P.R. 307, which covers the consideration of indefinite saved pay in the determination of representative rates; and SPERLING v. POSTAL SERVICE, 75 M.S.P.R. 629, which covers the determination of representative rates in an ungraded pay system.

4. REPRESENTATIVE RATE-EXPLANATION (reference 3-A-24-4).

(a) "REPRESENTATIVE RATE" is the basic rate of pay without regard to:

(1) Overtime; (5 CFR 531.403); (5 CFR 532.401)

(2) Night differential; (5 CFR 531.403); (5 CFR 532.401)

(3) Cost of living allowances; (5 CFR 531.403); (5 CFR 532.401)

(4) Premium pay (including pay for shortage category positions); (5 CFR 531.403); (5 CFR 532.401), or

(5) Locality-based comparability payments for General Schedule employees under 5 U.S.C. 5304. (5 CFR 531.403); (5 CFR 532.401)

o For additional information, reference DUBE v. NAVY, 72 M.S.P.R. 394, in which the Merit Systems Protection Board found that locality-based comparability payments under 5 U.S.C. 5304 are not considered in determining employees' representative rates.

(b) (Reference 3-A-24-4) Representative rate includes pay which is an inherent part of the basic rate, and cannot be isolated and subtracted from the rate (e.g., the locality component of pay under the Federal Wage System, which is defined as basic pay).

6. REPRESENTATIVE RATE-RATE USED TO DETERMINE RETENTION RIGHTS (reference 3-A-24-6). The agency compares employees' representative rates that are in effect on the date the agency issues specific reduction in force notices. (5 CFR 351.701(e)(2))

- Example 1: A released employee's AD-12 position has a representative rate of $55,000. A GS-13 has a representative rate of $60,000, which exceeds the AD-12 representative rate. A GS-12 has a representative rate of $50,000. Since this is the highest GS grade representative rate that does not exceed the released employee's current representative rate of $55,000, GS-12 is the highest grade GS position to which the employee may be assigned.

There are no multi-grade intervals in the normal line of progression in the employee's current AD series, and the employee may bump/retreat to an AD-9 which has a representative rate of $30,000.

A GS-6 has a representative rate of $28,000. Since this is less than the representative rate of $30,000 for AD-9, GS-6 is below the lowest allowable grade. GS-9 has a representative rate of $33,000; this is the lowest grade that meets or exceeds the representative rate of AD-9, the lowest grade to which the employee may be assigned in his current pay schedule.

The grade range to which the employee may has potential assignment rights in the General Schedule is covers GS-12 through GS-9.

o When the approval of new pay rates has been announced before the date of notices and the new rates will be put into effect by the effective date of the reduction in force, the new pay rates must be used. (5 CFR 351.701(e)(2))

o For additional information, reference WHITTINGTON v. AIR FORCE, 3 M.S.P.R. 551, in which the Merit Systems Protection Board found that a pay adjustment is not official, and may not be considered in determining employees' representative rates, until final approval is authorized.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 25. CONSIDERATION OF QUALIFICATIONS WHEN DETERMINING EMPLOYEES' ASSIGNMENT RIGHTS.

1. ONLY QUALIFIED EMPLOYEES HAVE ASSIGNMENT RIGHTS (reference 3-A-25-1). An employee who is released from a competitive level by reduction in force has assignment rights to another encumbered position (i.e., bump and retreat rights) only if the released employee is qualified for assignment; for additional information, reference HAYES v. HHS, 829 F.2d 1092; NARCISSE v. TRANSPORTATION, 21 M.S.P.R. 232; and TENGERES v. POSTAL SERVICE, 75 M.S.P.R. 537. (5 CFR 351.702(a))

o Sections 3-A-25 and 3-B-25 only apply to qualifications decisions the agency makes during second round reduction in force competition. (5 CFR 351.701(a))

o Sections 3-A-25 and 3-B-25 do not apply to decisions the agency makes in establishing a competitive level during first round reduction in force competition. (5 CFR 351.403(a))

o (Reference 3-A-9-3) In first round reduction in force competition, all positions in the competitive level are interchangeable. Each employee in a competitive level is presumed qualified for every position in that level (5 CFR 351.403(a))

2. QUALIFICATIONS STANDARD (reference 3-A-25-2). A released employee with higher retention standing than an unaffected employee is qualified for assignment if the released employee meets the four conditions required in 5 CFR 351.701(a), which are also covered in 3-A-25-2. (5 CFR 351.702(a))

o (Reference 3-A-25-2-(a)-(c)) For additional information on qualifications determinations in assignment, reference SEIDEL v. AGRICULTURE, 26 M.S.P.R. 605; NARCISSE v. TRANSPORTATION, 32 M.S.P.R. 232; VIGIL v. ARMY, 63 M.S.P.R. 384; BUCKLER v. FRITB, 73 M.S.P.R. 476, and FLORES v. POSTAL SERVICE, 75 M.S.P.R. 546. (5 CFR 351.702(a))

o (Reference 3-A-25-2-(d)) For additional information on "Undue Interruption" in considering qualifications for assignment to occupied positions, reference NARCISSE v. TRANSPORTATION, 32 M.S.P.R. 232; BUCKLER v. FRITB, 73 M.S.P.R. 476; and TENGERES v. POSTAL SERVICE, 75 M.S.P.R. 537. (5 CFR 351.702(a))

o (Reference 3-A-25-2-(d)) For additional information on undue interruption in considering qualifications to vacant positions, reference JAMISON v. TRANSPORTATION, 20 M.S.P.R. 513; and LEWELLEN v. AIR FORCE, 25 M.S.P.R. 525. (5 CFR 351.203; 5 CFR 351.702(a))

3. OTHER QUALIFICATIONS FACTORS (refer to 3-A-25-3). Beside the basic qualifications standard covered in paragraph 3-A-25-2, an agncy must, when applicablem consider other factors in determining whether a released employee is qualified for assignment to another position. (5 CFR 351.702)

o (Reference 3-A-25-3-(d)) The recency of experience provision is used to determine employees' assignment only when justified in special circumstances, such as with certain scientific positions where there are rapid advances and state-of-the-art knowledge is critical (5 CFR 351.702(d)(4)); for additional information on the recency of experience provision in determining employees' qualifications, reference TENGERES v. POSTAL SERVICE, 75 M.S.P.R. 537. (5 CFR 351.702(a)(4))

4. ASKING EMPLOYEES FOR A QUALIFICATIONS UPDATE (reference 3-A-25-4). An agency may ask employees to update their qualifications statements prior to a reduction in force, and may establish a formal deadline for the receipt of this material; for additional information, reference GREGG v. NAVY, 71 M.S.P.R. 127. (5 CFR 351.702(a))

o (Reference 3-A-25-4) The agency is not obligated to consider material received after the cutoff date in determining employees' qualifications for assignment to other positions; for additional information, reference GREGG v. NAVY, 71 M.S.P.R. 127. (5 CFR 351.702(a))

o (Reference 3-A-25-4) Without the cutoff date, the agency is required to consider any additional material submitted by employees through the effective date of the reduction in force; for additional information, reference ISHIKAWA v. LABOR, 21 M.S.P.R. 153; QUARTARO v. LABOR, 23 M.S.P.R. 110; ADACHI v. NAVY, 36 M.S.P.R. 110; and GREGG v. NAVY, 71 M.S.P.R. 127. (5 CFR 351.702(a))

o (Reference 3-A-25-4) Because of the general uniform and consistent requirement found in 5 CFR 351.201(c) of OPM's reduction in force regulations, if an agency allows one employee to submit additional qualifications information past the cutoff date, all employees would have the right to update their qualifications records; for additional information, reference GREGG v. NAVY, 71 M.S.P.R. 127. (5 CFR 351.201(c); 5 CFR 351.702(a))

5. MAKING QUALIFICATIONS DETERMINATIONS-GENERAL (reference 3-A-25-5). The agency reviews available records to determine whether the employee is qualified for assignment to a position in a different competitive level; reference SOLIMAN v. ENERGY, 18 M.S.P.R. 539; SEIDEL v. AGRICULTURE, 26 M.S.P.R. 605; NARCISSE v. TRANSPORTATION, 32 M.S.P.R. 232; BUCKLER v. FRITB, 73 M.S.P.R. 476; and ANDERSON v. POSTAL SERVICE, 76 M.S.P.R. 16. (5 CFR 351.702(a))

6. MAKING QUALIFICATIONS DETERMINATIONS-PHYSICAL QUALIFICATIONS DETERMINATIONS (reference 3-A-25-6).

(a) (Reference 3-A-25-6-(a)) The agency determines on the basis of available information whether an employee is physically qualified for a position; for additional information, reference O'CONNOR v. AIR FORCE, 9 M.S.P.R. 400; EDWARDS v. ARMY, 24 M.S.P.R. 162; and JOHNSON v. NAVY, 58 M.S.P.R. 386. (5 CFR 351.702(a))

o (Reference 3-A-25-6-(a)) The Merit Systems Protection Board will consider whether the employee made the agency aware of a possible problem meeting the physical standards for a position before the effective date of the reduction in force (reference O'CONNOR v. AIR FORCE, 9 M.S.P.R. 400), or after the effective date of the reduction in force (reference EDWARDS v. ARMY, 24 M.S.P.R. 162). (5 CFR 351.702(a))

o (Reference 3-A-25-6-(a)) In determining whether a handicapped employee meets the physical standards for a position, the agency must consider what accomodation is possible for the employee; for additional information, reference MARTIN v. NAVY, 61 M.S.P.R. 21. (5 CFR 351.702(a))

o (Reference 3-A-25-6-(a)) If an employee is physically disqualified from an apparent best offer of reduction in force assignment, the agency must then determine whether the employee has assignment rights to a different position in which the employee would be qualified for assignment. (5 CFR 351.701; 5 CFR 351.702(a))

(b)(1) (Reference 3-A-25-6-(b)) An agency may not deny reduction in force assignment rights to an employee who is reached for release from a competitive level during a leave of absence that resulted from a compensable injury solely because the employee is physically disqualified as a result of the compensable injury. (5 CFR 351.702(c)).

o (Reference 3-A-25-6-(b)) The agency must determine whether the injured employee is entitled to any reduction in force assignment rights, subject to recovery from the injury as provided by 5 U.S.C. 8151 and 5 CFR Part 353. (5 CFR 351.702(c))

o (Reference 3-A-25-6-(b)) Without a reduction in force situation, the agency makes a decision on the employee's physical qualifications when the employee requests a return to duty under the restoration provisions set forth in 5 CFR 353 of OPM's regulations. (5 CFR 353.301)

o (Reference 3-A-25-6-(b)) If the employee has not requested a return to duty by the effective date of the reduction in force action, the agency would still use its available information to determine whether the employee has any reduction in force assignment rights:

- Example 1: An employee may be physically disqualified from assignment to a position that requires lifting 75 pounds, but may still be qualified for reduction in force assignment to a position with less demanding physical duties.

o (Reference 3-A-25-6-(b)) In order to be qualified for assignment to another position, the employee must meet the same general standards covered in paragraphs 3-A-25-1 and 3-A-25-2 for assignment, including the physical qualifications requirements and the same 90-day standard for undue interruption, that are applicable to other employees covered by the reduction in force regulations: (5 CFR 351.702(a))

- Example 2: A WG-10 employee in retention tenure subgroup I-B is on a leave of absence because of a compensable injury. The employee is released from his competitive level by reduction in force. The employee should have a right to retreat to a WG-8 position; however, upon initial review, the agency finds that, on the effective date of the reduction in force, the released employee is unable to perform the physical requirements of the WG-8 position.

If the agency finds that the released WG-10 employee will not be able to perform the physical requirements of the WG-8 position within the 90-day time period of the undue interruption standard, the employee has no right of assignment to that position. The agency must then determine whether the released WG-10 employee may have a right of assignment to a different position, which would then become a best offer of an available position.

o (Reference 3-A-25-6-(b)) If the employee has requested a return to duty by the effective date of the reduction in force action, the agency would refer to 5 CFR Part 353 and determine whether, in fact, the employee has recovered from the compensable injury and is entitled to restoration. If restored, the employee would compete for other positions on the basis of the employee's position of record on the reduction in force effective date.

o (Reference 3-A-25-6-(b)) Under 5 CFR 353.302, an employee carried on an agency's rolls because of a compensable injury is subject to reduction in force actions the same as if the injury had not occurred (i.e., the employee is not excluded from reduction in force competition because of the compensable injury). (5 CFR 353.302)

(2) (Reference 3-A-25-6-(b)) Separation of the employee by reduction in force while the employee is on compensation terminates the employee's restoration rights based upon the compensable injury. (5 CFR 353.302)

8. WAIVER OF QUALIFICATIONS REQUIREMENTS IN OFFERING RIF ASSIGNMENT TO VACANT POSITIONS (reference 3-A-25-8). For information on undue interruption in considering qualifications to vacant positions, reference JAMISON v. TRANSPORTATION, 20 M.S.P.R. 513.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 26. USE OF TRAINEE AND DEVELOPMENTAL POSITIONS WHEN DETERMINING EMPLOYEES' ASSIGNMENT RIGHTS.

2. DEFINITION OF A TRAINEE OR DEVELOPMENTAL POSITION (reference 3-A-26-2). A formally designated trainee or developmental purposes, as defined for purposes of OPM's reduction in force regulations, must meet four conditions covered in 3-A-26-2 (5 CFR 351.702(e)(1) through 5 CFR 351.702(e)(4)); for additional information, reference GILBERT v. TRANSPORTATION, 21 M.S.P.R. 108.

o An agency may not define a position as a formally designated trainee or developmental position for the sole purpose of protecting an employee from a reduction in force action unless the position otherwise meets the conditions covered in subsection S5-8e.

3. FULLY TRAINED EMPLOYEES HAVE NO ASSIGNMENT RIGHTS TO A TRAINEE OR DEVELOPMENTAL POSITION (reference 3-A-26-3). A released employee who otherwise meets the conditions for entry into a formally designated trainee or developmental program may not displace a lower-standing employee in the program if undue interruption would result; for additional information, reference HARRIS v. TREASURY, 5 M.S.P.R. 545.

o Since undue interruption is based on a 90-day time period, a higher-standing employee who otherwise meets the conditions for entry into a formally designated trainee or developmental program is not expected to have a right of assignment into a program that has been implemented at least 90 days before the effective date of the reduction in force.

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 28. ADMINISTRATIVE ASSIGNMENT OPTIONS

3. BUMPING RIGHTS FOR EMPLOYEES IN TENURE GROUP III (reference 3-A-28-3). An agency may permit competing employees in tenure Group III to bump other employees in tenure Group III. (5 CFR 351.705(a)(2))

o (Reference 3-A-28-3) Unless provided by the agency, Group III employees have no right of assignment under the reduction in force regulations. (5 CFR 351.705(a)(2))

o (Reference 3-A-28-3) An agency may not provide a Group III employee with retreat rights. (5 CFR 351.705(a)(2))

o (Reference 3-A-28-3) Assignment rights and term employees.

The separation or downgrading of a term employee before expiration of the term appointment is covered by OPM's reduction in force regulations if the action results from one of the reasons covered in 5 CFR 351.201(a)(2) (e.g., reorganization, lack of work, shortage of funds, etc.). This means that, before the reduction in force effective date, the term employee must be given a specific 60 days reduction in force notice under 5 CFR 351.801(a)(1), or a specific 120 days reduction in force notice under 5 CFR 351.801(a)(2) applicable when 50 or more employees are separated from a competitive area in the Department of Defense. Also, the agency must apply the other provisions of 5 CFR Part 351, such as establishing competitive levels under 5 CFR 351.403, which potentially provides the term employee with the opportunity to displace another Tenure Group III employee on the same retention register.

The separation of a Tenure Group III employee because of expiration of a term appointment is not covered under 5 CFR 351.201(a)(2) of OPM's reduction in force regulations.

A term employee released by reduction in force has no mandatory assignment rights to positions in other competitive levels. At its option, an agency may, under 5 CFR 351.705(a)(2), provide bumping rights, but not retreat rights, to released term employees.

Under 5 CFR 351 Subpart G, bump and retreat rights are only applicable to the movement of a released employee to a position on a different competitive level. Movement of the released employee to a position held by a lower-standing employee in the same competitive level is a simple displacement. For example, a Subgroup IIIA term employee whose position is abolished may displace a lower-standing Subgroup IIIB employee in the same level even though the agency has not provided assignment rights permitted under authority of 5 CFR 351.701(a)(2).)

o (Reference 3-A-28-3) A Tenure Group III employee who is separated by reduction in force is not eligible for:

- The agency's Reemployment Priority List (reference Module 6, "REEMPLOYMENT PRIORITY LIST");

- The Career Transition Assistance Plan in the employee's present agency (reference 5 CFR 330.604(b)); or

- The Interagency Career Transition Assistance Plan, which provides separated employees with priority consideration for positions in other Federal agencies (reference 5 CFR 330.703(b)(1)).

4. CONTENT OF SPECIFIC NOTICES (reference 3-A-29-1). A sample specific reduction in force is available on the next page.

o An agency may use this sample as a reference in developing a specific reduction in force notice that is applicable to its particular situation.

o Attached is the May 1998 sample Reduction in Force notice.

o A package of 23 action-specific reduction in force notices is available on the BBS under "NOTSAMP1.WP"; this is a WordPerfect 5.1 file that can be readily imported by most software programs.

Example, SAMPLE SPECIFIC REDUCTION IN FORCE NOTICE
(LETTERHEAD)

From: (Appropriate Agency or Component Official)

To: (Employee's Name)

Subj: SPECIFIC REDUCTION IN FORCE NOTICE

Ref: (a) OPM's 5 CFR Part 351 Retention Regulations
(b) (Any agency issuances relating to reduction in force policies)

Encl: (1) Placement and Reemploymement Information Sheet
(2) Reduction in Force Placement Acceptance Form

1. I regret to inform you that your name has been reached for a reduction in force action. This reduction in force is necessary due to a reorganization in the Files Management Division in the Bureau of Automated Information. The Bureau is undertaking this reorganization to achieve its combined goals of resolving an expected future shortage of funds, and of conducting its work in a streamlined organization. The Bureau has carefully determined the retention rights of all its employees. This constitutes a specific reduction in force notice to you.

2. Retention Preference Information:

Present Position: (Official Position of Record)
Tenure Group and SubGroup: (e.g., I-A, I-B, II-b, etc.)
Type of Service: (Competitive or Excepted)
Service Computation Date: (Basic SCD)
Last Three Performance Evaluations: (List Each Summary Rating)
Adjusted SCD Using Last Three Performance Ratings: (Adjusted SCD)
Competitive Area: (As Defined by Agency)
Last Day of Active Duty in Present Position: (RIF Effective Date)
Competitive Level: (As Determined by Agency)

3. Action to be taken: (e.g., Separation, Offer of Lower-graded Postion, Offer of Vacnacy, etc.)

___A. You have been reached for release from your competitive level in accordance with the reduction in force procedures prescribed by references (a) and (b) and will be separated effective (date).

___B. Placement action:

(1) You are offered placement to the position _____

(2) You are offered a change to lower grade to the position of _____

___C. Personal grade retention: You will retain your current grade, step, and pay/for a period not to exceed two years from the effective date of your demotion. You will be treated as being in the higher grade for future pay raises and benefit purposes.

___D. Pay retention:

(1) Upon expiration of your entitlement to personal grade retention you will be entitled to pay retention if your current salary is higher than the top step of the position to which you were demoted. The retained pay will be the same pay you have been receiving except that the retained pay cannot exceed 150% of the top step of the position to which demoted. As long as your pay is higher than the top step of the position to which demoted, you will receive only 50 percent of comparability increases for the top step of the position in which demoted. Your pay retention will continue indefinitely until your salary catches up to your retained rate of pay, unless terminated by a break in service of one day or more, demotion for cause, request for change to lower grade or declination of offer of a comparable position.

(2) You are entitled to pay retention if your current salary is higher than the top step of the position to which you were demoted. The retained pay will be the same pay you have been receiving except that the retained pay cannot exceed 150% of the top step of the position to which demoted. As long as your pay is higher than the top step of the position to which demoted, you will receive only 50 percent of comparability increases for the top step of the position in which demoted. Your pay retention will continue indefinitely until your salary catches up to your retained rate of pay, unless terminated by a break in service of one day or more, demotion for cause, request for change to lower grade or declination of offer of a comparable position.

___E. If you accept this offer, please sign and return enclosure (2) to this office within five (5) days of receipt of this notice. If you do not accept, you will be separated effective (date).

4. You may resign at any time after receipt of this notice. If you resign, the customary advance notice required for resignation will be waived. Your resignation may be effective on the date you specify or on the separation date described in this notice, whichever is earlier.

5. Annual leave to your credit will be paid in a lump sum.

6. (Name of Personnel Office Contact), Room # _____, Telephone _____is available to assist you by explaining this proposed action and will provide access to pertinent regulations, reduction in force registers and other material you may wish to review which is related to this notice. Upon your request, you are entitled to a copy of OPM's retention regulations found in 5 CFR Part 351. If, after examination of the register and pertinent regulations, you feel that any of your rights have been violated, you may appeal to the Merit Systems Protection Board (MSPB), (Address) in writing anytime during the 30-day period beginning with the day after the effective date of the reduction in force action. A copy of the MSPB regulation is attached.

OR

(as a member of a bargaining unit covered by a negotiated grievance procedure, you may file a grievance under Article _____ of the negotiated agreement within _____days of the effective date of the reduction in force).

7. The action described above should not be considered as reflecting upon your performance or conduct. It is being taken solely for the reasons stated. The bureau sincerely appreciates your services to our mission.

SIGNED

MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 30. ADDITIONAL NOTICE REQUIREMENTS WHEN EMPLOYEES ARE SEPARATED BY REDUCTION IN FORCE

2. ADDITIONAL NOTICE REQUIREMENTS WHEN EMPLOYEES ARE SEPARATED BY RIF IN FORCE UNDER THE REVISED NOVEMBER 24, 1997, RETENTION REGULATIONS (reference 3-A-30-2-(c)-(7). OPM published final retention regulations in the Federal Register on November 24, 1997, at 62 FR 62495, with revised procedures providing additional notice requirements when employees are separated by reduction in force.

(a) In a Note to revised 5 CFR 351.803(a), OPM states that subject to the requirements of 5 U.S.C. 7116(a)(7), agencies may implement revised 5 CFR 351.803(a) with these new notice requirements at any time between December 24, 1997 and October 1, 1998.

(b) For reduction in force actions effective between December 24, 1997 and September 30, 1998, agencies may use either 5 CFR 351.803(a) effective December 24, 1997, or the prior 5 CFR 351.803(a) in 5 CFR part 351 (January 1, 1997 edition).

(c) (Reference 3-A-30-7-(c)-(7))

(c)(7) If the employee receives a notice of separation because of reduction in force, along with the reduction in force notice of separation (i.e., either in or with the reduction in force notice, or as a separate supplemental notice to the released employee), the agency must also give the employee information concerning: (5 CFR 351.802(a)(5); 5 CFR 351.803(a))

(7) A release to authorize, at the employees' option, the release of the employee's resume and other relevant employment information for employment referral to State dislocated worker unit(s), and potential public or private sector employers. (5 CFR 351.803(a))

o A sample release authorization is available on the next page.

(SUGGESTED LANGUAGE FOR RELEASE STATEMENT)

To assist separating personnel in securing employment, the (agency name) wishes to convey qualifications information to interested employers. The qualifications informaiton, provided by the employee, may be in the form of a resume, curriculum vitae, OF 612, SF 171, or other format. The information provided will be disclosed to public and private employers (including Federal, State, and local employment agencies, and outplacement agencies, and public and community service agencies. Provision of this information is voluntary. In order to have his/her qualifications information conveyed to potential employers, an employee must read and sign the following:

Privacy Act Notice

I authorize the (agency name) to disclose information regarding my employment qualifications to public and private employers. I will provide/have provided this information to (agency name) prior to my separation date, either through submission of new materials or prior application form. I understand that this authorization is voluntayr. If I choose to rescind this authorization in the future, I will notify the (agency name) in writing.

Signature:_____ Date: __/__/__

4. CONTENT OF CERTIFICATION OF EXPECTED SEPARATION (reference 3-A-32-4). A sample Certification of Expected Separation is available on the next page.

o An agency may use this sample as a reference in developing a specific reduction in force notice that is applicable to its particular situation.

o Attached is the May 1998 sample Certification of Expected Separation.

CERTIFICATION OF EXPECTED SEPARATION

TO: (Name & address of employee receiving notice)

FROM: (appropriate agency official)

Dear Mr/Mrs/Ms_____:

(Name of agency/agency activity) plans to effect a reduction in force on or about _____. Based on a review of your personnel records, we have determined that:

1. There is a good likelihood you will be separated by reduction in force procedures; and

2. You are not eligible or have not filed an application for retirement or indicated an intent to do so; and

3. Opportunities for you to be placed in your same or similar position with this agency or other Federal agencies in this local commuting area are limited or nonexistent; and

4. Opportunities for you to obtain other employment in this local commuting area in your same or similar position are limited or nonexistent.

This is NOT a specific reduction in force notice. At least 60 days prior to any separation action, you will receive a specific notice of reduction in force, explaining the reasons for the action, your retention rights, and other relevant information about the action.

The purpose of this Certification is to enable you to participate in the (name of agency)'s Career Transition Assistance Plan and to register in other programs intended to assist you to locate alternative employment, or improve your alternative employment prospects, prior to the expected date of reduction in force thereby minimizing the adverse impact to you. To enroll in these programs, you must have a copy of this Certification.

I encourage you to participate in the following programs:

(1) Job Training Partnership Act. The U.S. Department of Labor provides funding for various types of retraining and readjustment assistance to displaced workers, such as counseling, testing, and placement assistance. For additional information about the Job Training Partnership Act, please refer to Attachment 1.

(2) The (name of agency)'s Career Transition Assistance Plan (CTAP). Surplus and displaced eligible agency employees may now obtain assistance through the (name of agency)'s CTAP. In accordance with the CTAP, the (name of agency) will provide career transition services to all surplus and displaced employees, provide special selection priority for eligible employees, and establish and maintain the Reemployment Priority List described in #3 below.

Agency field employees will be notified of career transition services through the Field Director (or other appropriate official) who will be the designated point of contact in each field office. The (name of agency)'s CTAP will become fully operational on or before May 1, 1996. You will receive specific information regarding CTAP policies and procedures as soon as they are finalized.

(3) Reemployment Priority List (RPL). Through the RPL, the (name of agency) gives reemployment consideration to competitive service employees separated (or about to be separated) by reduction in force. Should (name of agency) fill any vacancies in the local commuting area, program registrants would be given priority consideration over certain outside job applicants. If you wish to register for placement assistance on the (name of agency)'s RPL, you must complete and submit the application form at attachment 2. For additional information about the RPL, please refer to Attachment 3.

Effective February 29, 1996, the Office of Personnel Management's Interagency Placement Program was replaced by a new form of assistance. In its place is a new system, the "INTERAGENCY CAREER TRANSITION ASSISTANCE PLAN" (ICTAP) which requires agencies to select a displaced employee when the (name of agency) attempts to fill the position from outside its own agency.

Under the new ICTAP program, a displaced employee who applies directly for a vacancy and is determined by the agency to be well-qualified, and lives in the local commuting area, will be given priority selection for that position. If you receive a specific reduction in force separation notice, you will be eligible for placement assistance under the ICTAP. Should this occur, you will be given information about the ICTAP at that time.

ICTAP eligibility lasts for 1 year following involuntary separation because of reduction in force.

For additional information regarding the CTAP and the other programs listed above, or if you have questions, please call (name of an agency representative).

Sincerely,

XXXXXXXXXX
Director of Personnel

Attachments

4. EXCEPTION TO THE BASIC EMPLOYEE RIGHT TO GRIEVE A RIF ACTION-ELECTION OF PROCEDURE (reference 3-A-34-4). The agency must advise each employee having the right to grieve a reduction in force matter under a negotiated grievance procedure that the employee has the option of filing a reduction in force appeal to the Board when a discrimination issued is raised. (5 CFR 1201.3(c)(2))

o Paragraph 5 CFR 1201.3(c) states:

"(c) Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures:

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) Any appealable action that is excluded from the application of the negotiated grievance procedures may be raised under the Board's appellate procedures.

(2) Choice of procedure. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between these procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

(3) Review of discrimination grievances. If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with section (5 CFR) 1201.154."

o For additional information, reference JOHNSON v. LABOR, 26 M.S.P.R. 447; MCCANN v. NAVY, 57 M.S.P.R. 288; and DI SERA v. ARMY, 71 M.S.P.R. 120.

5. EXCEPTION TO THE BASIC EMPLOYEE RIGHT TO GRIEVE A RIF ACTION-TIME LIMITS FOR ELECTION (reference 3-A-34-5). An employee may not file a reduction in force appeal to the Merit Systems Protection Board before the effective date of the reduction in force action, even when the employee's basic right is to file a grievance under a negotiated procedure. (5 CFR 351.901; 5 CFR 1201.3(a)(1))

(a) An employee who chooses to file a grievance follows the provisions of the negotiated procedure; the negotiated grievance procedure must provide that the employee may elect to file the grievance after the effective date of the reduction in force action. (5 CFR 1201.3(c)(1))

o For additional information, reference JOHNSON v. LABOR, 26 M.S.P.R. 447; FIERRO v. TREASURY, 37 M.S.P.R. 609; MCCANN v. NAVY, 57 M.S.P.R. 288; and DI SERA v. ARMY, 71 M.S.P.R. 120.

(b) The employee who elects to file a reduction in force appeal with the Board that includes a discrimination issue may then file the appeal during the 30-day period beginning with the day after the effective date of the action being appealed. (5 CFR 1201.22(b))

o For additional information, reference JOHNSON v. LABOR, 26 M.S.P.R. 447; MCCANN v. NAVY, 57 M.S.P.R. 288; and DI SERA v. ARMY, 71 M.S.P.R. 120.

o In ARMSTRONG v. ITC, 74 M.S.P.R. 349, the Board reviewed the decision of an arbitrator in a reduction in force grievance. The Board acted under authority of 5 U.S.C. 7121(d) because the appellants alleged that they were affected by a prohibited personnel practice under 5 U.S.C. 7121(d), and because the underlying reduction in force actions are otherwise appealable to the Board under 5 U.S.C. 7702. The Board subsequently found no basis to set aside or to modify the arbitrator's decision. The Board noted that arbitration awards are entitled to a greater degree of deference than initial decisions of the Board (referencing BENSON v. NAVY, 65 M.S.P.R. 548). The Board stated that it will modify or set aside an arbitration award only when the arbitrator has erred as a matter of law in interpreting civil service statute, rule, or regulation. Even if after reviewing the facts of a case the Board would disagree with the arbitrator's decision, the Board cannot, absent legal error, substitute its conclusions for the arbitrator's decision.

APPENDIX A. MODULE 3 (REDUCTION IN FORCE), UNIT B (GUIDANCE), SECTION 15. CREDIT FOR PERFORMANCE IN REDUCTION IN FORCE UNDER OPM'S JANUARY 1, 1997, RETENTION REGULATIONS

A1. OPM published final retention regulations in the Federal Register on November 24, 1997, with revised procedures on the crediting of employees' performance ratings in reduction in force. (62 FR 62495)

(a) In a Note to revised 5 CFR 351.504, OPM states that subject to the requirements of 5 U.S.C. 7116(a)(7), agencies may implement revised 5 CFR 351.504 with these new performance provisions at any time between December 24, 1997 and October 1, 1998.

(1) Section 5 U.S.C. 7116(a)(7) provides that "For purposes of this chapter (i.e., Chapter 71 of Title 5, U.S.C., "Labor-Management Relations"), it shall be an unfair labor practice for an agency--(7) to enforce any rule or regulation (other than a rule or regulations implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."

(2) This Section 15, Unit B, of Module 3 (i.e., Section 3-B-15 found in Appendix A) includes the prior Section 15, Unit B, of Module 3 covering retention credit for performance based upon the regulations in effect on January 1, 1997.

(b) For reduction in force actions effective between December 24, 1997 and September 30, 1998, agencies may use either 5 CFR 351.504 effective December 24, 1997, or the prior 5 CFR 351.504 in 5 CFR part 351 (January 1, 1997 edition).

(1) Section 3-B-15 (i.e., Section 3-B-15 found in the body of Module 3, Unit B) covers retention credit for performance based upon the regulations OPM published on November 24, 1997.

(2) Section 3-A-15 (i.e., Section 3-A-15 found in the body of Module 3, Unit A (REQUIRED PROCEDURES) covers retention credit for performance based upon the regulations OPM published on November 24, 1997.

APPENDIX A

MODULE 3 (RIF), UNIT A (REQUIRED PROCEDURES), SECTION 15. CREDIT FOR PERFORMANCE IN REDUCTION IN FORCE UNDER OPM'S JANUARY 1, 1997, RETENTION REGULATIONS

6. OTHER THAN FIVE RATING LEVELS (reference 3-A-6). When any of an employee's three most recent annual performance ratings of record used other than five summary rating levels (e.g., ratings a three-level or a two-level system), an agency using a five level rating system determines equivalent rating levels between the ratings systems and credits the employee accordingly. (5 CFR 351.504(b)(4))

o This is consistent with 5 CFR 351.504(b)(4), which provides that the agency must specify in its performance appraisal system (or other appropriate issuance) which ratings are used for retention purposes.

o Example: An agency changes its performance appraisal system from five summary rating levels to three summary rating levels effective with ratings issued on or after September 30, 1995.

o The three summary rating levels in the agency's new system are equivalent to "Outstanding," "Fully Acceptable," and "Unacceptable" in the five level system.

o Employees would no longer receive retention service credit for ratings of "Exceeds Fully Successful" or "Minimally Successful" because those summary rating levels no longer exist.

o For ratings issued prior to implementation of the new three summary rating levels system on September 30, 1995, employees would still receive retention service credit for performance based on a system with five summary rating levels, since the performance appraisal system in place when the ratings were initially issued provided for that benefit.

7. AMOUNT OF CREDIT (reference 3-A-15-7). Performance ratings of "Outstanding" (Level 5), "Exceeds Fully Successful"(Level 4), "Fully Successful" (Level 3), "Minimally Successful" (Level 2), and "Unacceptable" (Level 1) mean ratings under authority of 5 CFR Part 430. (5 CFR 351.504(d))

o Any reference to one of these rating levels also refers to an equivalent of that level.

o An agency not subject to 5 CFR Part 430 applies the provisions of its own performance appraisal system as appropriate.

8. RATINGS USED FOR RIF PURPOSES (reference 3-A-15-8-(c)).

(c)(1) (Reference 3-A-15-8-(c)-(1)): To ensure proper application under OPM's reduction in force regulations, each agency must specify in its performance management plan, or other appropriate issuance, which ratings of record will be used for reduction in force purposes (5 CFR 351.504(b)(4)(1)); for additional information, reference HAATAJA v. LABOR, 25 M.S.P.R. 594.

(c)(2) (Reference 3-A-15-8-(c)-(2)): To ensure proper application under OPM's reduction in force regulations, each agency must specify in its performance management plan, or other appropriate issuance, the conditions under which a rating is considered to have been received for purposes of determining an employee's retention standing; for additional information, reference MAZZOLA v. LABOR, 25 M.S.P.R. 682.

(c)(3) (Reference 3-A-15-8-(c)-(3)): Example-If the agency has no policy providing for a cutoff date for performance ratings and issues specific reduction in force notices on August 31, 1995, each employee is entitled to credit for performance ratings issued during the 4-year period from August 31, 1991 through August 30, 1995.

(c)(3) (Reference 3-A-15-8-(c)-(3)): Example-If the agency has a policy providing for the cutoff of performance ratings 30 days before it issues specific reduction in force notices on August 31, 1995, each employee is entitled to credit for performance during the 4-year period extending from August 1, 1991, through July 31, 1995.