

Restructuring Information Handbook Module 3

Reduction in Force

Unit B, Guidance (December 2002 version)

Introduction The U.S. Office of Personnel Management developed the **Restructuring Information Handbook** to assist Federal agencies in identifying the mandatory statutory and regulatory procedures that apply to restructuring situations.

The Handbook also offers agencies options for minimizing or even eliminating the disruption that often results from restructuring.

There is no requirement for Federal agencies to use this Handbook. Also, the United States Court of Appeals for the Federal Circuit stated in **James v. Von Zemenszky**, 284 F.3D 1310 (2002), that: “. . . OPM’s Restructuring Information Handbook is not a formal regulation, but merely an informal statement of agency views.”

The structure of the Handbook assists the user in locating as much or as little restructuring information as the user needs. Some Modules contain only one **Unit**, while other Modules have two or more Units.

For subjects with mandatory statutory or regulatory requirements, **Unit A (Mandatory Requirements)** provides the user with a crash course on the subject in Section 1, and also with detailed information, complete with citations of requirements contained in law and regulation.

When appropriate, **Unit B (Guidance)** provides the user with useful guidance, including key appeals decisions from appellate bodies such as the Merit Systems Protection Board.

The summaries of appeals decisions are guidance prepared by individual OPM employees. The appeals summaries do not represent official summaries approved by OPM, the Board, or other appellate organizations, and are not intended to provide legal counsel or to be cited as legal authority. Instead, the appeals summaries inform and help the user locate relevant appellate precedents on a specific downsizing subject.

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Unit F (Basic Index to Module) and **Unit G (Detailed Index to Module)** help the user readily locate information within a specific Module.

Other Modules may contain additional Units, such as **Unit C (Appeals Index)**, and **Unit D (Samples)**.

Finally, Module 1 contains **Unit H, (Detailed Index to the Restructuring Information Handbook)**.

We welcome comments on the Restructuring Information Handbook.

Send any comments and suggestions to the Center for Talent and Capacity Policy at (202) 606-0960; FAX (202) 606-2329; or e-mail Thomas A. Glennon at taglenno@opm.gov.

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OPM's Restructuring Information Handbook Modules contain the following topics:

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| Career Transition Assistance | 7 | A, F, G |
| Interagency Career Transition Assistance Plan | 8 | A, F, G |
| Voluntary Early Retirement | 9 | A, B, C, F, G |
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Using the Handbook

The Modules contain many cross-references to additional pertinent material. To assist in searches, each Module features a unique index system that assists the user in readily locating information in that Module or in the other Modules.

For example, a reference to "**3-A-15-3**" refers to:

- (1) Module 3 ("**Reduction in Force**"),
- (2) Unit A ("**Required Procedures**"),
- (3) Section 15 ("**Credit for Performance in Reduction in Force**"),
- (4) Paragraph 3 ("**Time Period Covered by Employees' Performance Ratings**").

For a second example, a reference to "**3-B-6-5-(b)**" refers to:

- (1) Module 3 ("**Reduction in Force**"),
- (2) Unit B ("**Guidance**"),
- (3) Section 6 ("**Reorganization and Job Erosion**"),
- (4) Paragraph 5 ("**Use of RIF Procedures in Job Erosion Situations**"),
- (5) Subparagraph (b).

All of the Modules use the same index system.

For example, a reference to "**4-A-4-3**" refers to:

- (1) Module 4 ("**Transfer of Function**"),
 - (2) Unit A ("**Required Procedures**"),
 - (3) Section 4 ("**Determining Whether the Transfer of Function Provisions are Applicable**"),
 - (4) Paragraph 3 ("**Basis for Transfer of Function Decisions**").
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RESTRUCTURING INFORMATION HANDBOOK MODULE 3

Reduction in Force

Unit B, Required Procedures (December 2002 version)

Introduction Restructuring Information Handbook Module 3 provides guidance on OPM's Reduction in Force regulations published in part 351 of title 5 of the Code of Federal Regulations (5 CFR part 351). Module 3 presently consists of seven Units: (1) Unit A, "Required Procedures," (2) Unit B, "Guidance," (3) Unit C, "Reduction in Force Appeals Index," (4) Unit D, "Sample Downsizing Notices," (5) Unit E, "Reduction in Force Service Credit," (6) Unit F, "Basic Index to Module 3," and (7) "Detailed Index to Module 3." This is the December 2002 version of Unit B.

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Reduction in Force

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Section 2, Management Rights

Introduction This section contains additional guidance on the agency's right to make organizational decisions, which is covered in Section 2 of Module 3, Unit A (3-A-2).

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Basic Right To Organize Workforce | 3-B-2-1 |
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| Right to Conduct Other Personnel Actions | 3-B-2-3 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-2-1 | 3-B-2-1 |
| 3-A-2-2 | 3-B-2-2 |
| 3-A-2-3 | 3-B-2-3 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

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-B-2-2

Reduction in Force Decisions

A

[Guidance for paragraph **3-A-2-2**.]

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 which agency official has authority to make these decisions (e.g., depending on the agency, the official may be in the headquarters, in a subagency, or in a component of the subagency).
- (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 (such as a lack of work, or shortage of funds) rather than for a reason personal to an employee (such as reprisal, or nonperformance of assigned duties).
 - For additional guidance, see **Wilmot v. United States**, 205 Ct. Cl. 666 (1974); **Local 2855 AFGE (AFL-CIO) v. United States**, 602 F.2d 574 (1979, Third Cir.); **Losure v.**

Interstate Commerce Commission, 2 M.S.P.R. 195 (1980); **Liguori v. United States Military Academy**, 4 M.S.P.R. 6 (1980); **Bacon v. Department of Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.); and **Waksman v. Commerce**, 37 M.S.P.R. 640 (1988), aff'd sub nom. **Harris v. Commerce**, 878 F.2d 1447 (1989, Fed. Cir. Table).

- **Explanation:** Neither the Board nor the Court will otherwise review the agency's decision in order to evaluate the merits of the agency's decision. For example, there is no appellate review to consider whether the agency should or should not have conducted a reorganization.
 - For additional guidance, see **Vielec v. United States**, 456 F.2d 690 (1972, D.C. Cir.); **Griffin v. Agriculture**, 2 M.S.P.R. 168 (1980); **Gandola v. Federal Trade Commission**, 773 F.2d 271 (1985); **Bacon v. Department of Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.); **Holmes v. Army**, 41 M.S.P.R. 612 (1989), 914 F.2d 271 (1990, Fed. Cir. Table); **Winchester v. Tennessee Valley Authority**, 55 M.S.P.R. 485 (1992); and **Cross v. Transportation**, 127 F.3d 1493 (1997, Fed. Cir.)

3-B-2-3

Right to Conduct Other Personnel Actions

A

[Guidance for paragraph **3-A-2-3**.]

An agency has the authority and responsibility to take other personnel actions before, during, and after a reduction in force, provided that the action is appropriate.

- (a) The agency must comply with any formally adopted limitations on management's right to take personnel actions. For example, a freeze on personnel actions that is 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.
- (b) For additional guidance on the appellate review of agencies' internal policies in downsizing situations, see:

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- (1) **Hernandez v. Army**, 53 M.S.P.R. 199 (1992), (general policies);
 - (2) **Smith v. Office of Personnel Management**, 67 M.S.P.R. 29 (1995) (freezing of personnel actions prior to reduction in force);
 - (3) **Dixon v. Postal Service**, 64 M.S.P.R. 445 (1994), aff'd 77 F.3d 503 (1995, Fed. Cir. Table) (general right of agency to detail employee to transition center, although detail is still potentially appealable in future);
 - (4) **Drake v. Commerce**, 18 M.S.P.R. 475 (1983) (improper change in duties prior to reduction in force);
 - (5) **Peters v. Energy**, 29 M.S.P.R. 253 (1985) (improper promotion prior to reduction in force);
 - (6) **Rosen v. Interstate Commerce Commission**, 20 M.S.P.R. 571, (improper hiring during reduction in force notice period);
 - (7) **Baker v. Veterans Administration**, 4 M.S.P.R. 315 (1980); **Williams v. Tennessee Valley Authority**, 24 M.S.P.R. 555 (1985); and **Martin v. Navy**, 61 M.S.P.R. 21 (1994) (proper post-reduction in force restaffing actions); and
 - (8) **Eriksen v. Energy**, 20 M.S.P.R. 135 (1984); **Tucker v. Consumer Product Safety Commission**, 21 M.S.P.R. 621 (1984); and **Metger v. Navy**, 68 M.S.P.R. 225 (1995) (improper post-reduction in force restaffing actions).
-

Section 3, Compliance With OPM's Reduction in Force Regulations

Introduction This section contains additional guidance on the agency's responsibility to properly apply OPM's reduction in force regulations, which is covered in Section 3 of Module 3, Unit A (3-A-3).

Contents This section contains the following topics:

| Topic | See Paragraph |
|-----------------------|---------------|
| Agency Responsibility | 3-B-3-1 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-3-1 | 3-B-3-1 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 3, Compliance With OPM's Reduction in Force Regulations

3-B-3-1

Agency Responsibility

A

[Guidance for paragraph **3-A-3-1**.]

Each agency must ensure that any reduction in force actions it takes comply with applicable laws, regulations, and collective bargaining agreements. (5 CFR 351.204)

- **Explanation**-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 guidance, see **Giesler v. Transportation**, 3 M.S.P.R. 277 (1980), 686 F.2d 844 (1982); **Sonneborn v. Department of Defense**, 80 M.S.P.R. 215 (1998); **Weslowski v. Army**, 80 M.S.P.R. 585 (1998), 217 F.3d 854 (2000, Fed. Cir. Table); and **Warren v. Army**, 87 M.S.P.R. 426 (2001).
-

Section 5, Coverage of OPM's Reduction in Force Regulations

Introduction This section provides additional guidance on which employees and personnel actions are covered by OPM's reduction in force regulations. The basic guidance is found in Section 5 of Module 3, Unit A (3-A-5).

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Obligation of the Agency to Use OPM's Reduction in Force Regulations | 3-B-5-1 |
| Agency Authority To Reassign | 3-B-5-2 |
| Optional Use of Reduction in Force or Reassignment | 3-B-5-3 |
| Reduction in Force Actions And Reasons For A Reduction in Force | 3-B-5-4 |
| Actions Excluded From Reduction in Force Coverage | 3-B-5-5 |
| Employees Covered By OPM's Reduction in Force Regulations | 3-B-5-6 |
| Modifications to General Coverage Under OPM's Reduction in Force Regulations | 3-B-5-7 |
| Employees Excluded From Coverage Under OPM's Reduction in Force Regulations | 3-B-5-8 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-5-1 | 3-B-5-1 |
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| 3-A-5-2-(c) | 3-B-5-2-(c) |
| 3-A-5-3 | 3-B-5-3 |

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-5-4-(a) | 3-B-5-4-(a) |
| 3-A-5-4-(b) | 3-B-5-4-(b) |
| 3-A-5-4-(c) | 3-B-5-4-(c) |
| 3-A-5-5-(a) | 3-B-5-5-(a) |
| 3-A-5-5-(b) | 3-B-5-5-(b) |
| 3-A-5-5-(c) | 3-B-5-5-(c) |
| 3-A-5-5-(d) | 3-B-5-5-(d) |
| 3-A-5-5-(e) | 3-B-5-5-(e) |
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| 3-A-5-7-(d) | 3-B-5-7-(d) |
| 3-A-5-8-(e) | 3-B-5-8-(e) |
| 3-A-5-8-(f) | 3-B-5-8-(f) |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 5, Coverage of OPM's Reduction in Force Regulations

3-B-5-1 Obligation of the Agency to Use OPM's Reduction in Force Regulations

A [Guidance for paragraph **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 paragraph 5 CFR 351.201(a)(2), and 3-A-5-4 (including, reorganization, lack of work, shortage of funds, reduction in personnel ceiling, etc.).

- For additional guidance, see **Brunjes v. Army**, 2 M.S.P.R. 189 (1980); and **Aho v. Agriculture**, 25 M.S.P.R. 569 (1985), 776 F.2d 1065 (1985, Fed. Cir. Table).
-

3-B-5-2 Agency Authority To Reassign

A [Guidance for paragraph **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).

- For additional guidance on the agency's general right to reassign employees without regard to relative retention standing, see **MacMurdo v. Agriculture**, 24 M.S.P.R. 388 (1984), 785 F.2d 322 (1985, Fed. Cir. Table); **Harpster v. Army**, 39 M.S.P.R. 43 (1988); and **Cooke v. Postal Service**, 67 M.S.P.R. 401 (1995), 73 F.3d 380 (1995, Fed. Cir.).

A [Guidance for subparagraph **3-A-5-2-(a)**.]

(a) The agency may reassign an employee to a position in the same or a different competitive level.

- For additional guidance on reassignment to a position in the same competitive level, see **Hayes v. National Aeronautics and Space Administration**, 2 M.S.P.R. 477

(1980);

- For additional guidance on reassignment to a position in a different competitive level, see **MacMurdo v. Agriculture**, 24 M.S.P.R. 388 (1984), 785 F.2d 322 (1985, Fed. Cir. Table); and **Cooke v. Postal Service**, 67 M.S.P.R. 401 (1995), 73 F.3d 380 (1995, Fed. Cir.).

[Guidance for subparagraph **3-A-5-2-(c)**.]

A

- (c) An agency may use OPM's 5 CFR Part 752 adverse action procedures to separate an employee who declines reassignment to a position in a different local commuting area.
- For additional guidance, see **Ketterer v. Agriculture**, 2 M.S.P.R. 294 (1980); **MacMurdo v. Agriculture**, 24 M.S.P.R. 388 (1984), 785 F.2d 322 (1985, Fed. Cir. Table); and **Cooke v. Postal Service**, 67 M.S.P.R. 401 (1995), 73 F.3d 380 (1995, Fed. Cir.).

3-B-5-3

Optional Use of Reduction in Force or Reassignment

A

[Guidance for paragraph **3-A-5-3**.]

At its discretion, an agency may avoid reduction in force procedures by reassigning an employee who is reached for a reduction in force action.

- For additional guidance, see **Brunjes v. Army**, 2 M.S.P.R. 189 (1980); **Aho v. Agriculture**, 25 M.S.P.R. 569 (1985), 776 F.2d 1065 (1985, Fed. Cir. Table); and **Talley v. Army**, 50 M.S.P.R. 261 (1991).

3-B-5-4

Reduction in Force Actions And Reasons For A Reduction in Force

A

[Guidance for paragraph **3-A-5-4**.]

An agency must use OPM's 5 CFR Part 351 reduction in force regulations when both the action to be taken (including separation, downgrading, or furlough for more than 30 consecutive days), and the

reason for the action, are covered by OPM's retention regulations. (5 CFR 351.201(a)(1))

A [Guidance for subparagraph **3-A-5-4-(a)**.]

- The “**Action to be Taken**” for a reduction in force action covered by 5 CFR § 351.201(a)(2) is the release of a competing employee from a competitive level by:

A [Guidance for subparagraph **3-A-5-4-(a)-(1)**.]

(1) **Separation;**

- For additional guidance, see **Waksman v. Commerce**, 37 M.S.P.R. 640 (1988), 878 F.2d 1447 (1989, Fed. Cir. Table, aff'd sub nom., **Harris v. Commerce**);

A [Guidance for subparagraph **3-A-5-4-(a)-(2)**.]

(2) **Furlough For More Than 30 Days;**

- For additional guidance, see **Allen v. Labor**, 19 M.S.P.R. 80 (1984); and **Clerman v. Interstate Commerce Commission**, 35 M.S.P.R. 190 (1987));

A [Guidance for subparagraph **3-A-5-4-(a)-(3)**.]

(3) **Demotion;**

- For additional guidance, see **Robinson v. Postal Service**, 63 M.S.P.R. 307 (1994); **Wade v. Interior**, 79 M.S.P.R. 686 (1998); **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997); and **Burwell v. Army**, 78 M.S.P.R. 645 (1998); or

[Guidance for subparagraph **3-A-5-4-(a)-(4)**.]

(4) **Reassignment (Or Assignment) Requiring Displacement In First Of Second Round Reduction In Force Competition;**

- For additional guidance on displacement during first round reduction in force competition, see **Apodaca v.**

Education, 19 M.S.P.R. 540 (1984).

- For additional guidance on displacement during second round reduction in force competition, see **Carroll v. Army**, 64 M.S.P.R. 603 (1994)); and **Disney v. Navy**, 67 M.S.P.R. 563 (1995).

A [Guidance for subparagraph **3-A-5-4-(b)**.]

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

A [Guidance for subparagraph **3-A-5-4-(b)-(1)**.]

(1) **Lack of Work**;

- For additional guidance, see **Rosen v. Interstate Commerce Commission**, 20 M.S.P.R. 571 (1984); and **Winchester v. Tennessee Valley Authority**, 55 M.S.P.R. 485 (1992);

A [Guidance for subparagraph **3-A-5-4-(b)-(2)**.]

(2) **Shortage of Funds**;

- For additional guidance, see **Schroeder v. Transportation**, 60 M.S.P.R. 566 (1994); **Armstrong v. International Trade Commission**, 74 M.S.P.R. 349 (1997); **Cook v. Interior**, 74 M.S.P.R. 454 (1997); **Cross v. Transportation**, 127 F.3d 1493 (1997, Fed. Cir.); and **Heleen v. Commerce**, 75 M.S.P.R. 366, 154 F.3D 1306 (1998, Fed. Cir.); and **Veneziano v. Energy**, 189 F.3d 1363 (1999, Fed. Cir.);

A [Guidance for subparagraph **3-A-5-4-(b)-(3)**.]

(3) **Insufficient Personnel Ceiling**

- For additional guidance, see **Jones v. Veterans Administration**, 4 M.S.P.R. 320 (1980); and **Nielson v. Navy**, 26 M.S.P.R. 92 (1985), 790 F.2d 92 (1986, Fed. Cir. Table);

- A** [Guidance for subparagraph **3-A-5-4-(b)-(4)**.]
- (4) **Reorganization;**
- For additional guidance, see **Bacon v. Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.); and **Cook v. Interior**, 74 M.S.P.R. 454 (1997);

- A** [Guidance for subparagraph **3-A-5-4-(b)-(5)**.]
- (5) **An Employee's Exercise of Reemployment Rights or Restoration Rights;**
- For additional guidance, see **Coleman v. Navy**, 24 M.S.P.R. 426 (1984); and **Dancy v. United States**, 668 F.2d 1224 (1982, Ct. Cl.); or

- A** [Guidance for subparagraph **3-A-5-4-(b)-(5)**.]
- (6) **Reclassification (That Results In The Downgrading Of An Employee's Position) Due To Erosion Of Duties** 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.
- For additional guidance, see **Shillinger v. Labor**, 47 M.S.P.R. 145 (1991); **Hardy v. Army**, 67 M.S.P.R. 292 (1995); **Guba v. Army**, 70 M.S.P.R. 192 (1996); **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997); and **Burwell v. Army**, 78 M.S.P.R. 645 (1998)

- A** [Guidance for subparagraph **3-A-5-4-(c)**.]
- (c) OPM's regulations do not allow an agency to retroactively conduct a reduction in force unless an intervening event has occurred.
- For additional guidance, see:

- (1) **Washington v. Tennessee Valley Authority**, 22 M.S.P.R. 379 (1984): Under the Merit Systems Protection Board's final order, the appellant was entitled to benefits from the period beginning with his wrongful separation under the adverse action procedures, and ending with the effective date of the retroactive reduction in force.
- (2) **Community Services Agency Employees v. Health and Human Services**, 21 M.S.P.R. 379 (1984), 762 F.2d 978 (1985, Fed. Cir.): The United States Court of Appeals for the Federal Circuit affirmed the Board's decision. All of the employees were separated because their former agency was abolished. Certain functions transferred to a different agency. The Board found that the gaining agency must retroactively determine the employees' transfer of function and reduction in force rights.
- (3) **Carpenter v. Health and Human Services** (1988): In another decision resulting from the same situation as the Community Services Agency Employees decision covered in subparagraph (2) above, the agency retroactively placed the employees in their transferred positions. The agency then reconstructed their retention rights and found that each employee would have been separated by subsequent reductions in force. Referencing the Washington decision covered in subparagraph (1) above, the Board stated that an employee has no right to retroactive restoration past a prior reduction in force date. The Board also found that the agency's retroactive reduction in force separations were new appealable actions.
- (4) **Manescalchi v. Postal Service**, 74 M.S.P.R. 479 (1997): The Board quoted and affirmed an OPM advisory to the agency explaining that there is no precedent, or appeals case law, to support the agency's proposal to retroactively conduct a reduction in force RIF that would result in the separation or downgrading of competing employees who previously won their reduction in force appeals to the Board.

3-B-5-5 **Actions Excluded From Reduction in Force Coverage**

A [Guidance for subparagraph **3-A-5-5-(a)**.]

- (a) OPM's retention regulations do not apply to the termination of a:
- (1) Temporary promotion;
 - (2) Term promotion; or
 - (3) Detail.
- For additional guidance on all three situations, see **Testan v. United States**, 424 U.S. 392 (1976, Supreme Court); **Jicha v. Navy**, 65 M.S.P.R. 73 (1994); and **Treese v. Postal Service**, 77 M.S.P.R. 187 (1998).
 - See the same three appeals decisions for additional guidance on the return of an employee to the position held before the temporary promotion, before the term promotion, or before the detail.
 - **Explanation**-In **Dixon v. Postal Service**, 64 M.S.P.R. 446 (1994), aff'd 77 F.3d 503 (1996, Fed. Cir. Table), the Board noted that a detail to a transition center is generally not appealable as a reduction in force action because the employee's official position of record was unchanged. However, the Board added that it would consider jurisdiction of an appeal of an excessively long detail if the employee could demonstrate a loss of substantive retention rights.

A [Guidance for subparagraph **3-A-5-5-(b)**.]

- (b) OPM's retention regulations do not apply to a change to lower grade based on the reclassification (the downgrading) of an employee's position due to the--
- (1) Application of new classification standards, (5 CFR 351.202(c)(2)), or
 - (2) Correction of classification error. (5 CFR 351.202(c)(2))
- For additional guidance on both situations, see **Atwell v. Merit Systems Protection Board**, 2 M.S.P.R. 484, 670

F.2d 272 (1981, D.C. Cir.); and **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997).

A [Guidance for subparagraph **3-A-5-5-(c)**.]

- (c) OPM's retention regulations do not apply to a change to lower grade based on the reclassification (the downgrading) of the employee's position due to erosion of duties.
- For additional guidance, see **Hardy v. Army**, 67 M.S.P.R. 292 (1995); **Guba v. Army**, 70 M.S.P.R. 192 (1996); **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997); and **Burwell v. Army**, 78 M.S.P.R. 645 (1998).

- ①
- Note that paragraphs **3-A-6-5** and **3-B-6-5** fully cover the job erosion exclusion).

A [Guidance for subparagraph **3-A-5-5-(d)**.]

- (d) OPM's retention regulations do not apply to the placement in nonpay of an employee serving on an on-call basis, or on a seasonal basis.
- For additional guidance concerning both on-call and seasonal, see **Schmidt v. Treasury**, 19 M.S.P.R. 202 (1984); **Strickland v. Merit Systems Protection Board**, 748 F.2d 681 (1984, Fed. Cir.); and **Adams et. al. v. Internal Revenue Service**, 314 F.3d 1367 (2003, Fed. Cir.). (Note that these decisions cover conditions established at the time of appointment).

A [Guidance for subparagraph **3-A-5-5-(e)**.]

- (e) OPM's retention regulations do not apply to a change in an employee's work schedule from other-than-full-time to full-time.
- For additional guidance, see **Cobb v. Labor** 774 F.2d 475 (1985, Fed. Cir.)
 - (Note: An involuntary change from full-time to other-than-full-time is covered by OPM's reduction in force regulations; for more information, see **Ricci v. Veterans**

Administration, 40 M.S.P.R. 113 (1989), concerning change from full-time to part-time; and **Bennally v. Interior**, 20 M.S.P.R. 713 (1984), concerning change from full-time to seasonal).

A [Guidance for subparagraph **3-A-5-5-(f)**.]

- (f) OPM's retention regulations do not apply to a reduction in the number of scheduled hours within a part-time tour of duty.
- For additional guidance, see **Tucker v. Consumer Product Safety Commission**, 21 M.S.P.R. 621 (1984).

A [Guidance for subparagraph **3-A-5-5-(g)**.]

- (g) OPM's reduction in force regulations do not apply to a reduction in rank.
- For additional guidance, see **Wakeland v. Merit Systems Protection Board**, 6 M.S.P.R. 37 (1981); **Russell v. Navy**, 6 M.S.P.R. 698 (1981); **Gregory v. Office of Personnel Management**, 66 M.S.P.R. 691 (1995); and **Crum v. Navy**, 75 M.S.P.R. 75 (1997).
 - **Explanation:** In a reduction in rank situation, an employee retains a position at the same grade even though a management decision has reduced the relative standing of the position in the organizational hierarchy. For example, a manager is reassigned to a nonmanagerial position, or a reorganization results in a supervisor having responsibility for a smaller number of subordinates.

A [Guidance for subparagraph **3-A-5-5-(h)**.]

- (h) OPM's retention regulations do not apply to a constructive demotion.

For additional guidance, see **Russell v. Navy**, 6 M.S.P.R. 698 (1981); **Spicer v. Department of Defense**, 59 M.S.P.R. 359 (1993); **Hogan v. Navy**, 81 M.S.P.R. 252 (1999); **Manlogon v. Environmental Protection Agency**, 87 M.S.P.R. 653 (2001); and **Marcheggiani v. Department Of Defense**, 90 M.S.P.R. 212 (2001).

3-B-5-6 **Employees Covered By OPM's Reduction in Force Regulations**

A [Guidance for subparagraph **3-A-5-6-(c)**.]

(c) OPM's reduction in force regulations apply to an employee carried on an agency's rolls because of a compensable injury.

- **Explanation**-Under paragraph 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. The employee is not excluded from reduction in force competition because of the compensable injury).

If the employee has requested a return to duty by the effective date of the reduction in force action, the agency refers to 5 CFR Part 353 and determines whether, in fact, the employee has recovered from the compensable injury and is entitled to restoration. If restored, the employee competes for retention on the basis of the position of record that the employee holds on the reduction in force effective date.

①

- Subparagraph **3-A-25-6-(c)** explains how in a reduction in force an agency evaluates the qualifications of an employee who incurred a compensable injury.
- Paragraph 5 CFR 353.302 provides that if an employee who is on injury compensation is reached for separation by reduction in force, the employee loses all restoration rights based upon the compensable injury.

3-B-5-7 **Modifications to General Coverage Under OPM's Reduction in Force Regulations**

A [Guidance for subparagraph **7-A-5-7-(a)**.]

(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

- For additional guidance, see **May v. Interstate**

Commerce Commission, 20 M.S.P.R. 557 (1984); and
Clerman v. Interstate Commerce Commission, 35
M.S.P.R. 190 (1987).

A [Guidance for subparagraph **7-A-5-7-(b)**.]

- (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.
- For additional guidance, see **Antoine v. Interior**, 63 M.S.P.R. 185 (1994).

A [Guidance for subparagraph **7-A-5-7-(c)**.]

- (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).
- For additional guidance, see **Robinson v. Postal Service**, 63 M.S.P.R. 307 (1994).
 - Postal Service employees who are not eligible for veterans' preference are not covered by OPM's 5 CFR Part 351 retention regulations; for additional guidance, see **Marcoux v. Postal Service**, 63 M.S.P.R. 373 (1994); and **Love v. Postal Service**, 72 M.S.P.R. 571 (1996).

A [Guidance for subparagraph **7-A-5-7-(d)**.]

- (d) "Hybrid" VA Title 38 Employees. Under Title 38, U.S.C., there are a group of employees in the Department of Veteran Affairs (VA) designated as "hybrids."
- **Explanation**-The "hybrids" are excepted service employees appointed either under 38 U.S.C. § 7401(3) (full-time permanent employees), or under 38 U.S.C. 7405 (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.

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 therapists, physical therapists, 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 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.

- **Explanation**-VA Health Care Professional Title 38 Employees are excepted service employees covered by OPM's reduction in force regulations. VA health care professional employees hold positions covered by Title 38 U.S.C. The positions include physicians, dentists, and registered nurses.

In 1999, the Merit Systems Protection Board found that these VA employees are excepted service employees covered by OPM's reduction in force regulations; for additional guidance, see **Von Zemenszky v. Department of Veterans Affairs**, 80 M.S.P.R. 663 (1999), 85 M.S.P.R. 655 (2000); aff'd **James v. Zemenszky**, 284 F.3D 1310 (Fed. Cir., 2002).

3-A-5-8

Employees Excluded From Coverage Under OPM's Reduction in Force Regulations

A

[Guidance for subparagraph **3-A-5-8-(e)**.]

- (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
- For additional guidance, see **Spiegel v. Department of**

Defense, 33 M.S.P.R. 165 (1987), 828 F.2d 769 (1987, Fed. Cir.).

[Guidance for subparagraph **3-A-5-8-(f)**.]

A

- (f) OPM's reduction in force regulations do not cover a foreign service national employee who is appointed under programs authorized by Section 408 of the Foreign Service Act of 1980 (22 U.S.C. 3968).
- For additional guidance, see **Montasari v. Merit Systems Protection Board**, 232 F.3d 1376 (2000, Fed. Cir.).
-

Section 6, Reorganization, Misclassification, and Job Erosion

Introduction This section provides additional guidance on the personnel procedures that an agency uses to carry out a reorganization, correct a classification action, or downgrade a position because of job erosion. Section 6 of Module 3, Unit A (3-A-6) contains the basic guidance.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Reorganization Basics | 3-B-6-1 |
| Use of Reduction in Force Procedures in Reorganization | 3-B-6-2 |
| Misclassification Due To New Classification Standards or Correction of Classification Error | 3-B-6-3 |
| Reclassification Due To Job Erosion | 3-B-6-4 |
| Use of Reduction in Force in Job Erosion | 3-B-6-5 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-6-1 | 3-B-6-1 |
| 3-A-6-2-(a) | 3-B-6-2 |
| 3-A-6-2-(b) | 3-B-6-2-(b) |
| 3-A-6-2-(c) | 3-B-6-2-(c) |
| 3-A-6-2-(d) | 3-B-6-2-(d) |
| 3-A-6-2-(e) | 3-B-6-2-(e) |
| 3-A-6-3 | 3-B-6-3 |
| 3-A-6-4-(a) | 3-B-6-4-(a) |
| 3-A-6-5 | 3-B-6-5 |

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| A This symbol highlights the references back to Unit 3-A. |
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Reduction in Force
Unit B, Guidance (December 2002 version)

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 6, Reorganization, Misclassification, and Job Erosion

3-A-6-1 Reorganization Basics

A [Guidance for paragraph **3-A-6-1**.]

OPM's reduction in force regulations define "**Reorganization**" 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 (for example, more work or less work); or
 - (9) Other reasons.
- (b) OPM's reduction in force regulations do not define a minimum standard to quantify what constitutes a reorganization.
- For additional guidance, see:
 - (1) **Killingsworth v. Health and Human Services**, 11 M.S.P.R. 273 (1982) (a one person reorganization);
 - (2) **Cooper v. Tennessee Valley Authority**, 723 F.2d 1560 (1983, Fed. Cir.) (broad management discretion in reorganization); and

(3) **Bacon v. Department of Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.) (broad management right to reorganize).

- **Explanation**-A reorganization may be small and involve only one position in an organization, or a reorganization may be large and involve the establishment of a new agency, or a major subdivision of the agency.
- (c) OPM's retention regulations require an agency to conduct a reduction in force when one or more employees will be separated or downgraded as a result of a reorganization.
- In some situations the effective date of the reduction in force may be after the effective date of the reorganization.
- ① • For additional guidance on delayed reorganizations, see subparagraph **3-B-6-2-(a)** below.
- ① • See paragraphs **3-A-2-2** and **3-B-2-2** for additional guidance on management's right to determine the effective date of a reduction in force.
- (d) The agency has broad latitude in conducting a reorganization
- For additional guidance, see **Local 2855 AFGE v. United States**, 602 F.2d 574 (1979, Third Cir.); **Bacon v. Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.); **McMillan v. Army**, 84 M.S.P.R. 476 (1999); and **McClue v. Veterans Administration**, 86 M.S.P.R. 362 (2000).
- (e) 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, or because of the employee's performance problems)
- For additional guidance, see **Losure v. Interstate Commerce Commission**, 2 M.S.P.R. 195 (1980); and **Liguori v. United States Military Academy**, 4 M.S.P.R. 6 (1980).

- (f) 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 (for example, a review of whether the agency should have chosen a different course of action).
- For additional guidance, see *Griffin v. Agriculture*, 2 M.S.P.R. 168 (1980); **La Bonte v. Commerce**, 23 M.S.P.R. 534 (1984); and **Gandola v. Federal Trade Commission**, 23 M.S.P.R. 383 (1984), 773 F.2d 308 (1985, Fed. Cir.).
- (g) A bona fide reorganization resulting in a reduction in force action requires the actual abolishment of an employee's position.
- For additional guidance, see **Casselli v. Army**, 27 M.S.P.R. 196 (1985); and **Metger v. Navy**, 68 M.S.P.R. 225 (1995).
- (h) 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 guidance, see **O'Connell v. Health and Human Services**, 21 M.S.P.R. 257 (1984); **DePascale v. Air Force**, 59 M.S.P.R. 186 (1993); and **Hardy v. Army**, 67 M.S.P.R. 292 (1995).
- (i) 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 guidance, see **Mead v. Justice**, 9 M.S.P.R. 283 (1981), 687 F.2d 285 (1982, 9th Cir.); **Nichols v. Department of Defense**, 19 M.S.P.R. 471 (1984); and **Buckler v. Federal Retirement Investment**

Thrift Board, 73 M.S.P.R. 476 (1997).

- (j) An agency may consider an employee's job performance in determining which positions the agency will abolish (the employee is still included in first and second round reduction in force competition).
- For additional guidance, see **Gandola v. Federal Trade Commission**, 23 M.S.P.R. 383 (1984), 773 F.2d 308 (1985, Fed. Cir); **Anderson v. Department of Defense**, 48 M.S.P.R. 388 (1991); and **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997).
-

3-B-6-2

Use Of Reduction in Force Procedures in Reorganization

A

[Guidance for subparagraph **3-A-6-2-(a)**.]

- (a) 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))
- 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 guidance on the use of reduction in force in a delayed implementation situation, see **Shiefer v. Labor**, 39 M.S.P.R. 34 (1998); **Douglas v. Interior**, 41 M.S.P.R. 575 (1989); **Hardy v. Army**, 67 M.S.P.R. 292 (1995); **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997); **Boudreaux v. Army**, 82 M.S.P.R. 393 (1999); and **Habdas v. Navy**, 84 M.S.P.R. 412 (1999).

A

[Guidance for subparagraph **3-A-6-2-(b)**.]

- (b) Most reduction in force actions, including the actions labeled in subparagraph **3-B-5-4-(b)** (including lack of work, shortage of funds, and reduction in personnel ceiling) result from

reorganizations. Other reorganization situations include:

- (1) 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 guidance, see **Gurkin v. Air Force**, 40 M.S.P.R. 95 (1989); and **Moran v. Air Force**, 64 M.S.P.R. 77 (1994).
- (2) The redistribution of duties and responsibilities in an organization is a reorganization even if employees' position descriptions are not changed.
 - For additional guidance, see **Stechler v. Energy**, 20 M.S.P.R. 23 (1984), 758 F.2d 666 (1984, Fed. Cir. Table).
- (3) 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 guidance, see **Stechler v. Energy**, 20 M.S.P.R. 23 (1984), 758 F.2d 666 (1984, Fed. Cir. Table); **Johns v. Interior**, 23 M.S.P.R. 146 (1984); and **Holmes v. Army**, 41 M.S.P.R. 612 (1989), 914 F.2d 271 (1990, Fed. Cir. Table).

A [Guidance for subparagraph **3-A-6-2-(c)**.]

- (c) 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 if an employee is separated or downgraded.
 - For additional guidance, see **Streitfeld v. Railroad Retirement Board**, 20 M.S.P.R. 182 (1984).
- (1) A competing employee has no assignment right to positions held by a contractor
 - For additional guidance, see **Coursey v. Interior**, 16 M.S.P.R. 40 (1983).
- (2) Neither OPM nor the Merit Systems Protection Board will

not review the merits of an agency's decision to privatize work.

- For additional guidance, see **Griffin v. Agriculture**, 2 M.S.P.R. 168 (1980).
- (3) The Merit Systems Protection Board will not review the agency's implementation of Office of Management and Budget Circular A-76.
- For additional guidance, see **PSSE Union v. Tennessee Valley Authority**, 76 M.S.P.R. 162 (1997).
- (4) An employee reached for release from the competitive level as the result of an agency's decision to privatize work under authority of Office Management and Budget (OMB) Circular A-76 may have "**First Refusal Rights**" to positions added by the private sector vendor.
- **Explanation**-OMB Circular A-76 provides "First Refusal Rights" for any employee who is released from a reduction in force competitive level as the result of the contracting out of work to the private sector.

The displaced Federal employee has first opportunity for positions filled by the private sector contractor if (1) the contractor fills new positions as the result of acquiring the contract, and (2) the contractor determines that the employee is qualified for the position.

Specifically, Chapter 1, paragraph H of OMB "Circular No. A-76 Revised Supplemental Handbook--Performance of Commercial Activities" (March 1996) discusses the personnel considerations of employees affected by an agency's A-76 decision. Specifically, paragraph H-1 and H-2 state:

"H. Personnel Considerations.

1. Adversely affected Federal employees are employees identified for release from the competitive level by an agency, in accordance with 5 CFR Part 351 and Chapter 35 of Title 5, United States Code, as a direct result of a decision to convert to contract, ISSA performance or the agency's

Most Efficient Organization (MEO).

2. Federal employees and existing Federal support contract employees adversely affected by a decision to convert to contract or ISSA performance have the Right-of-First-Refusal for jobs for which they are qualified that are created by the award of the conversion."

A [Guidance for subparagraph **3-A-6-2-(d)**.]

- (d) Under general authority of 5 U.S.C. 7106(a), and implementing reduction in force regulations in 5 CFR 351.201(a)(1), an agency has the right to carry out a reorganization and a resultant reduction in force on its own initiative, not just in response to a specific external event such as an immediate reduction in funds or lack of work.
 - 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
 - For additional guidance on the agency's broad right to reorganize and conduct a reduction in force, see **Local 2855 AFGE v. United States**, 602 F.2d 574 (1979, Third Cir.); **Bacon v. Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.); and **McMillan v. Army**, 84 M.S.P.R. 476 (1999).

A [Guidance for subparagraph **3-A-6-2-(e)**.]

- (e) The agency always has the right to reassign an employee to avoid a reduction in force action.
 - For additional information, see **Camhi v. Energy**, 13 M.S.P.R. 465 (1982); **MacMurdo v. Agriculture**, 24 M.S.P.R. 388 (1984); 785 F.2d 322 (1985, Fed. Cir. Table); and **Thomas v. United States**, 709 F.2d 48 (1983, D.C. Cir.).
- (1) An employee has no right to compete for retention under OPM's reduction in force regulations if the agency reassigns the employee to another position.

- For additional guidance, see **Brunjes v. Army**, 2 M.S.P.R. 189 (1980); and **Aho v. Agriculture**, 25 M.S.P.R. 569 (1985), 776 F.2d 1065 (1985, Fed. Cir. Table).
 - For guidance on management's general right to reassign employees, see paragraph **3-A-5-2**. (5 CFR 335.102)
- ①
- (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.
 - For additional guidance, see **MacMurdo v. Agriculture**, 24 M.S.P.R. 388 (1984); 785 F.2d 322 (1985, Fed. Cir. Table); **Harpster v. Army**, 39 M.S.P.R. 43 (1988); and **Cooke v. Postal Service**, 67 M.S.P.R. 401 (1995), 73 F.3d 380 (1995, Fed. Cir.).
-

3-B-6-3

Misclassification Due to New Classification Standards or Correction of Classification Error

A

[Guidance for paragraph **3-A-6-3**.]

The downgrading of an employee due to "**Classification Error**," or an implementation of a "**New Classification Standard**," 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))

- (a) "Classification Error" results when there is no change in the duties and responsibilities of an employee's official position of record, but the position is overgraded or undergraded.
 - When an 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 guidance on positions overgraded because of classification error, see **Atwell v. Merit Systems Protection Board**, 670 F.2d 272 (1981, D.C. Cir.); **Saunders v. Merit Systems Protection Board**, 757 F.2d 1288 (1985, Fed. Cir.); and **Barry v. Federal Labor Relations Authority**, 74 M.S.P.R. 159 (1997).
 - See the same appeals references concerning a situation when an employee's official position of record is overgraded because of the implementation of a "New Classification Standard."
- (b) 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.
- ① • **Explanation**--Contrast "Classification Error" with a demotion involving a change in duties or responsibilities, which may result from a reorganization (see paragraphs **3-A-6-2** and **3-B-6-2**), or from job erosion (see paragraphs **3-A-6-4** and **3-B-6-4**).
- For additional guidance, see **Bolton v. Army**, 79 M.S.P.R. 333 (1998); and **Shifflet v. Navy**, 83 M.S.P.R. 472 (1999).
- (c) If the agency wishes to correct the classification error by moving the employee to a new official position of record with different duties and responsibilities than the overgraded position, a separate personnel action is required after the agency first corrects the classification error.
- **Example 1 (3-B-6-3)**: 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 support a GS-11 position, not a GS-12 position. 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 correct 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.

3-B-6-4

Reclassification Due To Job Erosion

A

[Guidance for paragraph **3-A-6-4-(a)**.]

- (a) "**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))
- For additional guidance, see **Shillinger v. Labor**, 47 M.S.P.R. 145 (1991); **Hardy v. Army**, 67 M.S.P.R. 292 (1995); and **Guba v. Army**, 70 M.S.P.R. 192 (1996).
- (1) OPM's title 5 CFR regulations have no regulatory definition of "Job Erosion."
- (2) Agencies often discover a potential job erosion situation during a classification or audit review of an employee's position.
- (3) A classifier or auditor should also be aware that what appears to be a job erosion situation may be something else:
- (i) An employee may simply be working on duties other than those in the employee's official position description; the agency may possibly solve the overgrading situation by simply returning the employee to the duties in the official position description.
 - (ii) 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.
 - (iii) 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.

- (iv) The employee may not be carrying out the grade-controlling duties because of a performance-based problem; the agency should correct the problem through performance evaluations and related options to ensure that the employee will effectively perform the official position of record.
-

3-B-6-5 **Use of Reduction in Force in Job Erosion**

A [Guidance for paragraph **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 guidance, see **Hardy v. Army**, 67 M.S.P.R. 292 (1995); **Guba v. Army**, 70 M.S.P.R. 192 (1996); **Burwell v. Army**, 78 M.S.P.R. 645 (1998); **Shifflet v. Navy**, 83 M.S.P.R. 472 (1999); and **Habdas v. Navy**, 84 M.S.P.R. 412 (1999).
- (a) An agency must use reduction in force procedures to correct an actual job erosion reclassification situation when two conditions are met (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; and
 - (2) The reduction in force will occur within 180 days after the effective date of the downgrading action.
- (b) As one 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.

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- ①
 - For additional guidance on the agency's general right to reassign employees, see paragraph **3-A-5-2**.

- ① (c) As another alternative to reduction in force, subject to the restrictions covered in subparagraphs **3-B-6-5-(a)** and **-(b)** above, 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.
 - For additional guidance, **see Shillinger v. Labor**, 47 M.S.P.R. 145 (1991); **Hardy v. Army**, 67 M.S.P.R. 292 (1995); and **Guba v. Army**, 70 M.S.P.R. 192 (1996).
 - See paragraphs **3-A-6-4**, and **3-B-6-4** above, for additional guidance on reclassification due to job erosion.

- ① (d) In determining whether reduction in force procedures are required under subparagraph **3-A-6-5-(b)-1**, the agency must consider whether the reduction in force is "**Announced**." (5 CFR 351.202(c)(3))
 - "Announced" means that the agency has issued one or more specific reduction in force notices in the competitive area.
 - **Explanation**-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.

The purpose of the 180-day rule referenced in paragraph **3-B-6-2** above is to preclude reclassifications based on job erosion when reduction in force actions are pending in the competitive area. For additional guidance, see the final reduction in force regulations that OPM published in the Federal Register at 51 FR 319, January 3, 1986.

- (e) 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 transferred the employee's grade-controlling duties elsewhere in the agency with no update to the employee's position description.

- (f) For additional guidance, see **Hardy v. Army**, 67 M.S.P.R. 292 (1995), **Guba v. Army**, 70 M.S.P.R. 192 (1996); **Crum v. Navy**, 75 M.S.P.R. 75 (1997); and **Burwell v. Army**, 78 M.S.P.R. 645 (1998).



- See subparagraph **3-B-6-4-(a)-(3)** above for additional guidance on matters that a classifier or auditor should consider in an apparent job erosion situation.
-

Section 7, Competitive Area

Introduction This section provides additional guidance on the basic competitive area guidance found in Section 7 of Module 3, Unit A (3-A-7).

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| General Information About Competitive Areas | 3-B-7-1 |
| Basis for Competitive Area | 3-B-7-2 |
| Separate Administrative Management Authority in Competitive Area Determinations | 3-B-7-6 |
| Size of Competitive Area | 3-B-7-7 |
| Local Commuting Area | 3-B-7-8 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-7-1-(e) | 3-B-7-1-(e) |
| 3-A-7-2-(b) | 3-B-7-2-(b) |
| 3-A-7-6 | 3-B-7-6 |
| 3-A-7-7-(a) | 3-B-7-7-(a) |
| 3-A-7-7-(b) | 3-B-7-7-(b) |
| 3-A-7-7-(c) | 3-B-7-7-(c) |
| 3-A-7-7-(d) | 3-B-7-7-(d) |
| 3-A-7-8-(a) | 3-B-7-8-(a) |

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| A This symbol highlights the references back to Unit 3-A. |
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| ① This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 7, Competitive Area

3-B-7-1

General Information About Competitive Areas

A

[Guidance for subparagraph **3-A-7-1-(e)**.]

- (e) A telework or telecommuting employee competes in reduction in force on the basis of the competitive area that includes the employee's official position of record, including the location of the employing activity.

Explanation- Telework or telecommuting by itself does not affect an employee's retention rights.

Unless an agency has processed a personnel action assigning an employee's official position of record to a different duty station, a telework or telecommuting employee competes in reduction in force on the basis of the employee's official position of record, including the location of the employing activity.

For example, an employee works in Organization A located in Washington, DC. The employee commutes from Gettysburg, Pennsylvania, a different local commuting area. Local Commuting Area" is defined in 5 CFR § 351.203. Organization A in Washington allows the employee to work from home in Pennsylvania. The employee will visit the Washington office once a week.

The agency has defined its reduction in force competitive area as all components in a local commuting area. The employee would still compete for reduction in force retention in the Washington competitive area without regard to the Gettysburg home work site.

The employee would compete in a separate one person Gettysburg competitive area only if prior to the reduction in force the agency officially documented Gettysburg as a duty station, and processed all supporting personnel actions (including applicable delegations of authority and mission statements) to document that change.

3-B-7-2 **Basis for Competitive Area**

A [Guidance for subparagraph **3-A-7-2-(b)**.]

- (b) Once the agency defines the competitive area on the basis of organization and geography, the competitive area includes all employees in the organization(s) and location(s) included in the competitive area definition. (5 CFR 351.402(b))
- For example, the agency may not modify the competitive area definition based on criteria such as bargaining unit membership, grade, or occupation, etc. (5 CFR 351.402(b))
 - An agency may not define competitive areas based on overlapping local commuting areas that “float” some employees from one competitive area to another based on the employee’s worksite.
 - **Explanation**-Paragraph 5 CFR 351.402(b) of OPM’s reduction in force regulations defines the standard for a competitive area to include all employees in the organization(s) and geographic location(s) that comprise the competitive area. With overlapping competitive areas keyed to a local commuting area mileage standard, the agency must either (1) include all the overlapping organizations in the same competitive area notwithstanding the mileage standard, or (2) redefine the competitive areas so that no competitive area includes an organization in a different local commuting area.

For example, organization A is in the same local commuting area with organization B, and organization B is in the same local commuting area with organization C, but organization A is in a different local commuting area from organization C.

Under option (1) above, the agency redefines the competitive area to include organizations A, B, and C because of the overlap.

Under option (2) above, the agency defines two competitive areas to include organizations A and B in one competitive area, with organization C in a different competitive area, or organization A in one competitive area, with organizations B and C in a different competitive area.

The agency may not in a single reduction in force include organizations A and B in one competitive area, and organizations B and C in a different competitive area.

3-B-7-6 **Separate Administrative Management Authority in Competitive Area Determinations**

A [Guidance for paragraphs **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, and to take other similar personnel actions, rather than the personnel office that processes the actions. (5 CFR 351.402(b))

- **Explanation**-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, 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 5 CFR § 351.402(b), 'separate administration' is the administrative authority to take or direct personnel actions (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."

- **Explanation**-Many agencies or components reserve certain personnel authorities to a central and/or higher level (including, 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.
 - For additional guidance on the competitive area "Separate Administrative Authority Standard", see **Young v. Interior**, 21 M.S.P.R. 568 (1984); **Coleman v. Education**, 21 M.S.P.R. 574 (1984); **Webb v. Labor**, 18 M.S.P.R. 13 (1983), 765 F.2d 161 (1985, Fed. Cir. Table); **Cox v. Tennessee Valley Authority**, 41 M.S.P.R. 686 (1989); **Castro v. Department of Defense**, 79 M.S.P.R. 152 (1998); **Markland v. Office of Personnel Management**, 130 F.3d 1031 (1998, Fed. Cir.); and **O'Brien v. Office of Personnel Management**, 144 F.3d 1458 (1998, Fed. Cir.).

3-B-7-7

Size of Competitive Area

An agency has many options in defining a competitive area that is consistent with OPM's regulations. (5 CFR 351.402(b))

A

[Guidance for subparagraph **3-A-7-7-(a)**.]

- (a) An agency may not establish a competitive area that is smaller than the standard defined in OPM's regulations.
 - For additional guidance on establishing a minimum

competitive area only consistent with OPM's regulations, see **Compton v. Energy**, 3 M.S.P.R. 452 (1980); and **Markland v. Office of Personnel Management**, 130 F.3d 1031 (1998, Fed. Cir.).

A [Guidance for subparagraph **3-A-7-7-(b)**.]

- (b) OPM's regulations do not require an agency to establish a competitive area larger than the minimum standard.
- For additional guidance on the option of establishing a minimum competitive area, see **Grier v. Health and Human Services**, 21 M.S.P.R. 777 (1984), 750 F.2d 844 (1984, Fed. Cir.).

A [Guidance for subparagraph **3-A-7-7-(c)**.]

- (c) OPM's regulations do not require that a minimum competitive area must include any defined number of positions.
- For additional guidance on the size of a competitive area, see **Grier v. Health and Human Services**, 21 M.S.P.R. 777 (1984), 750 F.2d 844 (1984, Fed. Cir.); **Markland v. Office of Personnel Management**, 130 F.3d 1031 (1998, Fed. Cir.); and **O'Brien v. Office of Personnel Management**, 144 F.3d 1458 (1998, Fed. Cir.).
 - **Explanation**-In some situations a proper competitive area potentially may consist of only of a one-person duty station
 - For additional guidance on one-person competitive areas, see **Ginnodo v. Office of Personnel Management**, 753 F.2d 1061 (1985, Fed. Cir.).

A [Guidance for subparagraph **3-A-7-7-(d)**.]

- (d) OPM's regulations do not define a maximum administrative limit on the size of a competitive area, which potentially could extend to the establishment of a nationwide competitive area.
- For additional guidance on large competitive areas, see **Rosenstiel v. Alcohol, Tobacco, and Firearms**, 19 M.S.P.R. 478 (1984).

3-B-7-8 **Local Commuting Area**

A [Guidance for subparagraph **3-A-7-8-(a)**.]

① The agency's "**Local Commuting Area**" must be consistent with the general definition in subparagraph **3-A-7-8-(a)**, and is relative to a given location. (5 CFR 351.203)

- **Explanation**-The "**Local Commuting Area**" standard is covered in **Beardmore v. Agriculture**, 761 F.2d 677 (1984, Fed. Cir.), 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.
-

Section 8, Request for a Competitive Area Change

Introduction This section contains additional guidance on the procedures covered in Section 8 of Module 3, Unit A (3-A-8), that an agency follows in requested OPM approval of a competitive area change within 90 days of the reduction in force effective date.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| OPM Prior Approval of Changes in Competitive Area Definition Within 90 Days of Reduction in Force Effective Date | 3-A-8-1 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on this key paragraph in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-8-1 | 3-B-8-1 |

A This symbol highlights the references back to Unit 3-A.

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Section 8, Request for a Competitive Area Change

3-A-8-1 OPM Prior Approval of Changes in Competitive Area Definition Within 90 Days of Reduction in Force Effective Date

A [Guidance for paragraph **3-A-8-1**.]

An agency does not establish a new competitive area, and does not need OPM approval, simply because of changes to the workforce or organizations contained within an existing competitive area.

- (a) A new competitive does not result from actions such as: (5 CFR 351.402(c))
- (1) The addition of work from one competitive area to an existing competitive area;
 - (2) Organizational changes within an existing competitive area; or
 - (3) Updating the competitive area definition to document other organizational changes that have taken place since the agency last updated the competitive area definition.
- For additional guidance on the effect of intervening organizational changes to an existing competitive area, see **O'Connell v. Department of Health and Human Services**, 21 M.S.P.R. 257 (1984); and **Blevins v. Tennessee Valley Authority**, 46 M.S.P.R. 239 (1990).
- (b) An agency must obtain OPM approval if within 90 days of the reduction in force effective date that agency:
- (1) Defines a new competitive area; or
 - (2) Redefines an existing competitive area.
-

Section 9, Competitive Level

Introduction This section contains additional guidance on how an agency establishes reduction in force competitive levels. Section 9 of Module 3, Unit A (3-A-9) covers basic guidance on competitive levels.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Position Descriptions are Basis For Competitive Levels | 3-B-9-2 |
| Undue Interruption | 3-B-9-5 |
| Separate Competitive Levels Required | 3-B-9-6 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-9-2 | 3-B-9-2 |
| 3-A-9-2-(a) | 3-B-9-2-(a) |
| 3-A-9-2-(b) | 3-B-9-2-(b) |
| 3-A-9-2-(c) | 3-B-9-2-(c) |
| 3-A-9-2-(d) | 3-B-9-2-(d) |
| 3-A-9-5 | 3-B-9-5 |
| 3-A-9-6-(d) | 3-B-9-6-(d) |
| 3-A-9-6-(e) | 3-B-9-6-(e) |
| 3-A-9-6-(f) | 3-B-9-6-(f) |

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Section 9, Competitive Level

3-B-9-2 **Position Descriptions are Basis For Competitive Levels**

A [Guidance for paragraph **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))

- For additional guidance, see **George v. Interstate Commerce Commission**, 29 M.S.P.R. 479 (1984), 758 F.2d 667 (1984, Fed. Cir. Table); **Foster v. Coast Guard**, 8 M.S.P.R. 240 (1981); **Kline v. Tennessee Valley Authority**, 46 M.S.P.R. 193 (1990); **Schroeder v. Transportation**, 60 M.S.P.R. 566 (1994); **Salazar v. Transportation**, 60 M.S.P.R. 633 (1994); and **Anderson v. Tennessee Valley Authority**, 77 M.S.P.R. 271 (1998).

A [Guidance for subparagraph **3-A-9-2(a)**.]

(a) 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 guidance, see **Kitching v. Health and Human Services**, 20 M.S.P.R. 579 (1984).

A [Guidance for subparagraph **3-A-9-2(b)**.]

(b) On appeal, at its discretion the Merit Systems Protection Board has the right to consider evidence other than the employees' official position descriptions in adjudicating a competitive level issue.

- For additional guidance, see **Bateman v. Navy**, 64 M.S.P.R. 464 (1994); **Disney v. Navy**, 67 M.S.P.R. 563 (1995); **Benkert v. Navy**, 72 M.S.P.R. 432 (1996); and **Anderson v. Tennessee Valley Authority**, 77 M.S.P.R. 271 (1998).

A [Guidance for subparagraph **3-A-9-2-(c)**.]

- (c) An agency may not establish competitive levels on the basis of employees' personal qualifications or performance levels.
- For additional guidance, see *Holliday v. Army*, 12 M.S.P.R. 358 (1982); *O'Donnell v. Army*, 13 M.S.P.R. 358 (1982); *George v. Interstate Commerce Commission*, 20 M.S.P.R. 479 (1984), 758 F.2d 667 (1984, Fed. Cir. Table); *Estrin v. Social Security Administration*, 24 M.S.P.R. 303 (1984); *Bateman v. Navy*, 64 M.S.P.R. 464 (1994); *Griffin v. Navy*, 64 M.S.P.R. 561 (1994); and *Disney v. Navy*, 67 M.S.P.R. 563 (1995).

A [Guidance for subparagraph **3-A-9-2-(d)**.]

- (d) The agency determines the competitive level on the basis of the position's classification series and/or grade on the effective date of the reduction in force.
- **Explanation-** There is no requirement in OPM's reduction in force regulations that an agency implement new classification standards or effect other classifications prior to conducting a reduction in force. Instead, an employee's retention rights are based upon the employee's official position held on the effective date of the reduction in force action.

Section 5 CFR 351.403(b) provides that an agency's establishes competitive levels based on the employee's official position of record on the reduction in force effective date. The official position of record is the position in which the employee is carried on the agency's rolls and paid. To identify the employee's official position of record, the agency takes the position's title, classification series, and grade and pay schedule from the employee's Official Personnel Folder.

Section 5 CFR 351.404(a) (which covers retention registers) provides that the employee's official position does not change, even if the employee is on a temporary promotion or detail to another position. There is no language requiring that the agency review or otherwise carry out classification actions prior to conducting a reduction in force.

For additional guidance, see **Apodaca v. Department Of Education**, 19 M.S.P.R. 540 (1984).

In **Apodaca**, the appellant was reached for release from his competitive level after he was displaced by a higher-standing employee in the same competitive level whose position was abolished. The appellant accepted an offer of assignment to a lower-graded position and appealed the reduction in force action. In his appeal, the appellant contended that the agency's records showed that the position of the higher-standing employee was misclassified at the time of the reduction in force. The appellant also asserted that had the agency properly classified the position, the other employee rather than the appellant would have been reached for the reduction in force action since their positions would not have been included in the same competitive level.

The Merit Systems Protection Board presiding official found that the agency erred in not properly classifying the position of the higher-standing employee prior to the reduction in force. In reversing the reduction in force action, the presiding official found that the agency failed to prove that it properly established the appellant's competitive level in accordance with the requirements of OPM's reduction in force regulations.

The agency filed a petition for review and noted that Appendix A-1 of the 1981 revision of Federal Personnel Manual Chapter 351 expanded upon the competitive level requirements of the RIF regulations. Citing Appendix A-1, the Board noted that the agency at all times carried the higher-standing employee on its rolls and paid him at the grade level of his abolished position. The Board then concluded that this is the grade level and position that determines the employee's retention standing.

The Board added that neither OPM's reduction in force regulations nor Federal Personnel Manual Chapter 351 require an agency to properly classify an employee's position prior to determining the employee's retention standing. At 19 M.S.P.R. 545, the Board stated in Footnote 4: "Prior to amending the FPM in July 1981, OPM required agencies to place employees in properly classified positions prior to preparing retention registers. FPM Chapter 351, subchapter 1-11 (February 28, 1973.) It is significant that the amended FPM no longer contains such a requirement." The Board

subsequently reversed the decision of the presiding official and affirmed the reduction in force action which affected the appellant.

3-B-9-5 **Undue Interruption**

A [Guidance for paragraph **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 positions in the competitive level without **"Undue Interruption."** (5 CFR 351.403(a)(1))

- ①
 - OPM's regulations define "Undue Interruption" in paragraph 5 CFR 351.203; in this Module, see the definition in subparagraph **3-A-4-1-(v)**.
 - For additional guidance on "Undue Interruption" in the establishment of competitive levels, see **Schultz v. Interior**, 12 M.S.P.R. 394 (1982); **Kline v. Tennessee Valley Authority**, 46 M.S.P.R. 193 (1990); and **Anderson v. Tennessee Valley Authority**, 77 M.S.P.R. 271 (1998).
-

3-B-9-6 **Separate Competitive Levels Required**

A [Guidance for subparagraph **3-A-9-6-(d)**.]

The agency establishes separate competitive levels for positions filled on the following five different work schedules: (5 CFR 351.403(b)(4))

- (1) Full-time;
 - (2) Part-time;
 - (3) Intermittent;
 - (4) Seasonal; or
 - (5) On-call.
- **Explanation**-There is no authority under OPM's regulations for an

agency to establish separate competitive levels based upon subsets of the five categories covered in subparagraphs 3-B-9-6-(d)-(1) through -(5) above.

For example, the agency places all seasonal employees in otherwise interchangeable positions in the same competitive level. The agency may not establish a competitive level for full-time seasonal employees, and a different competitive level for part-time seasonal employees.

A [Guidance for subparagraph **3-A-9-6-(e)**.]

- (e) The agency establishes separate competitive levels for formally-designated trainee and developmental positions. (5 CFR 351.403(b)(5), and 5 CFR 351.702(e)(1))

- For additional guidance, see **Harris v. Treasury**, 5 M.S.P.R. 545 (1981). (5 CFR 351.403(b)(5)).

- ① • **Explanation**-A formally-designated trainee position must meet the four conditions covered in paragraph **3-A-26-2**. 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. A position is not a formally-designated trainee position for purposes of reduction in force competition solely because the position has a career ladder.

- For additional guidance, see **Gilbert v. Transportation**, 21 M.S.P.R. 108 (1984).

A [Guidance for subparagraph **3-A-9-6-(f)**.]

- (f) 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.

- **Explanation**-The requirement that the agency establish separate competitive levels for supervisors or managers versus nonsupervisors or nonmanagers was formerly contained in subparagraph 5 CFR 351.403(b)(5) of OPM's reduction in force regulations.

This paragraph was deleted by the retention regulations OPM published on January 13, 1995. (OPM renumbered the former paragraph (5 CFR 351.403(b)(6)) as a new 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.

Section 10, Establishing Retention Registers

Introduction This section contains additional guidance on the content and format of reduction in force retention registers, which is covered in Section 10 of Module 3, Unit A (**3-A-10-1**).

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| General Information About Retention Registers | 3-B-10-1 |
| Employees Listed on the Retention Register | 3-B-10-2 |
| Employees Listed Apart From the Retention Register | 3-B-10-4 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-10-1 | 3-B-10-1 |
| 3-A-10-2 | 3-B-10-2 |
| 3-A-10-2-(a) | 3-B-10-2-(a) |
| 3-A-10-2-(b) and (c) | 3-B-10-2-(b) and (c) |
| 3-A-10-4 | 3-B-10-4 |
| 3-A-10-4-(a)-(1) | 3-B-10-4-(a)-(1) |

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| ① This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 10, Establishing Retention Registers

3-B-10-1 General Information About Retention Registers

A [Guidance for paragraph **3-A-10-1**.]

The "**Retention Register**" applies to the competitive level the four retention factors required in law by 5 U.S.C. 3502(a). (5 CFR § 351.404(a))

- **Explanation-A "Master Retention List"** (or "**Master Retention Register**") combines individual retention registers.
 - For additional guidance, see **Hanks v. Federal Emergency Management Agency**, 23 M.S.P.R. 567 (1984), 776 F.2d 1060 (1985, Fed. Cir. Table), in which the agency did not establish individual competitive levels because all positions in the competitive area were abolished. Also, see **Pezdek v. Department of Defense**, 84 M.S.P.R. 554 (1999).

3-B-10-2 Employees Listed on the Retention Register

A [Guidance for paragraph **3-A-10-2**.]

The retention register includes the name of each competing employee who holds an official position of record in the competitive level. (5 CFR 351.404(a))

- For additional guidance, see **Brock v. Navy**, 49 M.S.P.R. 564 (1991); **Smith v. Office of Personnel Management**, 67 M.S.P.R. 29 (1995); and **Testan v. United States**, 424 U.S. 392 (1976, Supreme Court).

A [Guidance for subparagraph **3-A-10-2-(a)**.]

(a) 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. (5 CFR 351.506(b))

- For additional guidance, see **Smith v. Office of**

Personnel Management, 67 M.S.P.R. 29 (1995).

A [Guidance for subparagraphs **3-A-10-2-(b)** and **-(c)**.]

(b)-(c) 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.

- **Explanation**-The agency must return an employee on a detail, temporary promotion, or term promotion to that employee's official position of record before releasing a competing employee (1) from the competitive level containing the detailed employee's official position of record, or (2) from the competitive level to which the employee held a position on detail, temporary promotion, or term promotion.
 - For additional guidance, see **Chance v. Federal Aviation Administration**, 5 M.S.P.R. 277 (1981); **Frankel v. Education**, 17 M.S.P.R. 453 (1983); and **Testan v. United States**, 424 U.S. 392 (1976, Supreme Court) (5 CFR § 351.404(a))

3-B-10-4 Employees Listed Apart From the Retention Register

A [Guidance for paragraph **3-A-10-4**.]

Employees holding certain positions in a competitive level do not compete for retention in that competitive level. (5 CFR 351.404(b)(1))

- **Explanation**-The agency enters all of the noncompeting employees on a separate list to document that, before a competing employee is released from the retention register, the agency has completed an appropriate personnel action for each noncompeting employee. For example, the agency returns each employee on a detail or temporary promotion to the competitive level that includes the competing employee's official position of record. For another example, the agency terminates each competitive service employee before releasing a competing employee from the retention register. (5 CFR 351.404(b))

A [Guidance for subparagraph **3-A-10-4-(a)-(1)**.]

- (1) The agency enters on a separate list the name of each noncompeting employee who is serving in the competitive level under a time-limited temporary appointment.
- **Explanation-Competitive Service Temporary Employees.** An employee appointed to a competitive service temporary position is not covered by OPM's reduction in force 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 by 5 CFR 316.403. (5 CFR 351.404(b)(1); 5 CFR 351.501(b)(3))
 - For additional guidance, see **Starling v. Housing and Urban Development**, 14 M.S.P.R. 620 (1984), 757 F.2d 271 (1985, Fed. Cir.).
 - **Explanation-Excepted Service Temporary Employees Serving on a Not-To-Exceed 1 Year Appointment.** An employee serving in an excepted service temporary position under an appointment with a time limitation of not-to-exceed 1 year is not covered by OPM's reduction in force regulations unless 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. (5 CFR 351.502(b)(3)(iii))
 - For additional guidance, see **Coleman v. Federal Deposit Insurance Corporation**, 62 M.S.P.R. 187 (1994).
 - **Explanation-Excepted Service Temporary Employees Serving on a Longer Than 1 Year Appointment.** 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))
 - For additional guidance, see **Davis v. Small Business Administration**, 74 M.S.P.R. 81 (1997).

Section 12, Retention Tenure Groups

Introduction This section contains additional guidance on competitive and excepted service tenure groups. Section 12 of Module 3, Unit A (3-A-12) provides basic guidance on retention tenure groups.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| General Information About Tenure Groups | 3-A-12-1 |
| Competitive Service Tenure Groups | 3-A-12-2 |
| Excepted Service Tenure Groups | 3-A-12-3 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-12-1 | 3-B-12-1 |
| 3-A-12-2-(c)-(2) | 3-B-12-2-(c)-(2) |
| 3-A-12-2-(c)-(3) | 3-B-12-2-(c)-(3) |
| 3-A-12-2-(d) | 3-B-12-2-(d) |
| 3-A-12-3-(a) | 3-B-12-3-(a) |
| 3-A-12-3-(b)-(2) | 3-B-12-3-(b)-(2) |
| 3-A-12-3-(c)-(1) | 3-B-12-3-(c)-(1) |
| 3-A-12-3-(c)-(2) | 3-B-12-3-(c)-(2) |
| 3-A-12-3-(c)-(3) | 3-B-12-3-(c)-(3) |

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| A This symbol highlights the references back to Unit 3-A. |
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| ① This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 12, Retention Tenure Groups

3-B-12-1

General Information About Tenure Groups

A

[Guidance for paragraph **3-A-12-1**.]

“**Tenure**” is one of the four retention factors required in 5 U.S.C. § 3502(a), which is derived from Section 12 of the Veterans' Preference Act of 1944. (5 U.S.C. 3502(a)(1))

- In **Hilton v. Sullivan**, 334 U.S. 323 (1948, Supreme Court), the Court found a congressional intent to recognize Federal creditable service as one of the four retention factors.
- In **Elder v. Brannan**, 351 U.S. 277 (1951, Supreme Court), the Court held that preference eligibles are entitled to preference over other competing employees within a tenure group.
- **Explanation**-Specifically, the Court found that the U.S. Civil Service Commission through regulation could establish reduction in force tenure subgroups based on tenure even though to do so would give nonveterans preference over veterans placed in lower tenure groups.

3-B-12-2

Competitive Service Tenure Groups

A

[Guidance for subparagraph **3-A-12-2-(c)-(2)**.]

- (c) Competitive service tenure group III includes each employee serving under a:
 - (2) Temporary Appointment Pending Establishment of a Register (TAPER). (5 CFR 351.501(b)(3))
 - The agency places in competitive service tenure group III Welfare-to-Work Program Worker-Trainee positions that the agency fills under a TAPER appointment.
- **Explanation**-Paragraph 5 CFR 316.201(b) provides that an agency

may use a TAPER appointment to fill Worker-Trainee positions. (Note-An agency may also use other appropriate types of appointments to fill GS-1 Worker-Trainee positions.)

The Worker-Trainee positions are filled at GS-1, WG-1, and WG-2. After appointment, the agency may reassign or promote the employees to other positions through GS-4, WG-5, or equivalent grades in the Federal Wage System. Any reassignments or promotions are under authority of 5 CFR 316.201(b), and must be consistent with the requirements found in 5 CFR 330.501.

An agency must convert a Worker-Trainee from TAPER to career status after the employee satisfactorily completes three years of service. Satisfactory performance includes completing training and meeting qualification requirements for the occupation in which the employee is presently servicing.



Employees in TAPER Worker-Trainee positions are covered by OPM's 5 CFR Part 351 reduction in force regulations if, before completing three years of satisfactory service, the employee will be separated, downgraded, or furloughed for more than 30 days as the result of reorganization, lack of work, shortage of funds, or other applicable reason. See paragraphs **3-A-5-4** and **3-B-5-4** for additional guidance on reasons for a reduction in force. (5 CFR 351.201(a)(2))

If, after the Welfare-to-Work TAPER employee completes three years of service, the agency must convert the employee to career status (which places the employee in competitive service retention group I) before the employee is reached for a reduction in force action.

A [Guidance for subparagraph **3-A-12-2-(c)-(3)**.]

(c) Competitive service tenure group III includes each employee serving under a:

(3) Term Appointment (5 CFR 351.501(b)(3))

- For additional guidance, see **Speaker v. Education**, 13 M.S.P.R. 163 (1982); and **Perlman v. Army**, 23 M.S.P.R. 125 (1984).

- **Explanation**-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 subparagraph 5 CFR 351.201(a)(2) (including reorganization, lack of work, shortage of funds, or reduction of personnel ceiling). This means that, before the reduction in force effective date, at a minimum the agency must give the term employee a specific 60 days reduction in force notice under 5 CFR 351.801(a)(1).

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.

- For additional guidance on the separation of a term employee because of expiration of an appointment, see **Depner v. Army**, 78 M.S.P.R. 237 (1998); and **Hall v. Army**, 78 M.S.P.R. 222 (1998).

A [Guidance for subparagraph **3-A-12-2-(d)**.]

- (d) 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. (5 CFR 351.404(b)(1); 5 CFR 351.501(b)(3))
- For additional guidance, see **Starling v. Housing and Urban Development**, 14 M.S.P.R. 620 (1984), 757 F.2d 271 (1985, Fed. Cir.); and **Hume v. Navy**, 29 M.S.P.R. 221 (1985).

A [Guidance for subparagraph **3-A-12-3-(a)**.]

- (a) Excepted service tenure group I includes each permanent employee whose appointment carries no restriction or condition such as conditional, indefinite, specific time limit, or trial period. (5 CFR 351.502(b)(1))
- For additional guidance, see **Heelen v. Commerce**, 154 F.3d 1306 (1998, Fed Cir.).

A [Guidance for subparagraph **3-A-12-3-(b)-(2)**.]

- (b) Excepted service tenure group II includes each employee:
- (2) 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))
- For additional guidance, see **Hargis v. Tennessee Valley Authority**, 41 M.S.P.R. 490 (1989).
 - 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.
 - **Explanation**-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-conditional appointment in the competitive service in agencies having similar excepted appointments.

Excepted service tenure group II also includes students participating in the Student Educational Employment Program who have not completed the education requirements for graduation, but are being carried by the agency 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. 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.

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.

A [Guidance for subparagraph **3-A-12-3-(c)-(1)**.]

- (c) Excepted service tenure group III includes each employee serving under:
- (1) An indefinite appointment that is not potentially permanent. (5 CFR 351.502(b)(3)(i))
 - At the agency's option, excepted service tenure group III may include a Schedule C employee.
 - For additional guidance on the potential coverage of a Schedule C employee under OPM's reduction in force regulations, see **Keener v. United States**, 165 Ct. Cl. 334 (1964); and **Miller v. Treasury**, 47 M.S.P.R. 223 (1991).
 - **Explanation**-An excepted service Schedule C employee serves under conditions established by the agency at the time of appointment. These conditions give broad latitude to the agency to terminate the appointment of a Schedule C employee. If the agency does not otherwise terminate the Schedule C appointment in a reduction in force, the Schedule C employee is generally entitled to be listed on a one-person competitive level, to be given a 60 days specific written reduction in force notice, and to appeal the separation action to the Merit Systems Protection Board.

[Guidance for subparagraph **3-A-12-3-(c)-(2)**.]

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- A** (c) Excepted service tenure group III includes each employee serving under:
- (2) 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))
 - OPM's reduction in force regulations cover the employee from the date of appointment.
 - For additional guidance, see **Davis v. Small Business Administration**, 74 M.S.P.R. 281 (1997).

[Guidance for subparagraph **3-A-12-3-(c)-(3)**.]

- A** (c) Excepted service tenure group III includes each employee serving under:
- (3) 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. (5 CFR 351.502(b)(3)(iii))
 - For additional guidance, see **Coleman v. Federal Deposit Insurance Corporation**, 62 M.S.P.R. 187 (1994).
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Section 13, Veterans' Preference in Reduction in Force

Introduction This section provides additional guidance on the eligibility criteria for veterans' preference under OPM's reduction in force regulations. Section 13 of Module 3, Unit A (3-A-13) contains the basic guidance on veterans' preference in reduction in force competition.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Tenure Subgroups | 3-A-13-1 |
| Eligibility for Veterans' Preference Based on Derivative Preference | 3-A-13-7 |
| Eligibility for Veterans' Preference When the Employee Is Retired From the Armed Forces | 3-A-13-8 |
| Eligibility for Veterans' Preference When the Employee is Retired From the Armed Forces as a Title 10 Reservist | 3-A-13-9 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-13-1 | 3-B-13-1 |
| 13-A-13-1-(b) | 13-A-13-1-(b) |
| 13-A-13-7-(a) | 13-B-13-7-(a) |
| 13-A-13-7-(b) | 13-B-13-7-(b) |
| 13-A-13-7-(c) | 13-B-13-7-(c) |
| 13-A-13-7-(d) | 13-B-13-7-(d) |
| 3-A-13-8 | 3-B-13-8 |
| 3-A-13-8-(a) | 3-B-13-8-(a) |
| 3-A-13-8-(b)-(1) | 3-B-13-8-(b)-(1) |
| 3-A-13-8-(b)-(3) | 3-B-13-8-(b)-(3) |
| 3-A-13-8-(c) | 3-B-13-8-(c) |
| 3-A-13-9 | 3-B-13-9 |

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This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 13, Veterans' Preference in Reduction in Force

3-B-13-1

Tenure Subgroups

A

[Guidance for paragraph **13-A-13-1**.]

"**Veterans' Preference**" is one of the four retention factors required in 5 U.S.C. 3502(a), which is derived from Section 12 of the Veterans' Preference Act of 1944.

- **Explanation**-The Court of Claims held that the Veterans' Preference Act reflects "Congress' will, as stated in *Johnson v. Robison*, 415 U.S. 361, 382, 94 S.Ct. 1160, 39 L.Ed. 2D 389 (1974), to encourage and reward military service to the nation, does not, however, render limitless rights and benefits which the Act furnishes. Nor does the Act...cloak veterans with any 'penumbral rights; its provisions are necessarily specific, and for plaintiffs to benefit therefrom they must show themselves to be clearly within the intended gambit of these provisions."
 - For additional guidance on the purpose of the retention provisions of Section 12 of the Veterans' Preference Act, see **Cutting v. Higley**, 235 F.2d 515, (1956, D.C. Cir.); **Crowley v. United States**, 527 F.2d 1176 (1975, Ct. Cl.); and **Hilton v. Sullivan**, 334 U.S. 323 (1948, Supreme Court).
- **Explanation**-Reduction in force preference under the Veterans' Preference Act is not agencywide, but instead is limited to the competitive area.
 - For additional guidance on the scope of veterans' preference in reduction in force competition, see **Fass v. Gray**, 91 U.S. App DC 28 (1948, D.C. Cir), 197 F.2D 587, cert. Denied 344 U.S. 839, 97 L.Ed. 653, 73 S.Ct. 39; **White v. Gates**, 102 U.S. App. DC 346, 253 F.2d 868 (1958, D.C. Cir.), cert. denied 356 U.S. 973, 2 L.Ed. 1147, 78 S.Ct. 1136; and **Finch v. United States**, 179 Ct. Cl. 1 (1967, Ct. Cl.).
- **Explanation**-Reduction in force preference under the Veterans' Preference Act applies after consideration of tenure, which is

another of the four retention factors.

- For additional guidance on the relationship of the four retention factors, see **Elder v. Brannan**, 351 U.S. 277 (1951, Supreme Court), 95 L.Ed. 939, 71 S.Ct. 685, rehearing denied 341 US 956, 95 L.Ed 1377, 71 S.Ct. 1012.

[Guidance for subparagraph **13-A-13-1-(b)**.]

A

(b) An agency is not required to consider veterans' preference records that are not available until after the effective date of the reduction in force. (5 CFR 351.506(a))

- **Explanation**-In **Burciaga v. Army**, 82 M.S.P.R. 460 (1999), the Merit Systems Board (MSPB) considered an appeal in which the appellant applied to the Department of Veterans Affairs (VA) for a disability rating of 30% or higher based upon a qualifying combat-incurred disability. The appellant applied to VA 6 months before the effective date of the reduction in force. After the effective date of the reduction in force, VA approved a retroactive award of disability benefits for the appellant.

On appeal, MSPB held that it would be unreasonable for the agency to redetermine the appellant's retention rights based on the retroactive VA award because of the long time period from the date of the appellant's separation from the Armed Forces and the effective date of the reduction in force.

3-B-13-7

Eligibility for Veterans' Preference Based on Derivative Preference

Veterans' preference also extends to four types of employees who are eligible for "**Derivative Preference**," and inclusion in retention subgroup "A". (5 CFR 211.102(c))

A

[Guidance for subparagraph **3-A-13-7-(a)**.]

(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)),

- **Explanation**-For purposes of Derivative retention preference

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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."

A [Guidance for subparagraph **3-A-13-7-(b)**.]

- (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)),

- **Explanation**-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."

A [Guidance for subparagraph **3-A-13-7-(c)**.]

- (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))

A [Guidance for subparagraph **3-A-13-7-(d)**.]

- (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))

3-B-13-8 **Eligibility for Veterans' Preference When the Employee Is Retired From the Armed Forces**

A [Guidance for paragraph **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) through -(3))

- **Explanation**-The Dual Compensation Act of 1964 generally 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 guidance, see **Monaco v. United States**, 523 F.2d 935 (1975); **Parton v. Army**, 4 M.S.P.R. 74 (1980); **Burrough v. Tennessee Valley Authority**, 43 M.S.P.R. 117 (1990); and **Reyes v. Navy**, 70 M.S.P.R. 476 (1996). (5 U.S.C. 3501(a)(3)(B))
- **Explanation**-The Dual Compensation Act restriction applies even if

the individual is receiving disability benefits from the Armed Forces, and/or the employee is receiving a service-compensable disability from the Department of Veterans Affairs.

- For additional guidance, see **Kelly v. Office of Personnel Management**, 53 M.S.P.R. 511 (1992); **Brooks v. Office of Personnel Management**, 59 M.S.P.R. 207 (1993); and **Castro v. Department of Defense**, 79 M.S.P.R. 152 (1998). (5 U.S.C. 3501(a))
- ① • **Explanation**-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 reduction in force 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 subparagraphs **3-A-13-8-(a)** through **-(c)**, and in subparagraphs **3-B-13-8-(a)** through **-(c)** below. (5 U.S.C. 3501(a); 5 CFR 351.501(d)(1)-(4))

A [Guidance for subparagraph **3-A-13-8-(a)**.]

- (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:
- (1) 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
 - (2) 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 1 (3-B-13-8-(a))**: 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 (not the Department of Veterans Affairs), and request a change in the basis of his Armed Forces retired pay

- For additional guidance, see **Unterberg v. United States**, 412 F.2d 1341 (1969, D.C. Cir.), 188 Ct. Cl. 994 (1965); **Kelly v. Office of Personnel Management**, 53 M.S.P.R. 511 (1992); **Brooks v. Office of Personnel Management**, 59 M.S.P.R. 207 (1993).

A [Guidance for subparagraph **3-A-13-8-(b)**.]

- (b) A retired member of the Armed Forces is eligible for veterans' preference in reduction in force if:
- (1) 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))
- **Explanation**-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 additional guidance, see **Burrough v. Tennessee Valley Authority**, 43 M.S.P.R. 117 (1990).
 - **Example 2 (3-B-13-8-(b))**: 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 guidance, see **Burrough v. Tennessee**

Valley Authority, 43 M.S.P.R. 117 (1990).

Explanation-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))

A [Guidance for subparagraph **3-A-13-8-(b)-(3)**.]

- (3) The Dual Compensation Act provisions of paragraph 5 U.S.C. 3501(a) also apply to early retirement from the Armed Forces under Public Law 102-484 based upon a minimum of 15 (rather than 20) years of active military service.

- ① • Subparagraphs **3-A-15-8-(a)** through **-(c)** cover the Dual Compensation Act restrictions on retention preference for certain retired members of the Armed Forces.

- **Explanation**-The Dual Compensation Act restrictions in paragraph 5 U.S.C. 3501(a) generally do not apply to early retirement from the Armed Forces based upon 15 years (rather than 20 years) of active service in the Armed Forces.

However, paragraphs 5 U.S.C. 2108(4) and (5) provide that an employee who retired from the Armed Forces at the rank of major or higher is not eligible for veterans' preference (including veterans' preference in reduction in force competition and retention service credit for most Armed Forces service) unless the employee also meets the definition of "Disabled Veteran" found in paragraph 5 U.S.C. 2108(2).

Paragraphs 5 U.S.C. 2108(4) and (5) apply to early Armed Forces retirements under section 4403 of Public Law 102-484 (approved October 23, 1992).

Section 4403 provided the Armed Forces with "Temporary Early Retirement Authority" during the drawdown period of enlisted

personnel, warrant officers, and regular or commissioned officers.

Subparagraph **3-A-13-8-(b)-(3)** explains that the Dual Compensation Act restrictions on veterans' preference for purposes of reduction in force competition in subparagraphs **3-A-15-8-(a)** through **-(c)** do not apply to an early retirement from the Armed Forces under Public Law 102-484 based upon a minimum of 15 (rather than 20) years of active military service only if the employee:

- (1) Retired below the rank of major (or equivalent); (5 U.S.C. 2108(4) and (5); 5 CFR 351.501(d)(4)), and
- (2) Meets the definition of "Disabled Veteran" found in 5 U.S.C. 2108(2). (5 U.S.C. 2108(4) and (5); 5 CFR 351.501(d)(4))

Under section 4404 of Public Law 102-484, the basis for the Armed Forces retirement could change to 20 years if after retiring the individual subsequently performs certain public or community service. Section 4404 is titled "Increased Early Retirement Retired Pay for Public or Community Service."

Section 4404 provides that a member or former member of the Armed Forces who retired under the early retirement provisions of Section 4403 (i.e., less than 20 years of active service) at age 62 is entitled to a recomputation of the retired pay if the individual was employed by a public service or community service organization. Section 4404(a)(2) provides that the recomputed Armed Forces retirement pay will include the public service or community service organization employment as years of active duty in the Armed Forces.

A [Guidance for subparagraph **3-A-13-8-(c)**.]

- (c) A retired member of the Armed Forces is eligible for veterans' preference in reduction in force if the employee has continuously worked for the Federal Government since November 30, 1964, in a position covered by OPM's retention regulations. (5 U.S.C. 3501(a)(3)(C); 5 CFR 351.501(d)(3))
- **Explanation**-This "Grandfather Provision" of 5 U.S.C. 3501(a)(3)(C) generally applies to a retired member of the Armed Forces who has

worked continuously for the Federal government since November 30, 1964, and who is otherwise eligible for veterans' preference for retention. However, the employee is eligible for the Grandfather Provision if the individual: (5 CFR 351.501(d)(4))

- (1) Retired lower than the rank of major (or equivalent) (5 U.S.C. 2801(4)(A)), and
- (2) Is a disabled veteran as defined in 5 U.S.C. 2108(2). (5 U.S.C. 2801(4)(B))

- ①
- See paragraph **3-A-13-4** for additional guidance on which employees meet the definition of a “Disabled Veteran.”
-

3-B-13-9 **Eligibility for Veterans' Preference When the Employee is Retired From the Armed Forces as a Title 10 Reservist**

A [Guidance for subparagraph **3-A-13-9-(b)**.]

- (b) The reservist is eligible for veterans' preference under OPM's reduction in force regulations only if the employee meets the applicable Armed Forces active service requirements
 - For additional guidance, see **Jacaruso v. Army**, 1 M.S.P.R. 373 (1980); and **Love v. Postal Service**, 76 M.S.P.R. 490 (1997). (5 CFR 351.501(d)(5))
-

Section 14, Reduction in Force Service Credit

Introduction This section contains additional guidance on reduction in force service credit. Section 14 of Module 3, Unit A (3-A-14), covers the types of civilian and military service that the agency credits under OPM's reduction in force regulations.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| General Information on Service Credit | 3-A-14-1 |
| Creditable Service for Retention | 3-A-14-3 |
| Determining the Service Date | 3-A-14-4 |
| Determining the Service Date of Retired Members of the Armed Forces | 3-A-14-5 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-14-1 | 3-B-14-1 |
| 3-A-14-3-(a) | 3-B-14-3-(a) |
| 3-A-14-4 | 3-B-14-4 |
| 3-A-14-5-(a) | 3-B-14-5-(a) |

A This symbol highlights the references back to in Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 14, Reduction in Force Service Credit

3-B-14-1 General Information on Service Credit

A [Guidance for paragraph **3-A-14-1**.]

"**Length of Service**" is one of the four retention factors required in 5 U.S.C. § 3502(a), which is derived from Section 12 of the Veterans' Preference Act of 1944. (5 U.S.C. 3502(a)(3))

- **Explanation**-In **Hilton v. Sullivan**, 334 U.S. 323 (1948, Supreme Court), the Court found a Congressional intent to give retention preference to veterans even in situations when the veteran has less creditable service than a nonveteran.
-

3-B-14-3 **Creditable Service for Retention**

A [Guidance for subparagraph **3-A-14-3-(a)**.]

- (a) Employees receive 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))
 - (1) Service that does not meet the definition of "**Federal Employee**" in 5 U.S.C. § 2105(a) is creditable for retention purposes only if a controlling statute specifically authorizes retention credit under OPM's regulations.
 - For additional guidance, see **Horner v. Acosta**, 803 F.2d 687 (1986, Fed. Cir.).
- **Explanation**- In **Horner**, 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 required in 5 U.S.C. 2105(a).

In order to be a Federal employee, the first criteria required 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.

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.

- For additional guidance, see **Watts v. Office of Personnel Management**, 814 F.2d 1576 (1987, Fed. Cir.), Cert. Denied, 484 U.S. 913 (1987, U.S. Supreme Court), 108 S.Ct. 258, 98 L.Ed. 2d 216 (1987, U.S. Supreme Court).
- (2) Service in a without compensation status (WOC) (with no appointment) is not creditable under OPM's reduction in force regulations.
- For additional guidance, see **Bridgewood v. Veterans Affairs**, 75 M.S.S.P.R. 480 (1997).

3-B-14-4 **Determining the Service Date**

A [Guidance for paragraph **3-A-14-4**.]

The agency needs an official record of each competing employee's creditable Government service (including civilian, military, and merchant marine service) to determine the employee's relative retention standing in a subgroup.

- ① • For additional guidance on the records used to determine the retention standing of competing employees, see **Section 3-B-16**.
- ① • Unit **3-E** contains detailed information on determining service credit under the reduction in force regulations.

3-B-14-5-(a) **Determining the Service Date of Retired Members of the Armed Forces**

A [Guidance for subparagraph **3-A-14-5-(a)**.]

- (a) "**Vet Guide**," which is available on the OPM website, covers the official beginning and ending dates for official "periods of war," "campaigns," and "expeditions."
- **Explanation**-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.
 - For additional guidance, see **Brooks v. Office of Personnel Management**, 59 M.S.P.R. 207 (1993); and **Clark v. Office of Personnel Management**, 95 F.3d 1139 (1996, Fed. Cir.).
-

Section 15, Reduction in Force Service Credit for Performance

Introduction This section contains additional guidance on the awarding of retention service credit based on employees' performance ratings of record. Section 15 of Module 3, Unit A, contains the basic guidance on additional credit for performance under OPM's reduction in force regulations.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| General Information About Performance | 3-B-15-1 |
| Ratings Used For Reduction in Force Purposes | 3-B-15-4 |
| Ratings in Other Agencies | 3-B-15-5 |
| Rating of Record-Employees Not Covered By 5 U.S.C. Chapter 43 Or 5 CFR Part 430 | 3-B-15-7 |
| Availability of Ratings | 3-B-15-8 |
| Freezing Ratings | 3-A-15-9 |
| Missing Ratings | 3-A-15-10 |
| Amount Of Credit-Single Rating Pattern | 3-A-15-11 |
| Amount of Credit-Multiple Rating Patterns | 3-A-15-12 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-15-1 | 3-B-15-1 |
| 3-A-15-4-(d) | 3-B-15-4-(d) |
| 3-A-15-5 | 3-B-15-5 |
| 3-A-15-7-(a) | 3-B-15-7-(a) |
| 3-A-15-7-(d) | 3-B-15-7-(d) |
| 3-A-15-8-(a) | 3-B-15-8-(a) |
| 3-A-15-8-(c) | 3-B-15-8-(c) |
| 3-A-15-8-(d)(1) | 3-B-15-8-(d)(1) |
| 3-A-15-8-(d)(2) | 3-B-15-8-(d)(2) |

Continued on next page

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-15-9-(a) | 3-B-15-9-(a) |
| 3-A-15-10-(a) | 3-B-15-10-(a) |
| 3-A-15-10-(b)-(1) | 3-B-15-10-(b)-(1) |
| 3-A-15-10-(b)-(2) | 3-B-15-10-(b)-(2) |
| 3-A-15-11 | 3-B-15-11 |
| 3-A-15-12 | 3-B-15-12 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 15, Reduction in Force Service Credit for Performance

3-B-15-1 General Information About Performance

A [Guidance for paragraph **3-A-15-1**.]

"**Performance**" is one of the four retention factors in 5 U.S.C. 3502(a), which is derived from Section 12 of the Veterans' Preference Act of 1944. (5 U.S.C. 3502(a)(4))

- **Explanation-In Reynolds v. Lovett**, U.S. App DC 276; 201 F.2d 181, Cert. Denied 345 U.S. 926, 97 L.Ed. 1357, 73 S.Ct. 784 (1952, D.C. Cir.), the United States Court of Appeals for the District of Columbia Circuit stated that when an agency conducts a reduction in force, the agency must apply the Civil Service Commission's retention regulations and four retention factors authorized by Section 12 of the Veterans' Preference Act of 1944 in selecting which employees are retained in a reduction of personnel. The Court added that an agency may not disregard the regulations and four retention factors by using other procedures to evaluate the relative merits of individual competing employees.

3-B-15-4 Ratings Used For Reduction in Force Purposes

A [Guidance for subparagraph **3-A-15-4-(d)**.]

An agency uses a "**Modal Rating**" only when the competitive area undergoing a reduction in force contains an employee (or employees) with no rating of record within the applicable 4-year period for crediting ratings.

- For example, an employee may not have received a rating of record because of a long-term absence from the job of record (reasons include 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).
- OPM's retention regulations do not require that the agency either determine, or 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.

- **Explanation-The Pattern of Summary Levels Determines the Modal Rating.** Modal ratings are specific to a pattern of summary levels, which are covered in paragraph 5 CFR 430.208(d). (5 CFR 351.203)

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))

Each summary pattern has its own modal rating.

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.

- **Explanation-When to Determine Modal Ratings.** Agencies should consider two options (**Options 1 and 2** below) in setting the time period for a modal rating:

Option 1: The agency determines modal ratings in advance of an actual reduction in force.

The 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.

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: The agency determines modal ratings when required to prepare retention records for an actual reduction in force.

When planning for an actual reduction in force, the 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))

- **Explanation-Issues for the Agency to Consider When Determining Modal Ratings.** For each employee with no rating of record, the agency must determine the following: (5 CFR 351.504(c)(1))
 - (1) What is the employee's position of record?
 - (2) What performance appraisal program covers that position?
 - (3) Which summary level pattern applies to that program on the date of the reduction in force?
 - The agency determines the modal rating based upon all the employees covered by the summary level pattern.
 - The agency does not determine the modal rating based upon a smaller grouping, such as only employees in an occupation or a classification series.
- **Explanation-Uniform Modal Rating.** The agency must use the same modal rating for all employees in the competitive area who:
 - (1) 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
 - (2) Are in positions of record covered by appraisal programs that use the same summary pattern. (5 CFR 351.203)
- **Explanation-Each Applicable Summary Level Rating Pattern Has a Separate Modal Rating.** 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))

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.

The agency should document the results of its decisions on modal ratings in a table, which is covered in the examples below.

- **Explanation-Four Steps to Determine the Modal Rating for a Summary Level Pattern.** 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 (3-B-5-4-(d)):**

- (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 the agency assigned ratings of record 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. The results are in Step 2 below.

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

| Rating | Number of Employees |
|---------|---------------------|
| Level 5 | 10 |
| Level 4 | 20 |
| Level 3 | 15 |
| Level 2 | 4 |
| Level 1 | 2 |

- (3) **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 ("Exceeds Fully Successful," or equivalent) is the modal rating for Pattern H in this competitive area.

- (4) **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 ("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.

- **Explanation-Additional Examples of the "Modal Rating", as defined in 5 CFR § 351.203:**
- **Example 2 (3-B-5-4-(d)): The Sports Agency**

- (1) **Step 1, Action, Applied to Situation:** 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 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 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

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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:

(2) **Step 2, Action, Applied to Situation:**

| The Golf Bureau Pattern E | |
|--------------------------------------|----------------------------|
| Rating Level | Number of employees |
| Level 1 (Unacceptable) | 3 |
| Level 2 (Minimally Successful) | Not applicable |
| Level 3 (Fully Successful) | 21 |
| Level 4 (Exceeds Fully Successful) | 22 * |
| Level 5 (Outstanding) | 9 |

| The Tennis Bureau Pattern B | |
|--|----------------------------|
| Rating Level | Number of employees |
| Level 1 (Unacceptable) | 0 |
| Level 2 (Minimally Successful) | Not applicable |
| Level 3 (Fully Successful) | 9 |
| Level 4 (Exceeds Fully Successful) | Not applicable |
| Level 5 (Outstanding) | 8 |

(3) **Step 3, Action, Applied to Situation:**

Golf Bureau: 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.

Tennis Bureau: 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.

(4) **Step 4, Action, Applied to Situation:**

Golf Bureau: 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.

Tennis Bureau: 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.

Continued on next page

| 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 (3-B-5-4-(d)): International Business Agency**

(1)-(3) **Steps 1, 2, and 3, Action, Applied to Situation:** 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 Human Resources 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 Intergovernmental Personnel Assignment with no appraisal, and 2 are new hires.)

| The International Business Agency | | | | | |
|---|----------------|----------------|----------------|----------------|----------------|
| | Level 1 | Level 2 | Level 3 | Level 4 | Level 5 |
| European Bureau; Asian Bureau; North American Bureau (Pattern A) | 2 | N/A | 105* | N/A | N/A |
| African Bureau (Pattern B) | 0 | N/A | 28* | N/A | 17 |
| Australian Bureau (Pattern E) | 3 | N/A | 21 | 30* | 14 |
| South American Bureau; Caribbean Bureau (Pattern H) | 1 | 1 | 43 | 60* | 40 |

- (4) **Step 4, Action, Applied to Situation:** 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:

| Rating Pattern | Modal Rating | Employees with <u>no</u> ratings receive credit equivalent to: |
|-----------------------|---------------------|---|
| Pattern A | Level 3 | Level 3 of Pattern A |
| Pattern B | Level 3 | Level 3 of Pattern B |
| Pattern E | Level 4 | Level 4 of Pattern E |
| Pattern H | Level 4 | Level 4 of Pattern H |

• **Example 3 (3-B-5-4-(d)): International Business Agency**

- (1)-(3) **Steps 1, 2, and 3, Action, Applied to Situation:** 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.

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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 Human Resources 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 Intergovernmental Personnel Assignment with no appraisal, and 2 are new hires.)

The International Business Agency

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

- (4) **Step 4, Action, Applied to Situation:** 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:

| Rating Pattern | Modal Rating | Employees with <u>no</u> ratings receive credit equivalent to: |
|----------------|--------------|--|
| Pattern A | Level 3 | Level 3 of Pattern A |
| Pattern B | Level 3 | Level 3 of Pattern B |
| Pattern E | Level 4 | Level 4 of Pattern E |
| Pattern H | Level 4 | Level 4 of Pattern H |

- **Example 4 (3-B-5-4-(d)): The Music Department**

- (1)-(3) **Steps 1, 2, and 3, Action, Applied to Situation:** 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:

Continued on next page

**The Music Department
 Pattern H**

| | 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 |
| Department – wide Totals | 7 | 5 | 114* | 108 | 106 |

- (4) **Step 4, Action, Applied to Situation:** As a result of the review, the modal rating for the competitive area (which in this example is 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 (the amount provided under paragraph 5 CFR 351.504(d) for a rating of record of Level 3, Pattern H).

3-B-15-5

Ratings in Other Agencies

A

[Guidance for paragraph **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))

- (a) 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))
- (b) 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))

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

3-B-15-7 **Rating of Record-Employees Not Covered By 5 U.S.C. Chapter 43 Or 5 CFR Part 430**

A [Guidance for subparagraph **3-A-15-7-(a)**.]

- (a) 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, see 5 CFR 351.203)
- **Explanation:** 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.

OPM's November 24, 1997, final 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 paragraph 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)

Subparagraphs 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 ("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).

A [Guidance for subparagraph **3-A-15-7-(d)**.]

- (d) An "**Equivalent Rating of Record**" is a performance evaluation that meets requirements set forth in paragraph 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.
- **Explanation**-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 the answer to any of the following questions is "**Yes**":

- (1) Does the performance evaluation come from an agency not subject to the appraisal law and regulations?
- (2) Did the employee occupy a position that was excluded from the appraisal law and regulations?
- (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?

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 paragraph 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.



In granting additional retention service credit for performance 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.)

3-B-15-8 **Availability of Ratings**

A [Guidance for subparagraph **3-A-15-8-(a)**.]

- (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))

- **Explanation**-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."

A [Guidance for subparagraph **3-A-15-8-(c)**.]

- (c) Consistent with the requirement set forth in subparagraph 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.

①

- For additional guidance on documenting agency policies implementing performance management issues, see subparagraphs **3-A-15-8-(d)-(1)**, and **-(2)**.
- Also, see **Haataja v. Labor**, 25 M.S.P.R. 594 (1985), in which the Merit Systems Protection Board references the agency's issuances in reviewing whether the agency provided competing employees with proper retention credit.

A [Guidance for subparagraph **3-A-15-8-(d)-(1)**.]

(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 the ratings 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.

- For additional guidance, see **Mazzola v. Labor**, 25 M.S.P.R. 682 (1985), in which the Merit Systems Protection Board first references **Haataja v. Labor**, 25 M.S.P.R. 594 (1985), and then refers to the agency's issuances in reviewing whether the agency properly determined which ratings of record were available for retention purposes.
- For additional guidance on ratings used in reduction in force competition, see **Veneziano v. Department of Energy**, 189 F.3d 1363 (1999, Fed. Cir.).

- ①
- **Explanation**-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. See subparagraph **3-B-15-8-(a)** above for additional information on the responsibility of the agency to document its policy on when a rating of record is available for purposes of OPM's reduction in force regulations.

A [Guidance for subparagraph **3-A-15-8-d-(2)**.]

(d)-(2) To ensure proper application under OPM's reduction in force regulations, each agency must specify in its internal policy the conditions under which a rating is considered frozen for purposes of determining an employee's retention standing

- **Example 1 (3-A-15-8-d-(2))**: 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, 2001, each employee is entitled to credit for ratings of record issued during the 4-year period from August 31, 1997 through August 30, 2001.
- **Example 2 (3-A-15-8-d-(2))**: 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, 2001, each employee is entitled to credit for performance during the 4-year period extending from August 1, 1997, through July 31, 2001.

3-B-15-9 **Freezing Ratings**

A [Guidance for subparagraph **3-A-15-9-(a)**.]

- (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))

- 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))

- **Explanation**-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."

The agency may not used any ratings placed on record after the cutoff date in determining employees' entitlements to additional retention service credit based on performance.

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.

3-B-15-10 **Missing Ratings**

A [Guidance for subparagraph **3-A-15-10-(a)**.]

- (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))

①

- Paragraphs **3-A-15-4-(d)** and **3-B-15-4-(d)** cover "**Modal Ratings**."

[Guidance for subparagraph **3-A-15-10-(b)-(1)**.]

A

- (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))

①

- 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.

①

- Paragraphs **3-A-15-11** and **3-B-15-11** 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 (3-B-15-10-(b)-(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 |
| | + |
| Sum | = 36 additional years of service |

The agency computes the net additional service credit 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.

[Guidance for subparagraph **3-A-15-10-(b)-(2)**.]

A

(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 (3-A-15-10-(b)-(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

The agency computes the net additional service credit on the basis of the amount of the additional service credit from the single rating, which results in 20 additional years of retention service credit for the employee.

3-B-15-12 **Amount of Credit-Multiple Rating Patterns**

A [Guidance for paragraph **3-A-15-12.**]

Section 5 CFR 351.504(e) provides that if an agency finds its employees in a competitive area have ratings of record under more than one pattern of summary levels (as covered in paragraph 5 CFR § 430.208(d)), the agency must consider the mix of patterns in providing competing employees with additional retention service credit for performance.

- **Explanation-A "Mixed Pattern"** exists when one or more ratings of record within a competitive area that the agency is now crediting for retention were given to competing employees under a different summary level pattern. (5 CFR 351.504)

An agency must consider all ratings of record (including equivalent ratings of record) during the applicable 4-year period for crediting ratings in considering whether a mixed pattern exists.

Although the agency may modify retention service credit for performance only for ratings put on record on or after October 1, 1997, the agency must still consider any applicable pre-October 1, 1997, ratings in considering whether the mixed pattern provisions are applicable.

Subparagraph 5 CFR 351.504(e)(8) of OPM's November 24, 1997, final reduction in force regulations provides that an agency may modify retention service credit for performance only on the basis of ratings of record that are put on record on or after October 1, 1997. However, subparagraph 5 CFR 351.504(e) still requires the agency to consider applicable performance ratings that were put on record before October 1, 1997, in deciding whether the employees' retention standing is based upon a single rating pattern, or upon multiple rating patterns.

In this situation, the agency could not modify the amount of retention service credit for the pre-October 1, 1997, ratings. (For reference, the January 1997 reduction in force regulations allow additional service credit for retention based on performance only on the basis of 12, 16, or 20 additional years of service.) However, the use of the pre-October 1, 1997, ratings is the basis for a mixed

pattern.

The agency can modify the amount of retention service credit for performance based on ratings of record beginning October 1, 1997, or later.

- **Explanation-Establish Agencywide Policy.** 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.
- The agency may then apply this policy to all competitive areas and reduction in force actions throughout the agency.
- For reference, see 5 CFR 351.504(b)(4)).
- **Explanation-Modify Agencywide Policy.** 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.
- The agency may then apply this modified policy to all competitive areas and reduction in force actions throughout the agency.
- For reference, see 5 CFR 351.504(b)(4)).
- **Explanation-Retention Credit Policy at Lower Agency Level.** 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).
- For reference, see 5 CFR 351.504(b)(4)).

- **Example 1 (3-A-15-12): The agency implements a different summary level pattern for its employees**

An agency changes its performance appraisal program, going from one summary level pattern to another (for example, 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 (3-A-15-12): An employee in one agency component moves to another agency component that uses a different summary level pattern**

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 (3-A-15-12): An employee in one agency transfers moves to another agency that uses a different summary level pattern**

An agency uses only a single appraisal program and a single summary level pattern. An employee transfers to the agency from another Federal agency, where the employee 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.

- **Explanation-Determining a Mix of Patterns.** To determine whether or not a mix of patterns exists, the agency must first refer to its own applicable definition of "**Competitive Area.**"

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.**"



The agency then compares the patterns of the ratings. As explained in paragraph **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.

- ① If the agency finds a mix of patterns in the competitive area, the agency must (i) consider the mix of patterns, and (ii) consider how to provide additional retention service credit for performance consistent with the options found in subparagraphs **3-A-15-12-(c)** through – (i).

- **Explanation-Determining Amount of Performance Retention Credit.** Subparagraph 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, 5 CFR § 430.208(d) defines "**Patterns of Summary Levels.**")

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:

- (1) How many different summary level patterns are there in the mix?
- (2) Is there a predominant summary level pattern?
- (3) How many employees have ratings of record under each of the different patterns?
- (4) How many ratings of record are from summary level patterns that differ from the predominant pattern?
- (5) What effect would it have on employees if the agency applied the default (and longstanding) 12/16/20 crediting procedure?
- (6) What summary level was assigned most frequently to employees in each pattern?
- (7) What types of performance distinctions have already been

made in the rating process, and how can those distinctions be preserved?

A [Guidance for subparagraphs **3-A-15-12-(c)** through **-(i)**.]

Agency Options for Determining Retention Credit Based Upon Performance Using Multiple Rating Patterns).

- The agency options in these paragraphs are not inclusive of all potential options.

A [Guidance for subparagraphs **3-A-15-12-(c)** and **-(d)**.]

(c)-(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.**

- For reference, see 5 CFR 351.504(e)(2) and (e)(3).
- **Example 4 (3-A-15-12-(c)-(d)):** 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 subparagraphs 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).

A [Guidance for subparagraph **3-A-15-12-(e)**.]

(e) **The agency may establish the same number of years of credit for different summary levels in the same pattern.**

- For reference, see 5 CFR 351.504(e)(4).)
- **Example 5 (3-A-15-12-(e)):** 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).

A [Guidance for subparagraph **3-A-15-12-(f)**.]

- (f) **The agency may not establish different amounts of additional retention service credit for the same level of performance in a single rating pattern.**
- For reference, see 5 CFR 351.504(e)(5).)
 - **Example 6 (3-A-15-12-(f)):** 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 subparagraph 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).

A [Guidance for subparagraph **3-A-15-12-(g)**.]

- (g) **The agency may establish different amounts of retention service credit for the same level in different patterns.;**
- The amount of additional retention service credit for performance may be any whole number between 12 years and 20 years of additional retention credit.
 - For reference, see subparagraph 5 CFR 351.504(e)(6).

- **Example 7 (3-A-15-12-(g)):** 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 subparagraph 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.
- **Example 8 (3-A-15-12-(g)):** 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 subparagraph 5 CFR 351.504(e)(2) and (e)(3), the agency, at its discretion, could decide (for example) 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 (for example) 20 years of additional retention service credit for each applicable Level 3 rating ("**Fully Successful**" or equivalent).

- **Explanation-More Information on Determining Retention Credit Based Upon Performance Using Multiple Rating Patterns.** By following three steps covered below, an agency can readily determine whether multiple rating patterns impact employees' retention standing. Examples **9** through **13** provide additional guidance.
 - (1) **Step One. The agency must first determine if a competitive area includes employees who have ratings of record under more than one pattern of**

summary rating levels.

- (2) **Step Two. 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 subparagraphs 5 CFR 351.504(e)(1)-(8).**
- **Example 9 (3-A-15-12-(h)-(i)):** 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 subparagraph 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.
- (3) **Step Three. 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.**
- The agency must then make this information readily available for review.
- **Example 10 (3-A-15-12-(h)-(i)):** The agency is planning for a June 1, 2002, reduction in force in a single competitive area (in this example, the entire agency headquarters is a single competitive area). Beginning October 1, 2000, 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, 1998, and September 30, 1999, were given under Pattern H (five-levels). The ratings of record for the rating years ending September 30, 2000, and September 30, 2001, 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.

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The agency rated all of the employees 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 | N/A | 12 | N/A | N/A |

- **Example 11 (3-A-15-12-(g)):** The activity (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.

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 | N/A | 16 | N/A | N/A |

- **Example 12 (3-A-15-12-(g)):** The activity is planning for a June 1, 2002, reduction in force in a single competitive area comprised of 100 employees. Beginning October 1, 1999, 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 reduction in force 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 on or after October 1, 1997.

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

| | Level 1 | Level 2 | Level 3 | Level 4 | Level 5 |
|------------------|----------------|----------------|----------------|----------------|----------------|
| Pattern H | 0 | 0 | 14 | 16 | 18 |
| Pattern A | 0 | N/A | 16 | N/A | N/A |

- **Example 12 (3-A-15-12-(g)):** The activity (a component of the agency) is planning for a June 1, 2002, reduction in force in a single competitive area comprised of 100 employees. Beginning October 1, 1999, the activity changed from a Pattern H (five-level) summary pattern to a Pattern A (two-level) summary pattern. However, five employees were hired from other activities in November 1998 after

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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:

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

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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 | N/A | 16 | N/A | N/A |
| Pattern B | 0 | N/A | 13 | N/A | 17 |
| Pattern C | 0 | N/A | 13 | 17 | N/A |
| Pattern D | 0 | 0 | 17 | N/A | N/A |
| Pattern E | 0 | N/A | 12 | 15 | 18 |
| Pattern F | 0 | 0 | 14 | N/A | 18 |
| Pattern G | 0 | 0 | 14 | 17 | N/A |
| Pattern H | 0 | 0 | 14 | 16 | 18 |

Section 16, Reduction in Force Records

Introduction This section contains additional guidance on the maintenance of agency retention records, and employee access to reduction in force retention registers. Section 16 of Module 3, Unit A, contains the basic guidance on reduction in force retention records.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Responsibility of Agency to Maintain Personnel Records | 3-B-16-1 |
| Employee Access To Retention Records | 3-B-16-3 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-16-1 | 3-B-16-1 |
| 3-A-16-3 | 3-B-16-3 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 16, Reduction in Force Records

3-B-16-1 **Responsibility of Agency to Maintain Personnel Records**

A [Guidance for paragraph **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 guidance, see **Sahni v. District of Columbia Government**, 4 M.S.P.R. 170 (1980); **Mazzola v. Labor**, 25 M.S.P.R. 682 (1985); and **Schroeder v. Transportation**, 60 M.S.P.R. 566 (1994).
- (a) The agency's burden of proof in a reduction in force appeal to the Merit Systems Protection Board remains with the employee's official position of record even when an agency uses an automated system to assist in determining employees' reduction in force rights
- For additional guidance, see:
 - (1) **Kitching v. Health and Human Services**, 20 M.S.P.R. 579 (1984)(which specifically deals with automated systems and records used to establish competitive levels); and
 - (2) **Flores v. Postal Service**, 75 M.S.P.R. 546 (1997), (which specifically deals with automated systems and records used to determine employees' assignment rights to other positions).
- ① (b) Subparagraph **3-B-16-1-(c)** below lists the basic information that agencies use to determine employees' retention standing.
- The service record card (Standard Form 7), or appropriate automated record, is the principal source of needed information about an employee.
 - Additional necessary information comes from information

in each employee's Official Personnel Folder and, if applicable, other agency records.

- (c) The agency uses the following information to determine employees' retention rights:
- (1) **Name of Employee.** The employee's name is recorded as it appears on the payroll.
 - (2) **Official Position.** The agency must identify the employee's position to determine the employee's retention rights, including the competitive level and assignment rights.
 - **Explanation-**The employee's official position is the position in which the agency's carries the employee on its rolls and pays the employee, or is the position from which the agency temporarily promoted or detailed the employee.
 - For additional guidance, see **Brock v. Navy**, 49 M.S.P.R. 564 (1991); **Smith v. Office of Personnel Management**, 67 M.S.P.R. 29 (1995); and **Testan v. United States**, 424 U.S. 392 (1976, U.S. Supreme Court). (5 CFR 351.404(a))
 - **Explanation-**To identify the employee's official position, the agency uses the employee's Standard Form 50 from the employee's Official Personnel Folder to identify the position's title, classification series, and grade and pay schedule. On appeal, the Merit Systems Protection Board may also decide to consider evidence other than Standard Form 50 to document an employee's official position of record.
 - For additional guidance, see **Bolton v. Army**, 79 M.S.P.R. 333 (1998).
 - (3) **Position Description.** The agency also needs an up-to-date position description (Optional Form 8 or its equivalent) to determine the employee's competitive level.
 - (4) **Organizational Location of Position.** The agency needs information concerning the division, branch, section, or office in which the employee's position is located to

determine which competitive area includes the position.

- (5) **Service.** The agency must identify whether the employee's appointment is in the competitive or excepted service.
- (6) **Type of Work Schedule.** This is necessary because the agency establishes separate competitive levels for full-time, part-time, intermittent, seasonal, and on-call positions.
- (7) **Tenure of Employment.** The record must show the employee's current tenure group I, group II, or group III.
 - The record also should show whether an employee has completed any applicable probationary period; the agency needs this information to determine the employee's tenure group.
- (8) **Veterans' Preference.** The records must show whether the employee is entitled to veterans' preference.
 - Section **3-A-13** covers veterans' preference in reduction in force competition.
- (9) **Special Retention Protections** (for, example, certain employees have mandatory restoration rights following completion of military duty).
 - Paragraph **3-A-17-5** covers the use of a mandatory exception to the regular order of release in a reduction in force.
- (10) **Performance Ratings.** The records must list each competing employee's three most recent performance ratings of record, or equivalent ratings of record.
- (11) **Basic Service Computation Date.** The record must show the employee's basic Service Computation Date that includes all periods of creditable service.
- (12) **Adjusted Service Computation Date.** The record must also show the employee's adjusted Service Computation

Date that includes both the Basic Service Computation Date covered in subparagraph **3-B-16-(c)-(12)** above, and all additional retention service credit for performance.

3-B-16-3 **Employee Access To Retention Records**

A [Guidance for subparagraph **3-A-16-3**.]

The agency must allow its retention registers and related records to be inspected by:

- (a) An employee of the agency who has received a specific reduction in force notice (5 CFR 351.505(b)(1)), or
- (b) The employee's representative as the individual acts on behalf of the individual employee. (5 CFR 351.505(b)(2))

- **Explanation**-On appeal of a reduction in force action to the Merit Systems Protection Board, through the discovery process the employee has access to all pertinent retention records even if the agency previously denied the records to the employee.
 - For additional guidance, see **Patterson v. Interior**, 3 M.S.P.R. 54 (1980); **Kotulak v. Agriculture**, 35 M.S.P.R. 111 (1987); **Boudreaux v. Army**, 82 M.S.P.R. 393 (1999)
-

Section 17, Release From the Competitive Level

Introduction This section contains additional guidance on the order in which an agency releases competing employees from a competitive level in a reduction in force. Section 17 of Module 3, Unit A, contains the basic guidance on releasing employees from a competitive level.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Date Used to Determine an Employee's Retention Standing | 3-B-17-1 |
| Release of Noncompeting Employees | 3-B-17-2 |
| Order of Releasing Employees from the Competitive Level | 3-B-17-3 |
| Mandatory Exception to the Regular Order of Release and the Use of Annual Leave to Obtain Retirement Benefits and/or to Continue Health Benefits | 3-B-17-6 |
| Permissive Temporary Exception to Satisfy a Government Obligation | 3-B-17-13 |
| Exception to the Regular Order of Release with the Liquidation Exception | 3-B-17-19 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-17-1 | 3-B-17-1 |
| 3-A-17-2-(c) | 3-B-17-2-(c) |
| 3-B-17-2-(d) | 3-B-17-2-(d) |
| 3-A-17-3 | 3-B-17-3 |
| 3-A-17-3-(b) | 3-B-17-3-(b) |
| 3-A-17-3-(c) | 3-B-17-3-(c) |
| 3-A-17-6 | 3-B-17-6 |

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-17-6-(f) | 3-B-17-6-(f) |
| 3-A-17-13 | 3-B-17-13 |
| 3-A-17-19 | 3-B-17-19 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 17, Release From the Competitive Level

3-B-17-1 **Date Used to Determine an Employee's Retention Standing**

A [Guidance for paragraph **3-A-17-1**.]

The agency determines each employee's retention standing as of the effective date of the reduction in force

- For additional guidance, see **Smith v. Office of Personnel Management**, 67 M.S.P.R. 29 (1995). (5 CFR 351.506(a))
- (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 (for example, 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))
 - 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)
- ① • See paragraph **3-A-15-4** for additional guidance on the use of performance ratings of record used for reduction in force competition.
- ① (b) When an agency uses an exception to the regular order of release from the competitive level (see paragraphs **3-A-17-5** through **-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))

- 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 reduction in force without a break in service of 1 workday, are considered simultaneous effective dates.
 - For additional guidance, see **Klegman v. Health and Human Services**, 16 M.S.P.R. 455 (1983). (5 CFR 351.506(a))
-

3-B-17-2 **Release of Noncompeting Employees**

A [Guidance for subparagraph **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))

A [Guidance for subparagraph **3-A-17-2-(c)**.]

(c) 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))

A [Guidance for subparagraph **3-A-17-2-(d)**.]

(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-B-17-3 **Order of Releasing Employees from the Competitive Level**

A [Guidance for paragraph **3-A-17-3**.]

When an employee's position is abolished, the employee is not automatically released from his or her competitive level.

- **Explanation**-At its option, the agency may reassign an employee holding an abolished position to a continuing vacant position in the same competitive level. The only restriction is that the agency must follow the proper order if an employee is actually released from the competitive level (the lowest-standing employee is always the individual ultimately released from the competitive level).

- ① The agency may also reassign any employee in the competitive level to a vacant job at the same grade in the same or in a different competitive level. (See paragraph **3-5-A-2** for additional guidance on "Reassignment").

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

A [Guidance for subparagraph **3-A-17-3-(b)**.]

- (b) 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 employees 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 (the employee with the least service in the lowest Group and subgroup is the first employee released from the competitive level).

A [Guidance for subparagraph **3-A-17-3-(c)**.]

(c) The Merit System Protection Board held that if a retention register includes employees in tenure groups I, II, and III, a tenure group I employee may not displace a tenure group III employee until all tenure group II employees are displaced from the register.

- **Explanation**-See the decision of the Merit Systems Protection Board in **Holland, Patrick, and Richard v. Department of the Army**, 84 M.S.P.R. 269 (1999).

One appellant was released from a GS-7 position and accepted an offer of assignment to a GS-5 position held by an employee serving under a term appointment. (Paragraph 5 CFR 351.504(b)(3) provides that an employee holding a term position is placed in retention tenure group III.) The appellant claimed a right of assignment to a permanent GS-5 position held by a career-conditional employee in held a position in the same competitive level as the term position. (Paragraph 5 CFR 351.504(b)(2) provides that an employee holding a career-conditional position is placed in retention tenure group II.)

The Board found in **Holland** that the agency should have offered the appellant the position held by the tenure group II employee even though the appellant would have retained the same status and tenure in the event of future reduction in force competition when the term position expired. The Board ordered the agency to cancel the offer of assignment to the temporary position, and to offer the appellant the permanent GS-5 position held by the career-conditional tenure group II employee, or as an alternative, to offer an equivalent position.

Subparagraph 351.601(a) of OPM's retention regulations allows an agency, at its option, to provide for intervening displacement within a competitive level provided that the employee with the lowest retention standing is the individual actually reached for release from the level.

Under the **Holland** decision, if a retention register includes employees in tenure groups I, II, and III, the agency would adopt a policy of intervening displacement so that a tenure group I

employee will not displace a tenure group III employee until all tenure group II employees are displaced from that register. This intervening displacement order covered in the **Holland** decision would apply both as a result of first round competition when the agency abolishes a position on the register, and as a result of second round competition when a higher-standing employee on a different register has bump or retreat rights to the register with the group I, II, and III employees.

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. This includes the right to displace a tenure group III employee (including a 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 90 days standard applies because the definition of "**Undue Interruption**" in paragraph 5 CFR 351.203 is keyed to a 90 day standard.) In any first round displacement under subparagraph 5 CFR 351.601(a), the higher-standing employee retains the same status and tenure.

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- Subparagraph **3-A-4-1-(v)** contains the definition of "Undue Interruption."
- **Example 1 (3-B-17-3-(c))**: The names of two employees are listed on the retention register for GS-301-9 positions. One employee is in subgroup I-B, and the second employee is in subgroup III-B because the employee was appointed to a term position with an expiration date 6 months after the reduction in force effective date. The agency abolishes the position of the I-B employee. The IB employee then displaces the III-B 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 (the employee holding the term position is still in subgroup I-B).

When the term position expires, the subgroup IB employee is entitled to a reduction in force notice, and has the right to compete under OPM's reduction in force regulations, with the employee's rights and benefits based upon subgroup I-B status and tenure. If the employee receives a specific reduction in force notice of separation, because of the employee's personal subgroup I-B status and tenure, the employee is eligible for: (1) the agency's Reemployment Priority List, (2) internal selection priority under the agency's Career Transition Assistance Plan (CTAP), and (3)

selection priority for positions in other Federal agencies under the Interagency Career Transition Assistance Plan (ICTAP).

Except in situations when a tenure group I or II employee displaces a tenure group III employee, a tenure group III employee who is separated by reduction in force is not eligible for reemployment selection priority in the same agency through the agency's Reemployment Priority List (RPL), or its Career Transition Assistance Plan (CTAP). 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 (ICTAP).

3-B-17-6 **Mandatory Exception to the Regular Order of Release and the Use of Annual Leave to Obtain Retirement Benefits and/or to Continue Health Benefits**

A [Guidance for paragraph **3-A-17-6**.]

- **Explanation**-Section 634 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in § 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 paragraph 5 U.S.C. 6302(g).

The immediate retirement may be under 5 U.S.C. 8336, 8412, 8414, or other authority.

The new paragraph 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 paragraph 5 U.S.C. 6302(g), on March 10, 1997, at 62 FR 19682, OPM added a new paragraph 5 CFR 351.606(b) covering mandatory exceptions to the regular order of release.

- **Explanation**-Section 5 U.S.C. 8412(g) includes the Federal Retirement System (FERS) "MRA+10" option as a form of immediate annuity. This means that an employee presently eligible for MRA + 10 has no right to use annual leave under the mandatory exception provision beyond the reduction in force effective date in order to gain initial title to a different immediate annuity option (such as discontinued service retirement).
- **Explanation**-An employee who is retained on a time-limited appointment (i.e., temporary or term) is generally not covered by OPM's reduction in force regulations when the appointment expires. This means that an employee who holds a time-limited appointment does not receive a reduction in force notice, and may not use annual leave to reach initial eligibility for immediate retirement and/or continuance of health benefits coverage.

The only exception to this general rule is a situation where the agency offers a competing employee a temporary or term position under OPM's reduction in force regulations). In this situation, the released employee retains the same status and tenure while holding the temporary or term position (e.g., the released I-A employee still has I-A status and tenure while holding the time-limited position). When the temporary or term position expires, the agency must then give the employee another specific reduction in force, meaning that 5 CFR 351.606(b) and 5 CFR 630.212 would provide the released employee with the potential option of using annual leave past the planned termination date to qualify for benefits.

A [Guidance for subparagraph **3-A-17-6-(f)**.]

- (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).
- **Explanation**-Paragraph 5 CFR 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 paragraph 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.

3-B-17-13 **Permissive Temporary Exception to Satisfy a Government Obligation**

A [Guidance for paragraph **3-A-17-13**.]

An agency may use a discretionary temporary exception, without regard to time limit, to the regular order of releasing employees in order to retain an employee and satisfy a Government obligation to the retained employee. (5 CFR 351.608(c))

- On appeal, the Merit Systems Protection Board has the right to review the agency's use of the exception.
- For additional guidance, see **Cox v. Tennessee Valley Authority**, 41 M.S.P.R. 686 (1989).
- **Example 1 (3-B-17-13)**: On August 1, 2001, the agency issues specific written reduction in force notices to its employees. The effective date of the reduction in force is October 15, 2001.

In an August 1, 2001, reduction in force notice to one employee, the agency explains that the employee's WS-12 position is abolished on October 15, 2001, but that because of his veterans' preference status he has a bump right to a WG-10 position. In later reviewing employees' retention records, on September 4, 2001, the agency finds that the WS-12 employee was not eligible for veterans' preference. The agency then recomputes the employee's retention standing and finds that he no longer has a bump right to the WG-10 position. Instead, the employee's best offer now is a right to retreat to a WG-8 position.

Because the WG-8 position has a lower representative rate than

the WG-10 position initially offered to the employee, the employee is entitled to a new 60 days specific written reduction in force notice. On September 5, 2001, the agency issues a revised notice to the WS-12 employee that offers him a retreat right to the WG-8 position, which the employee accepts.



In order to provide the employee with a minimum 60 days specific notice, the agency counts forward 60 days from September 6, 2001, because the day the employee receives the reduction in force notice is not counted in the minimum notice period. The effective date of the reduction in force action is also not counted in the minimum 60 days notice period. (Section **3-A-29** covers reduction in force notices.)

Counting forward, the agency finds that Monday, November 15, 2001, is the first workday after the new 60 days notice period is complete. That is the new implementation date of the October 15, 2001, reduction in force as it impacts this one employee. The November 5, 2001, date satisfies the employee's entitlement to a 60 days specific reduction in force notice. All of the employee's retention rights are still frozen as of October 15, 2001, the reduction in force effective date.

In this situation, the agency also uses a temporary exception to retain the lower-standing WG-8 employee until November 5, 2001, when the WS-12 employee actually encumbers the WG-8 position because of WS-12 employee's retreat right.

3-B-17-19

Exception to the Regular Order of Release with the Liquidation Exception

A

[Guidance for paragraph **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 1 (3-B-17-19)**: 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

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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.

An agency may use also use mandatory, discretionary continuing exceptions, and permissive temporary exceptions during a "Liquidation" closure of an activity, provided that the use is consistent with the controlling regulations found, respectively, in sections 5 CFR 351.606, 5 CFR 351.607, and 5 CFR 351.608.

Section 18, Actions Following Release From the Competitive Level

Introduction This section contains additional guidance on the obligation of an agency to offer an eligible competing employee released from a competitive level by reduction in force assignment to a position on a different competitive level. Section 18 of Module 3, Unit A, contains the basic guidance on this agency obligation.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---------------------------|---------------|
| Offer of Another Position | 3-B-18-1 |
| Separation or Furlough | 3-B-18-2 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-18-1-(b) | 3-B-18-1-(b) |
| 3-A-18-2 | 3-B-18-2 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 18, Actions Following Release From the Competitive Level

3-B-18-1 **Offer of Another Position**

A [Guidance for subparagraph **3-B-18-1-(b)**.]

- (b) An offer of assignment in a "**Mock RIF**" prior to the issuance of specific reduction in force notices does not affect the agency's later determination of the offers of assignment that are made in an employee's specific written reduction in force notice.
- For additional guidance, see **Myers v. Army**, 87 M.S.P.R. 77 (2000).
 - Restructuring Information Handbook Module 2, "Human Resource Responsibilities in Restructuring," has information on preparing an optional "Mock RIF."
-

3-B-18-2 **Separation or Furlough**

A [Guidance for paragraph **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; (5 CFR 351.705)
 - See Section **3-A-28** for additional guidance.
 - (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** for additional guidance.
 - (3) Offering an employee a vacant position in lieu of reduction in force separation or other reduction in force action
 - See paragraphs **3-A-21-5** and **-6** for additional guidance.
 - (4) Using a discretionary continuing exception to the regular reduction in force order of release; (5 CFR 351.607), or
 - See paragraphs **3-A-17-6** and **-7** for additional guidance.
 - (5) Using a discretionary temporary exception to the regular reduction in force order of release. (5 CFR 351.608)
 - See paragraphs **3-A-17-8** and **-9** for additional guidance.
-

Section 19, Determining Employees' Reduction in Force Assignment Rights

Introduction This section contains additional guidance on the requirements for an employee released from a competitive level by reduction in force to have potential “bump” or “retreat” rights to an “Available Position.” Section 19 of Module 3, Unit A (3-A-19), contains basic guidance on determining a released employee’s assignment rights under OPM’s reduction in force regulations.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Definition of Available Position | 3-B-19-4 |
| Positions Occupied by Temporary Employees | 3-B-19-5 |
| Limitations in Offering Employees Assignment to Other Positions | 3-B-19-6 |
| More Than One Available Position for Assignment | 3-B-19-7 |
| One Offer of Assignment | 3-B-19-8 |
| Requirement To Make an Additional Offer of Assignment | 3-B-19-9 |
| Employees' Status And Tenure After Accepting An Offer Of Assignment | 3-B-19-11 |
| Promotion Potential of a Position Offered for Assignment | 3-B-19-12 |
| Supervisory Positions | 3-B-19-13 |
| Displacing Employee Must Actually Perform Position | 3-B-19-14 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-19-4 | 3-B-19-4 |
| 3-A-19-4-(b) | 3-B-19-4-(b) |
| 3-A-19-4-(c) | 3-B-19-4-(c) |

Continued on next page

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-19-5 | 3-B-19-5 |
| 3-A-19-6-(a) | 3-B-19-6-(a) |
| 3-A-19-6-(d) | 3-B-19-6-(d) |
| 3-A-19-6-(f) | 3-B-19-6-(f) |
| 3-A-19-6-(g) | 3-B-19-6-(g) |
| 3-A-19-7 | 3-B-19-7 |
| 3-A-19-8 | 3-B-19-8 |
| 3-A-19-9 | 3-B-19-9 |
| 3-A-19-11-(b) | 3-B-19-11-(b) |
| 3-A-19-12 | 3-B-19-12 |
| 3-A-19-13 | 3-B-19-13 |
| 3-A-19-14 | 3-B-19-14 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 19, Determining Employees' Reduction in Force Assignment Rights

3-B-19-4 **Definition of Available Position**

A [Guidance for paragraph **3-A-19-4**.]

An "**Available Position**" satisfies an employee's reduction in force assignment right.

- For additional guidance, see **Porter v. Commerce**, 13 M.S.P.R. 177 (1982); and **LaPrade v. Transportation**, 27 M.S.P.R. 277 (1985). (5 CFR 351.701(a))

A [Guidance for subparagraph **3-A-19-4-(b)**.]

(b) An "**Available Position**" must be in the same competitive area.

- For additional guidance, see **Borowski v. Agriculture**, 40 M.S.P.R. 372 (1989); and **Paul v. Navy**, 80 M.S.P.R. 174 (1998). (5 CFR 351.701(a))

A [Guidance for subparagraph **3-A-19-4-(c)**.]

(c) An "**Available Position**" must last at least 3 months

- For additional guidance, see **Hill v. Commerce**, 25 M.S.P.R. 205 (1984).
- **Explanation**-In **Hill**, the Merit Systems Protection Board held that in an appeal in which an offer of assignment lasts less than 3 months, the Board would not reverse a reduction in force action where an agency's error in not 'precisely complying with the reduction in force regulations had no effect on the employee's substantive entitlements.' (5 CFR 351.701(a))

3-B-19-5 **Positions Occupied by Temporary Employees**

A [Guidance for paragraph **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 guidance, see **Starling v. Housing and Urban Development**, 14 M.S.P.R. 620 (1984); 757 F.2d 271 (1985, Fed. Cir.). (5 CFR 351.701(a))
 - Section **3-A-22** covers "Using Vacant Temporary Positions as Placement Offers."
- ①
-

3-B-19-6 **Limitations in Offering Employees Assignment to Other Positions**

A [Guidance for subparagraph **3-A-19-6-(a)**.]

- (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 guidance, see **Green v. Defense Logistics Agency**, 26 M.S.P.R. 649 (1985); **Dube v. Navy**, 72 M.S.P.R. 394 (1996); and **Sperling v. Postal Service**, 75 M.S.P.R. 629 (1997). (5 CFR 351.704(b)(1))

[Guidance for subparagraph **3-A-19-6-(d)**.]

- A** (d) An agency may not offer a released employee reduction in force assignment to a temporary position (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 guidance, see **Jones v. Army**, 42 M.S.P.R. 680 (1990). (5 CFR 351.704(b)(4))

A [Guidance for subparagraph **3-A-19-6-(f)**.]

- (f) An agency may not make an offer of reduction in force assignment from the competitive service to the excepted service. (5 CFR 351.705(b)(5))

- For additional guidance, see **Hutchison v. Defense Language Institute**, 26 M.S.P.R. 521 (1985).

A [Guidance for subparagraph **3-A-19-6-(g)**.]

(g) An agency may not make an offer of reduction in force assignment from the excepted service to the competitive service.

- For additional guidance, see **Killingsworth v. Health and Human Services**, 11 M.S.P.R. 273 (1982). (5 CFR 351.705(b)(6))
-

3-B-19-7 **More Than One Available Position for Assignment**

A [Guidance for paragraph **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. (5 CFR 351.701(a))

- An employee has no right to choose among positions with the same representative rate.
 - For additional guidance, see **Edlin v. National Aeronautics and Space Administration**, 18 M.S.P.R. 654 (1984); **Jorgenson v. Agriculture**, 22 M.S.P.R. 207 (1985); and **Endsley v. Army**, 55 M.S.P.R. 46 (1992).
-

3-B-19-8 **One Offer of Assignment**

A [Guidance for paragraph **3-A-19-8**.]

An employee is entitled to only one offer of assignment, except as provided in paragraph **3-A-19-9**. (5 CFR 351.701(a))

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- For additional guidance, see **Gayheart v. Army**, 12 M.S.P.R. 300 (1982); **Etter v. Defense**, 14 M.S.P.R. 367 (1983); and **Jorgenson v. Agriculture**, 22 M.S.P.R. 207 (1985).

3-B-19-9 **Requirement To Make an Additional Offer of Assignment**

A [Guidance for paragraph **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))

- For additional guidance, see **Petranek v. Army**, 4 M.S.P.R. 419 (1980).
- (a) 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))
- (b) A better position of assignment may become available when another employee rejects an offer or vacates a position by resignation, retirement, etc.
- **Example 1 (3-B-19-9)**: 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).

3-B-19-11 **Employees' Status And Tenure After Accepting An Offer Of Assignment**

A [Guidance for subparagraph **3-A-19-11-(b)**.]

- (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))

- **Explanation**-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.)



In any second round displacement (including Group III employees), paragraph 5 CFR 351.701(a) provides that the higher-standing employee retains the same status and tenure.

- **Example 1 (3-A-19-11-(b))**: 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. A competing employee encumbers the term position, 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. 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 (3-A-19-11-(b))**: 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 (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 OPM's 5 CFR Part 351 reduction in force regulations. In that situation, 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.

3-B-19-12 **Promotion Potential of a Position Offered for Assignment**

A [Guidance for paragraph **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. (5 CFR 351.701(a))

- For additional guidance, see **Gilbert v. Transportation**, 21 M.S.P.R. 108 (1984).
-

3-B-19-13 **Supervisory Positions**

A [Guidance for paragraph **3-B-19-13**.]

OPM's reduction in force regulations do not prohibit An otherwise qualified employee who is presently a nonsupervisor may potentially have assignment rights to a supervisory position. (5 CFR 351.702)

- For additional guidance, see **Saddler v. Education**, 27 M.S.P.R. 636 (1985).
-

3-B-19-14 **Displacing Employee Must Actually Perform Position**

A [Guidance for paragraph **3-A-19-14**.]

A released employee who has bumping or retreating rights to a position held by a lower-standing employee must actually perform that position after entering the position.

- For additional guidance, see **Carroll v. Army**, 64 M.S.P.R. 603 (1994). (5 CFR 351.701)
- **Explanation**-In **Carroll**, the Merit Systems Protection Board found that the agency displaced a lower-standing employee during a reduction in force merely as a paper exercise. However, the Board reversed the separation of the lower-standing employee through retreat rights after finding that the higher-standing employee never performed the position of the lower-standing employee.

The Board found that the higher-standing employee continued to perform duties assigned to him prior to the reduction in force, and displaced the appellant only on paper. The Board then reversed the reduction in force separation of the appellant, finding that "...the agency created a sham RIF as it pertained to (the appellant)." The Board also stated that "All the agency did was to effect, on paper, an action displacing the appellant by someone who did not displace him."

Section 20, Using Bump and Retreat in Meeting Employees' Assignment Rights

Introduction This section contains additional guidance on the procedures an agency uses to determine whether an employee reached for release from a competitive level by reduction in force has a “bump” or “retreat” right to another position. Section 20 of Module 3, Unit A (3-A-20) contains the basic guidance on determining a released employee’s potential assignment rights to a position on a different competitive level.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Bump Rights | 3-B-20-1 |
| Retreat Rights-General Information | 3-B-20-2 |
| Retreat Rights-Essentially Identical Position | 3-B-20-3 |
| Retreat Rights-Expanded Grade Limits for Disabled Veterans in Subgroup AD | 3-B-20-4 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-20-1-(a) | 3-B-20-1-(a) |
| 3-A-20-1-(c) | 3-B-20-1-(c) |
| 3-A-20-2-(a) | 3-B-20-2-(a) |
| 3-A-20-2-(e) | 3-B-20-2-(e) |
| 3-A-20-2-(f) | 3-B-20-2-(f) |
| 3-A-20-3-(a) | 3-B-20-3-(a) |
| 3-A-20-3-(f) | 3-B-20-3-(f) |
| 3-A-20-4 | 3-B-20-4 |

A This symbol highlights the references back to Unit 3-A.

① This symbol guides you toward more general references on the

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subject in Module 3 or in other Modules.

Section 20, Using Bump and Retreat in Meeting Employees' Assignment Rights

3-B-20-1

Bump Rights

A

[Guidance for subparagraph **3-A-20-1-(a)**.]

"Subgroup Superiority" in bumping means that a higher-standing employee who is released from a competitive level 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))

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- See paragraph **3-A-19-4** for the definition of **"Available Position."**

(a) 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 group III.
- (3) An eligible employee in subgroup I-B has the right to bump employees in group II and group III.
- (4) An eligible employee in subgroup II-AD has the right to bump 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 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.

A

[Guidance for subparagraph **3-A-20-1-(c)**.]

- (c) An agency is not required to consider employees' respective retention service dates in determining their bumping rights.
- For additional guidance, see **Harris v. United States**, 153 Ct. Cl. 425 (1961); and **Berry v. Energy**, 21 M.S.P.R. 95 (1984).
 - 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 (3-B-20-1)**: 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. Both GS-11 employees are in the same subgroup, but the employee with the greater amount of service formerly held an essentially identical position.

A [Guidance for subparagraph **3-A-20-2-(a)**.]

- (a) **"Retreat"** is a limited form of same subgroup bumping when the released employee is in the same retention tenure group and subgroup as another employee on a different competitive level, the released employee has more total creditable retention service than the other employee, and the released employee formerly held a position that is essentially identical to the position now held by the employee with less service. (5 CFR 351.701(c))
- **Example 1 (3-B-20-2)**: A GS-12 subgroup I-B employee may "Retreat" to a position held by a subgroup I-B employee who has less total creditable service, provided that the employee with the greater service meets the other conditions for a retreat right.

① • See paragraphs **3-A-20-2**, **3-A-20-3**, and **3-A-20-4** for additional guidance on the retreat right.

- **Example 2 (3-B-20-2)**: 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 (in this example, to tenure Group II), is a "Bump."

① • See paragraph **3-B-20-1** above for additional guidance on the bump right.

A [Guidance for subparagraph **3-A-20-2-(e)**.]

- (e) A released employee has no retreat rights based solely upon the employee's personal qualifications to perform the position held by an employee with less service in the same subgroup. (5 CFR 351.701(c)(3))

- **Explanation**-In final retreat regulations OPM published in the Federal Register on June 15, 1998 at 63 FR 32593, OPM stated at 63 FR 32594 that:

"Because retreat is a narrow right, § 351.701(c)(3) does not intend to provide a more disruptive, broader range of same subgroup bumping that, based upon personal qualifications, would provide a released employee with the right to displace a lower-standing employee solely because the released employee formerly held a

position in the same general line of work."

[Guidance for subparagraph **3-A-20-2-(f)**.]

- (f) The agency uses the grade progression of only the released employee's official position of record to determine the applicable grades (or grade-intervals or equivalent) of the employee's retreat right. (5 CFR 351.701(c)(2))
- **Explanation**-In interim retreat regulations OPM published in the Federal Register on October 20, 2000, at 65 FR 62991, OPM stated that:

"This interim regulation clarifies OPM's longstanding policy that an agency determines the grade or grade-interval range of a released employee's potential retreat rights solely on the basis of the official position of record held by the employee on the effective date of the reduction in force. See 51 FR 319 (January 3, 1986). In determining an employee's potential retreat rights, an agency does not consider the grade or grade-interval range of the position to which the employee may have a retreat right."

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

- **Explanation**-OPM published these retreat regulations as final in the Federal Register on February 5, 2002, at 67 FR 5196.

3-B-20-3

Retreat Rights-Essentially Identical Position

A

[Guidance for paragraph **3-A-20-3-(a)**.]

- (a) OPM's retention regulations provide that an agency determines an employee's potential retreat right rights only to the same position, or an "**Essentially Identical**" position, that the released employee previously held as a competing employee on the basis of an official position of record. (5 CFR 351.701(c)(3))
- (1) An employee's right to retreat is based only on only positions formerly held by the employee on a permanent basis in both the current agency, or in any former agencies. (5 CFR 351.701(c)(3))
- 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))
 - An employee has a potential right to retreat based on any prior time-limited position of record (e.g., a term position) that the employee held as a competing employee (e.g., a term position is placed in tenure group III). (5 CFR 351.701(c)(3))
- (2) An employee may have the right to retreat based on the employee's former Federal positions that are not covered by title 5 U.S.C. (e.g., 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))
- This may include positions the employee held in the legislative or judicial branches). (5 CFR 351.701(c)(3))
- **Example 1 (3-B-20-3-(a)):** 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.
- ① • **Explanation-**OPM's retention regulations define "Competing Employee" 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 subparagraph **3-A-4-1-(d)**.

A [Guidance for subparagraph **3-A-20-3-(b)**.]

(b) The agency applies a modified standard for a reduction in force "Competitive Level" in determining an employee's retreat rights

① • See Section **3-A-9** for information on "Competitive Level."

- **Explanation-** In final retreat regulations OPM published in the Federal Register on June 15, 1998 at 63 FR 32593, OPM stated at 63 FR 32595 that:

"In defining what constitutes 'an essentially identical position' for (purposes of retreat), final § 351.701(c)(3) still provides that in determining whether a position is essentially identical, the agency uses the competitive level criteria found in § 351.403, but without regard to the classification series, type of work schedule, or type of service, of the two positions. Consistent with OPM's interpretation of its own regulations, this reflects the longstanding history of retreat as a narrow right of same subgroup bumping limited to actual positions formerly held by a released employee, rather than a broader form of same subgroup bumping based upon a return to the same general occupation based upon personal qualifications for that position."

". . . These final regulations intend that agencies use a narrow modified competitive level standard set forth in § 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 (U.S. Civil Service) Commission's, longstanding definition of the competitive level as the basic standard for retreat rights. Also, this revision addresses the issue of what constitutes an 'essentially identical' position in the wake of the decisions of the Merit Systems Protection Board in **Parkhurst v. Department of Transportation**, 70 M.S.P.R. 309 (1996); and **Pigford v. Department of Interior**, 75 M.S.P.R. 251 (1997)."

- **Explanation-**The following four examples cover "Essentially Identical" positions in determining employees' retreat rights:
- **Example 1 (3-B-20-3-(b)):** 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. 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 modified competitive level standard.

- **Example 2 (3-B-20-3-(b))**: 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. 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 modified competitive level standard.
- **Example 3 (3-B-20-3-(b))**: Retreat based upon different work schedule: A full-time GS-343-11 employee formerly held a part-time GS-343-7 position. 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 modified competitive level standard.
- **Example 4 (3-B-20-3-(b))**: 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). 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 modified competitive level standard.

At its discretion, an agency may provide expanded same subgroup bumping to released employees. This option is based upon the released employee's personal qualifications, and the employee's higher subgroup standing in the same tenure group or in a higher tenure group. However, this broad-based alternative does not apply to the determination of employees' retreat rights.



- For additional guidance, see paragraph **3-A-28-2**.

3-B-20-4 **Retreat Rights-Expanded Grade Limits for Disabled Veterans in Subgroup AD**

A [Guidance for paragraph **3-A-20-4.**]

A released employee who is eligible for veterans' preference under OPM's reduction in force regulations, and who is receiving a service-compensable disability of 30% or more, has the right to retreat to positions down to five grades or grade-intervals (or equivalent). (5 CFR 351.702(c)(2))

- **Explanation**-In interim retreat regulations OPM published in the Federal Register on October 20, 2000, at 65 FR 62991, OPM stated that:

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

Section 21, Using Vacancies in Meeting Employees' Assignment Rights

Introduction This section contains additional guidance on options that an agency may consider in offering vacant positions to employees reached for release from a competitive level by reduction in force. Section 21 of Module 3, Unit A (3-A-21) contains the basic guidance on offers of vacant positions in a reduction in force situation.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Management's Decision to Fill Vacant Positions During a Reduction in Force | 3-B-21-1 |
| Using Vacancies in Meeting Employees' Assignment Rights | 3-B-21-2 |
| Consideration of Retention Standing In Offering Vacant Positions | 3-B-21-3 |
| Consideration of Undue Interruption in Determining Qualifications for Assignment to Vacant Positions | 3-B-21-4 |
| Waiver of Qualifications Requirements in Offering Reduction in Force Assignment to Vacant Positions | 3-B-21-5 |
| Offering Vacant Positions As Non-Reduction in Force Offers to Place Employees In Lieu of Separation or In Lieu of Other Reduction in Force Actions | 3-B-21-6 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-21-1 | 3-B-21-1 |
| 3-A-21-2-(a)-(3) | 3-B-21-2-(a)-(3) |
| 3-A-21-2-(b) | 3-B-21-2-(b) |

Continued on next page

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-21-3 | 3-B-21-3 |
| 3-A-21-4-(a) | 3-B-21-4-(a) |
| 3-A-21-4-(c) | 3-B-21-4-(c) |
| 3-A-21-5 | 3-B-21-5 |
| 3-A-21-6 | 3-B-21-6 |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 21, Using Vacancies in Meeting Employees' Assignment Rights

3-B-21-1 **Management's Decision to Fill Vacant Positions During a Reduction in Force**

A [Guidance for paragraph **3-A-21-1**.]

An agency is not required to fill vacant positions in a reduction in force, but the agency may decide to fill all, some, or no vacant positions. (5 CFR 351.201(b))

- For additional guidance on the agency's discretion in filling vacant positions in a reduction in force, see **Spartin v. Government Printing Office**, 46 M.S.P.R. 119, affirmed 937 F. 2d 623 (1991, Fed. Cir. Table).
-

3-B-21-2 **Using Vacancies in Meeting Employees' Assignment Rights**

A [Guidance for paragraph **3-A-21-2**.]

An agency offer a released employee assignment to a vacant position in order to satisfy the employee's right to assignment, or to offer the employee assignment in lieu of separation by reduction in force. (5 CFR 351.704(a)(1); 5 CFR 351.701(a))

A [Guidance for subparagraph **3-A-21-2-(a)-(3)**.]

(a)-(3) An agency may offer reduction in force assignment to a vacant position that is within the same grade and grade-interval limits that apply to offers of assignment based on bump and retreat rights.

- There is no authority for an agency to make a reduction in force offer of assignment to a position that is below the grade and grade-interval limits that apply to offers of assignment based on bump and retreat rights. (5 CFR 351.704(a)(1); 5 CFR 351.701(a))
- **Explanation**-In final regulations published in the Federal Register on

November 16, 1998, at 63 FR 63591, OPM stated that:

"These final regulations revise § 351.704(a)(1) to clarify longstanding OPM policy that an offer of assignment to a vacant position under authority of part 351 must be consistent with §§ 351.201(b) and 351.701, including the grade limits applicable to bump and retreat set forth in §§ 351.701(b)(2) and 351.701(c)(2)."

A [Guidance for subparagraph **3-A-21-2-(b)**.]

- (b) An agency may offer an employee assignment to a vacant position in lieu of separation by reduction in force, subject to the same conditions that apply to an offer of a vacant position to satisfy a released employee's assignment right. (5 CFR 351.704(a)(1); 5 CFR 351.701(a))

- ①
- Subparagraph **3-A-21-2-(a)** covers the conditions under which an agency may offer a vacant position in order to satisfy a released employee's assignment right.

- **Explanation-** In final regulations published in the Federal Register on November 16, 1998, at 63 FR 63591, OPM stated that:

"These final regulations also revise § 351.704(a)(1) to clarify longstanding OPM policy that an agency may offer an employee assignment to a vacant position in lieu of separation by reduction in force under part 351."

"These final regulations do not affect the agency's right to make offers of vacant positions under other authority."

3-B-21-3 **Consideration of Retention Standing In Offering Vacant Positions**

A [Guidance for paragraph **3-A-21-3**.]

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 (3-A-21-3-(a)-(d))**: 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 potential bump or retreat rights. (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))

- For additional guidance, see **Petranek v. Army**, 4 M.S.P.R. 419 (1980); and **Spartin v. Government Printing Office**, 46 M.S.P.R. 119 (1990), 937 F.2d 623 (1991, Fed. Cir. Table).
- **Example 2 (3-A-21-3-(a)-(d))**: 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. (5 CFR 351.201(c); 351.701(a); 351.704(a)(1))
 - For additional guidance, see **Petranek v. Army**, 4 M.S.P.R. 419 (1980).
- **Explanation**-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. (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))
 - For additional guidance, see **Berry v. Energy**, 21 M.S.P.R. 95 (1984).
- **Example 3 (3-A-21-3-(a)-(d))**: 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: one at GS-9 and one at GS-7. The agency chooses to offer both positions as reduction in force offers of assignment. Both released employees meet the qualifications for both the GS-9 and the GS-7 vacant positions.

If the agency offers the GS-9 vacancy, the GS-9 employee in

subgroup I-A is entitled to the GS-9 vacancy because of subgroup superiority even though the GS-11 employee has an earlier adjusted retention service date.

- **Explanation**-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. (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))
 - For additional guidance, see **Mello v. Energy**, 20 M.S.P.R. 45 (1984); **Green v. Defense Logistics Agency**, 26 M.S.P.R. 649 (1985).
- **Explanation**-A released employee has no right to choose among positions with the same representative rate (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))
 - For additional guidance, see **Edlin v. National Aeronautics and Space Administration**, 18 M.S.P.R. 654 (1984); **Jorgenson v. Agriculture**, 22 M.S.P.R. 207 (1985); and **Endsley v. Army**, 46 M.S.P.R. 46 (1992).
- **Explanation**-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); 351.701(a)(1)); 351.704(a)(1))
 - For additional guidance, see **Berry v. Energy**, 21 M.S.P.R. 95 (1984).
- **Explanation**-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 potential retreat right. (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))
 - For additional guidance, see **Berry v. Energy**, 21 M.S.P.R. 95.

- **Example 4 (3-A-21-3-(a)-(d)):** The agency releases two GS-13 employees in the same retention group and subgroup (subgroup I-B) with Level 3 ("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. For example, 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).

- For additional guidance, see **Berry v. Energy**, 21 M.S.P.R. 95 (1984).

- **Example 5 (3-A-21-3-(a)-(d)):** The agency releases two GS-13 employees in the same retention group and subgroup (e.g., subgroup I-B) with Level 3 ("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.



- For additional guidance, see subparagraph **3-A-21-3-(a)**, which notes that a vacant position that is filled before, or, or after the effective date of the reduction in force is an available position for purposes of determining employees' assignment rights. (5 CFR 351.201(c); 351.701(a)(1)); 351.704(a)(1))
- Also for additional guidance, see **Klegman v. Health and Human Services**, 16, M.S.P.R. 455 ((1983).

- **Example 6 (3-A-21-3-(a)-(d))**: The agency releases two GS-13 employees in the same retention group and subgroup (subgroup I-B) with Level 3 ("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. 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.

3-B-21-4

Consideration of Undue Interruption in Determining Qualifications for Assignment to Vacant Positions

A

[Guidance for subparagraph **3-A-21-4-(a)**.]

- (a) 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. (5 CFR 351.702(a)(4))
 - For additional guidance, see **Narcisse v. Transportation**, 32 M.S.P.R. 232 (1987); **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997); and **Tengeres v. Postal Service**, 75 M.S.P.R. 537 (1997).

A

[Guidance for subparagraph **3-A-21-4-(c)**.]

- (c) The 90-day standard for undue interruption generally does not apply to offers of assignment to vacant positions; the definition in paragraph 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." (5 CFR 351.203))
 - For additional guidance, see **Jamison v. Transportation**, 20 M.S.P.R. 513 (1984); and **Lewellen v. Air Force**, 25 M.S.P.R. 525 (1985).

3-B-21-5 **Waiver of Qualifications Requirements in Offering Reduction in Force Assignment to Vacant Positions**

A [Guidance for paragraph **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. (5 CFR 351.703)

- For additional guidance, see **Taylor v. Housing and Urban Development**, 6 M.S.P.R. 177 (1981); **Patterson v. Navy**, 6 M.S.P.R. 500 (1981); and **Manescalchi v. Postal Service**, 74 M.S.P.R. 479 (1997).

3-B-21-6 **Offering Vacant Positions As Non- Reduction in Force Offers to Place Employees In Lieu of Separation or In Lieu of Other Reduction in Force Actions**

A [Guidance for paragraph **3-A-21-6**.]

The agency has the right to offer vacant positions as voluntary offers apart from the retention regulations to employees who would otherwise be reached for separation or downgrading by reduction in force.

- For additional guidance, see **Hartman v. Treasury**, 79 M.S.P.R. 576 (1998); and **Paul v. Navy**, 80 M.S.P.R. 174 (1998).
- ① • Paragraphs **3-A-21-5** and **-6** cover the conditions for making voluntary offers to employees.
- **Explanation**-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.

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.

- For additional guidance on reduction in force

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displacement of a lower-standing employee in a different local commuting area, see **Conners v. Army**, 4 M.S.P.R. 422 (1980); and **Riley v. National Aeronautics and Space Administration**, 79 M.S.P.R. 505 (1998).

Section 22, Using Vacant Temporary Positions as Placement Offers

Introduction This section contains additional guidance on an agency's options in offering temporary positions as placement offers in reduction in force competition. Section 22 of Module 3, Unit A (3-A-22), contains the basic guidance.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Temporary Positions Are Not Available Positions | 3-B-22-1 |
| Using A Temporary Position as a Reduction in Force Offer of Assignment | 3-B-22-2 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-22-1-(a) | 3-B-22-1-(a) |
| 3-A-22-1-(b) | 3-B-22-1-(b) |
| 3-A-22-2 | 3-B-22-2 |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 22, Using Vacant Temporary Positions as Placement Offers

3-B-22-1 **Temporary Positions Are Not Available Positions**

A [Guidance for subparagraph **3-A-22-1-(a)**.]

(b)-(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))

- **Explanation**-An employee serving in a "Competitive Service Temporary Position" (except when the employee serves in a "Provisional Appointment" authorized by sections 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. (5 CFR 351.404(b)(1); 351.501(b)(3)); 351.701(a))

- For additional guidance, see **Starling v. Housing and Urban Development**, 14 M.S.P.R. 620 (1984), 757 F.2d 271 (1985, Fed. Cir.).

A [Guidance for subparagraph **3-A-22-1-(b)**.]

(b)-(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. (5 CFR 351.502(b)(3)(ii); 351.701(a))

- ①
- See paragraph **3-A-28-4** for additional guidance on optional assignment rights for excepted service employees.

(b)-(2) 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.

- For additional guidance, see **Coleman v. Federal Deposit Insurance Corporation**, 62 M.S.P.R. 187 (1994).
- **Explanation**-The same employee is also subject to displacement by a competing excepted service employee who is administratively provided bump or retreat rights by the agency under authority of subparagraph 5 CFR 351.705(a)(3)). (5 CFR 351.502(b)(3)(iii); 351.701(a))
 - See subparagraph **3-A-28-1-4** for additional guidance on optional assignment rights for excepted service employees.)

①

3-B-22-2 **Using A Temporary Position as a Reduction in Force Offer of Assignment**

A [Guidance for paragraph **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));

- **Explanation**-An agency may not offer a competing assignment under authority of OPM's reduction in force regulations to a temporary (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".
 - For additional guidance, see **Jones v. Army**, 42 M.S.P.R. 680 (1990).
 - **Explanation**-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 guidance, see **Jones v. Army**, 42

M.S.P.R. 680 (1990).

- **Example 1 (3-A-22-2):** 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, reassignment, 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.
-

Section 23, Consideration of Grades in Meeting Employees' Assignment Rights

Introduction This section contains additional guidance on the procedures the agency uses to determine the grade range of a potential offer of assignment to an employee released by reduction in force from a competitive level. Section 23, Unit A (3-A-23) contains the basic guidance on consideration of grade and grade-interval range for employees' assignment rights.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Employee's Position of Record Determines Grade and Grade-Interval Range | 3-B-23-2 |
| General Agency Responsibility to Determine the Grade Interval Progression for Positions Not Covered by the General Schedule | 3-B-23-5 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-23-2 | 3-B-23-2 |
| 3-A-23-5 | 3-B-23-5 |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 23, Consideration of Grades in Meeting Employees' Assignment Rights

3-B-23-2 **Employee's Position of Record Determines Grade and Grade-Interval Range**

A [Guidance for paragraph **3-A-23-2**.]

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)); 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.
- For example, an employee may have been reassigned from a one-grade interval job to the employee's present two-grade-interval position of record, but the agency only 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 1 (3-A-23-2)**: The agency determines that the normal line of progression for a WG-12 in a particular series is WG-5-8-10-12. In this case, a WG-12 employee in the series has potential bump and retreat rights to positions as low as WG-5.
 - **Example 2 (3-A-23-2)**: The agency determines that the normal line of progression for a WS-10 in a particular series is WG-5-8-10-WS-10. In this case, the WS-10 employee has potential bump and retreat rights to positions as low as WG-5.

- **Example 3 (3-A-23-2):** 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.
-

3-B-23-5

General Agency Responsibility to Determine the Grade Interval Progression for Positions Not Covered by the General Schedule

A

[Guidance for paragraph **3-B-23-5**.]

The agency has the responsibility to establish the normal line of progression for each occupational series and grade level for positions not covered by the General Schedule, and to then apply employees' assignment limits based on this determination.

- For additional guidance, see **Clark v. Navy**, 64 M.S.P.R. 487 (1994). (5 CFR 351.701(f)(3))
-

Section 24, Consideration of Representative Rates When Determining Employees' Assignment Rights

Introduction This section contains additional guidance on how an agency determines the representative rates of positions in different pay systems as part of the process to determine the potential assignment rights of an employee released from a competitive level by reduction in force. Section 24 of Module 3, Unit A (3-A-24) contains the basic guidance.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Pay Schedule Definition | 3-B-24-2 |
| Representative Rate Definition | 3-B-24-3 |
| Representative Rate Explanation | 3-B-24-4 |
| Representative Rate and the Rate Used to Determine Retention Rights | 3-B-24-6 |
| Application of Representative Rates in Determining Employees' Assignment Rights | 3-B-24-7 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-24-2 | 3-B-24-2 |
| 3-A-24-3-(c) | 3-B-24-3-(c) |
| 3-A-24-4-(e) | 3-B-24-4-(e) |
| 3-A-24-6 | 3-B-24-6 |
| 3-A-24-7 | 3-B-24-7 |

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| A This symbol highlights the references back to Unit 3-A. |
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| i This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 24, Consideration of Representative Rates When Determining Employees' Assignment Rights

3-B-24-2 Pay Schedule Definition

A [Guidance for paragraph **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 (3-A-24-2):** 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.
 - 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-B-24-3 Representative Rate Definition

A [Guidance for subparagraph **3-A-24-3-(c)**.]

"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)
- **Explanation-**For additional guidance on determining the

① representative rate for other positions under subparagraph **3-B-24-3-(c)** above, see:

- (1) **Peele v. Health and Human Services**, 6 M.S.P.R. 296 (1981), which covers the determination of representative rates in an unclassified pay system;
- (2) **Campbell v. Treasury**, 61 M.S.P.R. 99 (1994), which covers the determination of representative rates in a pay banding situation;
- (3) **Robinson v. Postal Service**, 63 M.S.P.R. 307 (1994), which covers the consideration of indefinite saved pay in the determination of representative rates; and
- (4) **Sperling v. Postal Service**, 75 M.S.P.R. 629 (1997), which covers the determination of representative rates in an ungraded pay system.

3-B-24-4 **Representative Rate Explanation**

A [Guidance for subparagraph **3-A-24-4-(e)**.]

- (e) "**Representative Rate**" is the basic rate of pay without regard to locality-based comparability payments for General Schedule employees under 5 U.S.C. 5304. (5 CFR 531.403; 532.401)
- For additional guidance, see **Dube v. Navy**, 72 M.S.P.R. 394 (1996), 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.

3-B-24-6 **Representative Rate and the Rate Used to Determine Retention Rights**

A [Guidance for paragraph **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, unless the agency officially knows that new pay rates: (5 CFR 351.701(e)(2))

- (a) Have officially been approved, and
- (b) Will be effective by the date of the reduction in force.

- **Explanation**-When the approval of new pay rates has been officially announced before the date of notices, and the new rates will be effective by the date of the reduction in force, the agency must use the new pay rates. Otherwise, under 5 CFR 351.701(e)(2) the agency uses representative rates that were effective on the date the agency issued the specific reduction in force notices.

For additional guidance, see **Whittington v. Air Force**, 3 M.S.P.R. 551 (1980), 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 by the appropriate authority.

- **Example 1 (3-A-24-6)**: An agency generally uses the representative rate in effect on the date the agency issues specific reduction in force notices. For example, on the date the agency issues specific reduction in force notices, a GS-4 employee has a representative rate of \$12.00/hour, and a WG-7 employee has a representative rate of \$11.50/hour. Based on the representative rates, on the reduction in force effective date the GS-4 employee will bump or retreat to the WG-7 position, resulting in the demotion of the GS-4 employee to the WG-7 position with a lower representative rate.

After the agency issues the reduction in force notices, the WG-7 employee receives a FWS pay increase that raises the representative rate of the WG-7 position to \$12.25 hour. Although an employee may not receive a promotion under the 5 CFR Part 351 reduction in force regulations, the GS-7 employee still displaces the WG-7 employee based on the representative rates in effect on the date the agency issued specific reduction in force notices. The GS-4 employee with a pre- reduction in force representative rate of \$12.00 now holds a WG-7 position with a representative rate of \$12.25 hours.

The agency processes a personnel action showing reduction in force demotion from the GS-4 to the WG-7 positions based on the

representative rates used to determine the GS-4 employee's assignment rights, and then the agency processes a subsequent pay adjustment action documenting the actual post- reduction in force salary rate in the WG-7 position.

3-B-24-7 **Application of Representative Rates in Determining Employees' Assignment Rights**

A [Guidance for paragraph **3-A-24-7**.]

The agency must determine the representative rates for the employee's current position and for the lowest grade to which the employee has potential bump and retreat rights. (5 CFR 351.701(b)(2); (5 CFR 351.701(c)(2))

- **Example 1 (3-A-24-7)**: 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 has potential assignment rights in the General Schedule includes GS-12 through GS-9.

Section 25, Consideration of Qualifications When Determining Employees' Assignment Rights

Introduction This section contains additional guidance on the information an agency considers in determining whether an employee released from a competitive level is qualified for assignment to an occupied position held by a lower-standing employee, or to a vacant position. Section 25 of Module 3, Unit A (3-A-25) contains the basic guidance on consideration of qualifications for assignment to another position.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Only Qualified Employees Have Assignment Rights | 3-B-25-1 |
| Qualifications Standard | 3-B-25-2 |
| Other Qualifications Factors | 3-B-25-3 |
| Asking Employees for a Qualifications Update | 3-B-25-4 |
| Making Qualifications Determinations-General Information | 3-B-25-5 |
| Making Qualifications Determinations-Physical Qualifications Determinations | 3-B-25-6 |
| Waiver of Qualifications Requirements in Offering Reduction in Force Assignment to Vacant Positions | 3-B-25-8 |
| Modification of Qualifications in Offering Positions In Lieu of Separation or In Lieu of Other Reduction In Force Actions | 3-B-25-9 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-25-1 | 3-B-25-1 |
| 3-A-25-2-(a) | 3-B-25-2-(a) |
| 3-A-25-2-(d) | 3-B-25-2-(d) |
| 3-A-25-3-(d) | 3-B-25-3-(d) |
| 3-A-25-3 | 3-B-25-3 |

Continued on next page

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Additional Information (continued)

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|--|-----------------------------------|
| 3-A-25-4 | 3-B-25-4 |
| 3-A-25-6 | 3-B-25-6 |
| 3-A-25-6-(a)-(3) | 3-B-25-6-(a)-(3) |
| 3-A-25-6-(d) | 3-B-25-6-(d) |
| 3-A-25-8 | 3-B-25-8 |
| 3-A-25-9 | 3-B-25-9 |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 25, Consideration of Qualifications When Determining Employees' Assignment Rights

3-B-25-1 Only Qualified Employees Have Assignment Rights

A [Guidance for paragraph **3-A-25-1**.]

An employee who is released from a competitive level by reduction in force has assignment rights to another encumbered position ("**Bump**" and "**Retreat**" rights) only if the released employee is qualified for assignment. (5 CFR 51.702(a))

- For additional guidance, see **Hayes v. Health and Human Services**, 829 F.2d 1092 (1987, Fed. Cir.); **Narcisse v. Transportation**, 21 M.S.P.R. 232 (1984); **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997); **Tengeres v. Postal Service**, 75 M.S.P.R. 537 (1997); **Flores v. Postal Service**, 75 M.S.P.R. 546 (1997); and **McMillan v. Army**, 84 M.S.P.R. 476 (1999).

① • **Explanation**-Sections **3-A-25** and **3-B-25** only apply to qualifications decisions the agency makes during second round reduction in force competition.

① 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.

In first round reduction in force competition, all positions in the competitive level are interchangeable. Each employee in a competitive level is qualified for every position in that level, including medical standards and/or physical qualifications when appropriate.

① • See paragraph **3-A-9-3** for additional guidance on the procedures as agency uses to construct competitive levels used in first round reduction in force competition.

3-B-25-2 Qualifications Standard

A [Guidance for subparagraph **3-A-25-2-(a)**].

- (a) A released employee with higher retention standing than an unaffected employee is qualified for assignment if the released employee meets the four conditions covered in paragraph **3-A-25-2**. (5 CFR 351.702(a))
- For additional guidance on qualifications determinations in assignment, see **Seidel v. Agriculture**, 26 M.S.P.R. 605 (1985); **Narcisse v. Transportation**, 32 M.S.P.R. 232 (1987); **Vigil v. Army**, 63 M.S.P.R. 384 (1994); **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997); and **Flores v. Postal Service**, 75 M.S.P.R. 546 (1997). (5 CFR 351.702(a))

A [Guidance for subparagraph **3-A-25-2-(d)**].

- ① (d) Paragraph **3-A-25-2** lists four conditions that an employee released from a competitive level by reduction in force must meet in order to establish a potential assignment right to a position held by a lower-standing employee.
- ①
- This subparagraph provides additional guidance on material in subparagraph **3-A-25-2-(d)**.
 - For additional guidance on considering "Knowledges, Skills, and Abilities" in determining a released employee's qualifications for assignment, see **Treese v. Postal Service**, 77 M.S.P.R. 187 (1998).
 - For more information on "**Undue Interruption**" in considering qualifications for assignment to occupied positions, see **Narcisse v. Transportation**, 32 M.S.P.R. 232 (1987); **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997); and **Tengeres v. Postal Service**, 75 M.S.P.R. 537 (1997). (5 CFR 351.702(a))
 - For additional guidance on "**Undue Interruption**" in considering qualifications to vacant positions, see **Jamison v. Transportation**, 20 M.S.P.R. 513 (1984); and **Lewellen v. Air Force**, 25 M.S.P.R. 525 (1985). (5 CFR §§ 351.203; 351.702(a))

- For additional guidance on determining qualifications when the displacing employee must have a license in order to hold the position, see **McMahon v. Army**, 21 M.S.P.R. 159 (1984).
 - For additional guidance on determining qualifications when the displacing employee must meet a minimum typing standard and the agency wants to test the employee's ability, see **Quartaro v. Labor**, 23 M.S.P.R. 110 (1984).
 - For additional guidance on the "**Preponderant Evidence Standard**" required by the Merit Systems Protection Board on issues involving a displacing employee's qualifications for assignment, see **Treese v. Postal Service**, 77 M.S.P.R. 187 (1998).
-

3-B-25-3

Other Qualifications Factors

A

[Guidance for subparagraph **3-A-25-3-(d)**.]

①

(d) Beside the basic qualifications standard covered in paragraph **3-A-25-2**, an agency must, when applicable consider other factors in determining whether a released employee is qualified for assignment to another position, including "**Recency of Experience**." (5 CFR 351.702(a)(4))

- **Explanation**-The agency uses the "**Recency of Experience**" provision to determine an employee's potential assignment right 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.
 - For additional guidance on the recency of experience provision in determining employees' qualifications, see **Tengeres v. Postal Service**, 75 M.S.P.R. 537 (1997); **McMillan v. Army**, 84 M.S.P.R. 476 (1999); and **Smith v. Army**, 86 M.S.P.R. 282 (2000).
-

3-B-25-4 **Asking Employees for a Qualifications Update**

A [Guidance for paragraph **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 guidance, see **Gregg v. Navy**, 71 M.S.P.R. 127 (1996); and **McMillan v. Army**, 84 M.S.P.R. 476 (1999). (5 CFR § 351.702(a))
- **Explanation**-The agency is not obligated to consider material received after the cutoff date in determining employees' qualifications for assignment to other positions; for more information, see **Gregg v. Navy**, 71 M.S.P.R. 127 (1996); and **McMillan v. Army**, 84 M.S.P.R. 476 (1999).

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 guidance, see **Ishikawa v. Labor**, 21 M.S.P.R. 153 (1984); **Quartaro v. Labor**, 23 M.S.P.R. 110 (1984); **Adachi v. Navy**, 36 M.S.P.R. 110 (1988); and **Gregg v. Navy**, 71 M.S.P.R. 127 (1996).
- **Explanation**-Because of the general uniform and consistent requirement found in paragraph 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 guidance, see **Gregg v. Navy**, 71 M.S.P.R. 127 (1996); and **McMillan v. Army**, 84 M.S.P.R. 476 (1999).

3-B-25-5 **Making Qualifications Determinations-General Information**

A [Guidance for paragraph **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. (5 CFR 351.702(a))

- For additional guidance, see **Soliman v. Energy**, 18 M.S.P.R. 539 (1984); **Seidel v. Agriculture**, 26 M.S.P.R. 605 (1985); **Narcisse v. Transportation**, 32 M.S.P.R. 232 (1987); **Buckler v. Federal Retirement Investment Thrift Board**, 73 M.S.P.R. 476 (1997); and **Anderson v. Postal Service**, 76 M.S.P.R. 16 (1997).
 - **Explanation**-In **McMillan v. Army**, 84 M.S.P.R. 476 (1999), the Merit Systems Protection Board found that the agency should have had "Constructive Knowledge" of an employee's qualifications for assignment based upon all of the information potentially available to the agency.
-

3-B-25-6

Making Qualifications Determinations-Physical Qualifications Determinations

A

[Guidance for paragraph **3-A-25-6**.]

The agency determines on the basis of available information whether an employee is physically qualified for a position. (5 CFR § 351.702(a))

- For additional guidance, see **O'Connor v. Air Force**, 9 M.S.P.R. 400 (1982); **Edwards v. Army**, 24 M.S.P.R. 162 (1984); and **Johnson v. Navy**, 58 M.S.P.R. 386 (1993).
- **Explanation**-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 or after the effective date of the reduction in force.
 - For additional guidance on a determination before the effective date of the reduction in force when the agency was aware of the problem, see **O'Connor v. Air Force**, 9 M.S.P.R. 400 (1982).
 - For additional guidance on a situation when the agency was not aware of the problem until after the effective date of the reduction in force, see **Edwards v. Army**, 24 M.S.P.R. 162 (1984).

- **Explanation**-In determining whether a handicapped employee meets the physical standards for a position, the agency must consider whether accommodation is possible for the employee.
 - For additional guidance on accommodation in a reduction in force situation, see **Martin v. Navy**, 61 M.S.P.R. 21 (1994).
 - For additional guidance on when accommodation is so unreasonable that it places an “undue hardship” on agency operations, see **Carr v. Reno**, 23 F.3d 525 (1994, D.C. Cir.).
- **Explanation**-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.

A [Guidance for subparagraph **3-A-25-6-(a)-(3)**.]

(a)-(3) An agency may require an employee who is released from a competitive level by reduction in force to undergo a relevant medical evaluation if the employee has potential assignment rights to a position with different performance tests (including physical fitness and physical agility) than the position held by the employee when released from the competitive level. (5 CFR 339.301(d))

- **Explanation**-A physical fitness test measures an employee’s performance in job-related tasks such as running, lifting, climbing, carrying an object, and similar actions.

A physical agility test measures an employee’s ability to perform job-related tasks such as bending, balancing, turning a wrench, and similar actions.

Other performance tests measure an employee’s ability to perform job-related tasks such as color recognition, speaking, and similar actions.

These three categories of tests measure an employee’s ability to

① perform a task, and are not considered to be medical examinations for purposes of 5 CFR Subpart 339-C (“Medical Examinations”).

A [Guidance for subparagraph **3-A-25-6-(d)**.]

(d) 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)).

- **Explanation**-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. In making a decision, the agency must also consider whether the employee may perform the position with accommodation for a disability or handicap.

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 regulations covered 5 CFR Part 353 of OPM's regulations.

With a reduction in force situation, if the employee has not requested a return to duty by the effective date of the reduction in force action, the agency uses its available information to determine whether the employee has any reduction in force assignment rights.

① The agency applies the "**Undue Interruption**" standard found in subparagraph **3-A-5-1-(v)** to its decision concerning whether or not an employee meets the physical requirements of a position for purposes of reduction in force.

- **Example 1 (3-A-25-6-(b))**: 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.

① 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 undue interruption

standard, that apply to other employees covered by the reduction in force regulations.

Specifically, 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 bump right to a WG-8 position that requires regular lifting of up to 75 pounds, and climbing to heights up to 30 feet.

In an initial review of the employee's qualifications, the agency found that, on the effective date of the reduction in force, the released employee would be unable to perform the physical requirements of the WG-8 position. On further review, the agency found that the WG-10 employee would not be able to perform the physical requirements of the WG-8 position within the 90-day time period of the undue interruption standard. In making its decision, the agency also found that it could not accommodate the employee's assignment to the WG-8 position.

The WG-10 employee did not have a bump right to the WG-8 position, but the employee could potentially have an assignment right to another position with different physical requirements.

Because the released employee did not meet the physical requirements for assignment to the WG-8 position, the WG-10 position did not meet the definition of an "Available Position."



- See paragraph **3-A-19-4** for more information on "**Available Position.**"

In this example, the agency then reviewed the retention records to determine whether the released WG-10 employee had an assignment right to a different position, which would then become a best offer of an available position. Ultimately, the agency found that the WG-10 employee had a retreat right to a WG-5 position because he could meet all of the requirements for that position.

3-B-25-8

Waiver of Qualifications Requirements in Offering Reduction in Force Assignment to Vacant Positions

A [Guidance for paragraph **3-A-25-8**.]

In offering a released employee assignment to a vacant position, an agency, at its discretion, may waive OPM's qualifications standards and requirements for the position if, in pertinent part, the agency determines 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)(2).

- For additional guidance on waiving qualifications for assignment to vacant positions, see **Patterson v. Navy**, 6 M.S.P.R. 500 (1981); and **Manescalchi v. Postal Service**, 74 M.S.P.R. 479 (1997).

3-B-25-9 **Modification of Qualifications in Offering Positions In Lieu of Separation or In Lieu of Other Reduction in Force Actions**

A [Guidance for paragraph **3-A-25-9**.]

The "**Qualifications Standards Handbook**" provides that an agency, at its discretion, may modify qualifications standards for inservice placement actions if the agency determines that the employee can successfully perform the work of a position even though the employee may not meet all the requirements in the OPM qualification standard.

- **Explanation**-With this option, an agency may modify OPM's qualification standards for interagency and intra-agency inservice placement actions, including reassignment, voluntary change to lower grade, transfer, reinstatement, or repromotion to a grade not higher than a grade previously held.

The agency may make a placement action made under this authority only to a position with no more promotion potential than the employee's present position. Placement to a position with greater promotion potential requires competition under the agency's internal staffing plan.

Section 26, Use of Trainee and Developmental Positions When Determining Employees' Assignment Rights

Introduction This section contains guidance about the special provisions in OPM's retention regulations that apply to formally designed trainee and developmental positions involved in reduction in force competition. Section 26 of Module 3, Unit A (3-A-26) contains basic guidance on the provisions that limit the impact of reduction in force actions on formally designated trainee and developmental positions.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Definition of a Trainee or Developmental Position | 3-B-26-2 |
| Fully Trained Employees Have No Assignment Rights to a Trainee or Developmental Position | 3-B-26-3 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-26-2 | 3-B-26-2 |
| 3-A-26-3-(d) | 3-B-26-3-(d) |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 26, Use of Trainee and Developmental Positions When Determining Employees' Assignment Rights

3-B-26-2 **Definition of a Trainee or Developmental Position**

- A** [Guidance for paragraph **3-A-26-2**.]
- ① A "**Formally Designated Trainee or Developmental Position**," as defined in OPM's reduction in force regulations, must meet four conditions covered in paragraph **3-A-26-2**. (5 CFR 351.702(e)(1)-(4))
- For additional guidance, see **Gilbert v. Transportation**, 21 M.S.P.R. 108 (1984).
- ① • **Explanation**-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 paragraph **3-A-26-2**.
- Positions in programs that do not meet all of the four conditions above are not considered trainee or developmental positions for reduction in force purposes.
- ① Under its general authority to make reduction in force-related decisions covered in paragraph **3-A-2-2**, the agency is responsible for the determination that positions are in a formally-designated trainee or development program.
- Referencing **Gilbert**, positions identified simply as "career ladder" positions, which do not meet all of the four characteristics covered above, are not considered as trainee or developmental positions for reduction in force purposes.
- ① Subparagraph **3-A-9-6-(e)** provides that an agency establishes separate competitive levels for positions in a formally-designated trainee or developmental program. The official position description evidences that the position is in a formally-designated trainee or developmental position, rather than in a "career ladder" position which does not meet all of the four characteristics covered in paragraph **3-A-26-2**.

Paragraph **3-A-26-3** notes that because of “Undue Interruption,” a fully trained employee has no assignment rights to a formally designed trainee or developmental position once the agency has implemented this special type of training program for its employees.

3-B-26-3 **Fully Trained Employees Have No Assignment Rights to a Trainee or Developmental Position**

A [Guidance for subparagraph **3-B-26-3-(d)**.]

- (d) 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 guidance, see **Harris v. Treasury**, 5 M.S.P.R. 545 (1981).
 - **Explanation**-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 the agency implemented on or before the effective date of the reduction in force.

A A formally designated trainee or developmental program with the four characteristics covered in paragraph **3-A-26-2** provides a selected employee with a carefully structured learning plan beyond that found in a regular “career ladder” position. The program assumes the selected employee will fully participate in each scheduled phase of the program. Undue interruption to the formally designated trainee or developmental program would likely result if a higher-standing employee displaced a lower-standing employee after the commencing date of the program because the agency would be required to provide retroactive training to the displacing employee.

- See paragraphs **3-A-26-2** and **3-B-26-2** for additional guidance on the differences between a “career ladder” position and a formally designated trainee or developmental position.
-

Section 28, Administrative Assignment Options

Introduction This section contains additional guidance on three assignment options that an agency, at its option, can provide to employees released by reduction in force from a competitive level. Section 28 of Module 3, Unit (3-A-28) contains the basic guidance on administrative assignment options.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Bumping Rights for Employees in Tenure Group III | 3-B-28-3 |
| Assignment Rights for Excepted Service Employees | 3-B-28-4 |
| Restrictions on Administrative Assignment Rights | 3-B-28-6 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-28-3 | 3-B-28-3 |
| 3-A-28-4 | 3-B-28-4 |
| 3-A-28-6-(d) | 3-B-28-6-(d) |
| 3-A-28-6-(e) | 3-B-28-6-(e) |

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| A This symbol highlights the references back to Unit 3-A. |
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| ① This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 28, Administrative Assignment Options

3-B-28-3 **Bumping Rights for Employees in Tenure Group III**

A [Guidance for paragraph **3-A-28-3**.]

An agency may permit competing employees in tenure group III to “bump,” but not “retreat,” to positions held by tenure group III employees on different competitive levels. (5 CFR 351.705(a)(2))

- **Explanation**-Under OPM’s reduction in force regulations, assignment rights only apply 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 III-A term employee whose position is abolished may displace a lower-standing subgroup III-B employee in the same competitive level even though the agency has not administratively provided assignment rights to positions in different competitive levels.

The separation of a tenure group III employee because of expiration of a term appointment is not covered by OPM's reduction in force regulations, and does not provide the separated employee with bump rights to any continuing positions regardless of the retention standing of the released employee.

- For additional guidance explaining that OPM’s reduction in force regulations do not cover the expiration of a term appointment, see **Depner v. Army**, 78 M.S.P.R. 237 (1998). (5 CFR 351.201(a)(2))

3-B-28-4 **Assignment Rights for Excepted Service Employees**

A [Guidance for paragraph **3-A-28-4**.]

Unless provided by the agency, excepted service employees have no assignment rights under OPM’s reduction in force regulations. (5 CFR § 351.701(a); 5 CFR 351.705(a)(3))

- For additional guidance, see **Dodd v. Tennessee Valley Authority**, 770 F.2d 1038 (1985, Fed. Cir); **Vincent v. Federal Deposit Insurance Corporation**, 41 M.S.P.R. 490 (1989); and **Whitehurst v. Tennessee Valley Authority**, 43 M.S.P.R. 486 (1990).
-

3-B-28-6 **Restrictions on Administrative Assignment Rights**

A [Guidance for subparagraph **3-A-28-6-(d)**.]

(d) An agency may not administratively assign an employee in the competitive service to a position in the excepted service. (5 CFR 351.705(b)(5))

- For additional guidance, see **May v. Interstate Commerce Commission**, 20 M.S.P.R. 557 (1984).

A [Guidance for subparagraph **3-A-28-6-(e)**.]

An agency may not administratively assign an employee in the excepted service to a position in the competitive service. (5 CFR 351.705(b)(6))

- For more information, see **Killingsworth v. Health and Human Services**, 11 M.S.P.R. 273 (1982).
-

Section 29, Reduction in Force Notices to Employees

Introduction This section contains additional guidance on the specific written reduction in force notices that an agency must issue to an employee at least 60 calendar days before the employee is released from a competitive level by reduction in force. Section 29 of Module 3, Unit A (3-A-29) contains the basic guidance on reduction in force notices.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Definition of a Specific Reduction in Force Notice | 3-B-29-1 |
| Content of Specific Reduction in Force Notice | 3-B-29-4 |
| Minimum 60-Day Reduction in Force Notice For All Employees | 3-B-29-8 |
| No Maximum Reduction in Force Notice | 3-B-29-11 |
| Employee's Duty Status During Reduction in Force Notice Period | 3-B-29-20 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-29-(1)-(b) | 3-B-29-(1)-(b) |
| 3-A-29-(1)-(c) | 3-B-29-(1)-(c) |
| 3-A-29-4-(b) | 3-B-29-4-(b) |
| 3-A-29-8-(a) | 3-B-29-8-(a) |
| 3-A-29-11 | 3-B-29-11 |
| 3-A-29-20-(a) | 3-B-29-20-(a) |
| 3-A-29-20-(c) | 3-B-29-20-(c) |

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| i This symbol guides you toward more general references on the subject in Module 3 or in other Modules. |
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Section 29, Reduction in Force Notices to Employees

3-B-29-1 **Definition of a Specific Reduction in Force Notice**

A [Guidance for paragraph **3-A-29-1**.]

① Subparagraph **3-A-4-1-(I)** defines a specific reduction in force notice as a written communication from an agency official to an employee stating that the employee will be reached for a reduction in force action. (5 CFR 351.801(a)(1))

[Guidance for subparagraph **3-A-29-1-(b)**.]

(b) An agency issues a reduction in force notice only for a reduction in force action and reason.

- For additional guidance, see **Smitka v. Postal Service**, 66 M.S.P.R. 680 (1995); **Cooley v. Postal Service**, 68 M.S.P.R. 353 (1995); **Krizman v. Merit Systems Protection Board**, 77 F.3d 434 (1996, Fed. Cir.); and **Torain v. Postal Service**, 83 F.3d 1420 (1996, Fed. Cir.)
- **Explanation**-For example, an agency is not required to issue a reduction in force notice in reassigning an employee to a position at the same grade even if the position is located in a different local commuting area.

A [Guidance for subparagraph **3-A-29-1-(c)**.]

(c) The reduction in force notice serves as the agency's initial burden of proof in a reduction in force appeal or grievance.

- For additional guidance, see **Hishikawa v. Agriculture**, 6 M.S.P.R. 510 (1981).

3-B-29-4 Content of Specific Reduction in Force Notice

[Guidance for paragraph **3-A-29-4**.]

[Guidance for subparagraph **3-A-29-4-(b)**.]

A

Although in a specific reduction in force notice the agency must state the reason for the reduction in force action, on appeal the Merit Systems Protection Board looks beyond the terminology in considering whether an agency properly applied OPM's retention regulations. (5 CFR 351.802)

- For more information, see **Cummings v. Defense**, 6 M.S.P.R. 202 (1981); **Precious v. Tennessee Valley Authority**, 15 M.S.P.R. 176, (1983); **May v. Interstate Commerce Commission**, 20 M.S.P.R. 557 (1984); **Brantley v. Tennessee Valley Authority**, 25 M.S.P.R. 199 (1984); and **Bacon v. Housing and Urban Development**, 757 F.2d 265 (1985, Fed. Cir.)
- ① • Subparagraph **3-A-5-4-(a)** covers the reasons for a reduction in force (for example, reorganization, lack of work, shortage of funds, reduction in personnel ceiling, etc.)
- ① • Paragraph **3-A-29-4** identifies all the information that an agency must provide in a specific reduction in force notice.
- **Explanation**-Most reduction in force actions are actually a reorganization. For example, an agency faced with a shortage of funds reorganizes in order to perform work with fewer staff. Likewise, an agency that finds itself with a lack of work, or a mandated reduction in personnel ceiling, reorganizes if the situation leads to a reduction in personnel.

Both the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit look beyond the terminology in a specific reduction in force notice. Instead, both consider the record to determine whether the agency conducted a bona fide reorganization in applying the retention regulations. For example, on appeal neither the Board nor the Court will reverse a bona fide reorganization if the agency states in the specific notice that the reason for the reduction in force was a lack of funds, but on appeal the record shows that the underlying reason was a reduction in personnel ceiling.

3-B-29-8

Minimum 60-Day Reduction in Force Notice For All Employees

A [Guidance for subparagraph **3-A-29-8-(a)**.]

- (a) An agency must give each competing employee at least 60 days specific written notice before the effective date of the reduction in force action. (5 U.S.C. 3502(d)(1)(A); 5 CFR 351.801(a)(1))
- The 60 days minimum reduction in force notice period is set by statute in 5 U.S.C. 3502(d)(1)(A).
 - For additional guidance, see **Cook v. Interior**, 74 M.S.P.R. 454 (1997).
-

3-B-29-11 **No Maximum Reduction in Force Notice**

A [Guidance for paragraph **3-A-29-11**.]

OPM's reduction in force minimum notice period applies to all reduction in force actions, including separation, demotion, and furlough. The regulations do not set a maximum limit for specific notices. (5 CFR 351.801(a)(1))

- For additional guidance, see **Schroeder v. Transportation**, 60 M.S.P.R. 566 (1994).
-

3-B-29-20 **Employee's Duty Status During Reduction in Force Notice Period**

A [Guidance for subparagraph **3-A-29-20-(a)**.]

- (a) If because of an emergency the agency lacks work or funds for all or part of the notice period, the agency may, with or without the employee's consent, place the employee on annual leave
- For additional guidance, see **Lerner v. Interior**, 7 M.S.P.R. 511 (1981). (5 CFR 351.806)
 - When possible, the agency must retain the employee on active duty during the reduction in force notice period. (5 CFR 351.806)

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A [Guidance for subparagraph **3-A-29-20-(c)**.]

- (c) If because of an emergency the agency lacks work or funds for all or part of the notice period, the agency may, with or without the employee's consent, place the employee in a nonpay status. (5 CFR 351.806)
- For additional guidance, see **Stewart v. Tennessee Valley Authority**, 77 M.S.P.R. 565 (1998).
-

Section 33, Reduction in Force Appeals

Introduction This section contains additional guidance on the right of an employee who is separated or demoted under OPM's reduction in force regulations to appeal the action to the Merit Systems Protection Board. Section 33 of Module 3, Unit A (3-A-33) contains the basic guidance on filing a reduction in force appeal.

Contents This section contains the following topics:

| Topic | See Paragraph |
|---|---------------|
| Basic Employee Right To Appeal a Reduction In Force Action | 3-B-33-1 |
| Corrective Action on Appeal-Action Reversed or Modified | 3-B-33-4 |
| Corrective Action on Appeal-Action Reversed or Modified With Interim Relief | 3-B-33-5 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-33-1-(d) | 3-B-33-1-(d) |
| 3-A-33-4 | 3-B-33-4 |
| 3-A-33-5 | 3-B-33-5 |

A This symbol highlights the references back to Unit 3-A.

i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 33, Reduction in Force Appeals

3-B-33-1 Basic Employee Right To Appeal a Reduction In Force Action

A [Guidance for subparagraph **3-A-33-1-(d)**.]

- (d) An employee has a basic right to file a reduction in force appeal to the Merit Systems Protection Board (MSPB) under the provisions of the Board's regulations only if, under authority of OPM's 5 CFR Part 351 reduction regulations, the employee was separated, demoted, or furloughed for more than 30 days. (5 CFR 351.901); (5 CFR 1201.3(a)(10))
- An employee who accepts an offer of assignment to another position at the same representative rate may not appeal the reduction in force action to the Board. (5 CFR 351.901); (5 CFR 1201.3(a)(10))
 - For additional guidance, see **Villante v. Navy**, 33 M.S.P.R. 542 (1987).
-

3-B-33-4 Corrective Action on Appeal-Action Reversed or Modified

A [Guidance for paragraph **3-A-33-4**.]

If the Board finds that the agency failed to properly apply OPM's reduction in force regulations, under subparagraph 5 CFR 1201.111(a)(5) the Board may direct appropriate corrective action, including canceling or modifying the reduction in force action, and overseeing the agency's corrective actions.

- For additional guidance, see:
 - (1) **Kerr v. National Endowment for the Arts**, 726 F.2d 730, (1985, Fed. Cir.). The Board may require an action to cancel a reduction in force action and return the employee to status quo ante.
- **Explanation**-The United States Court of Appeals for the Federal Circuit found that the Board erred as a matter of law when it ruled

that its authority over the matter of compliance ended when the petitioner resumed active duty in his former position at the same grade and pay. The Court directed the Board to make a substantive determination of whether the duties and responsibilities of the position to which the employee was restored are the same, or substantially equivalent to the duties and responsibilities of the position he held before termination.

- (2) **Grimaldi v. Interior**, 60 M.S.P.R. 49 (1993). When the Board corrects a wrongful personnel action, the decision must ensure that the employee is returned, as nearly as possible, to status quo ante. This requires that the employee be placed back in his former position or in a position substantially equivalent in scope and status to the former position.
 - (3) **Sink v. Postal Service**, 66 M.S.P.R. 325 (1994). The Board noted that when an agency did not reinstate the appellant has not been reinstated to perform the work of the prior position, the Board will determine whether that position still exists at the same grade level and classification. If the position still exists, the Board will then examine the agency's reasons for noncompliance to determine if the agency has a strong overriding interest or a compelling reason to justify its failure to restore the appellant to the full status quo ante.
- **Explanation**-The Board found that the agency had not cited an ending date for its ongoing reduction in force actions, or stated when the appellant will be provided a notice of further placement consistent with the Board's compliance order. The Board then concluded that within 120 days the agency must either reinstate the appellant in his former position or issue him a specific reduction in force notice.

Finally, the Board also appointed a Special Compliance Officer with full oversight responsibility to take whatever steps are necessary and appropriate to obtain full compliance with its order to the agency.

3-B-33-5

Corrective Action on Appeal-Action Reversed or Modified With Interim Relief

A [Guidance for paragraph **3-A-33-5**.]

If the appellant is the prevailing party in an initial appeal to the Board, the initial decision provides interim relief under subparagraph 5 U.S.C. 7701(b)(2) to the appellant unless the Board's administrative judge determines that the granting of interim relief is not appropriate. (5 CFR 1201.111(c))

- For additional guidance, see:
 - (1) **Gregg v. Navy**, 71 M.S.P.R. 127 (1996). In providing interim relief from a reduction in force appeal, the agency has the right in some situations to reemploy the appellant into a different position from that held in the reduction in force.
 - (2) **Buckler v. Federal Thrift Investment Board**, 73 M.S.P.R. 476 (1997). In providing interim relief from a reduction in force appeal, the agency has the right to consider whether undue interruption would result if the appellant returned to the workplace.
-

Section 34, Reduction in Force Grievances

Introduction This section contains additional guidance on the right of certain employees to file a reduction in force grievance under an applicable collective bargaining agreement. Section 34 of Module 3, Unit A (3-A-34) contains the basic guidance on filing a reduction in force grievance.

Contents This section contains the following topics:

| Topic | See Paragraph |
|--|---------------|
| Exception To The Basic Employee Right To Grieve a Reduction in Force Action-Election of Procedure | 3-B-34-4 |
| Exception to the Basic Employee Right To Grieve a Reduction in Force Action-Time Limits For Election | 3-B-34-5 |

Additional Information When appropriate, Restructuring Information Handbook Module 3, Unit B (Guidance) has additional information on material in Unit 3-A.

| To find additional information on these key paragraphs in Unit 3-A, | In Unit 3-B see paragraph: |
|---|----------------------------|
| 3-A-34-4 | 3-B-34-4 |
| 3-A-34-5 | 3-B-34-5 |

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i This symbol guides you toward more general references on the subject in Module 3 or in other Modules.

Section 34, Reduction in Force Grievances

3-B-34-4 Exception To The Basic Employee Right To Grieve a Reduction in Force Action-Election of Procedure

A [Guidance for paragraph **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))

- **Explanation**-Paragraph 5 CFR 1201.3(c) of the Merit Systems Protection Board regulations 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."

- For additional guidance, see **Johnson v. Labor**, 26 M.S.P.R. 447 (1985); **McCann v. Navy**, 57 M.S.P.R. 288 (1993); and **Di Sera v. Army**, 71 M.S.P.R. 120 (1996).
-

3-B-34-5

Exception to the Basic Employee Right To Grieve a Reduction in Force Action-Time Limits For Election

A

[Guidance for paragraph **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; 1201.3(a)(1))

- (a) An employee who chooses to file a grievance follows the provisions of the negotiated procedure, which 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))
- For additional guidance, see **Johnson v. Labor**, 26 M.S.P.R. 447 (1985); **Fierro v. Treasury**, 37 M.S.P.R. 609 (1988); **McCann v. Navy**, 57 M.S.P.R. 288 (1993); and **Di Sera v. Army**, 71 M.S.P.R. 120 (1996).
- (b) An 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))
- For additional guidance, see **Johnson v. Labor**, 26 M.S.P.R. 447 (1985); **McCann v. Navy**, 57 M.S.P.R. 288

(1993); and **Di Sera v. Army**, 71 M.S.P.R. 120 (1996).

- (c) If an employee chooses the negotiated grievance procedure and alleges discrimination, the employee may subsequently ask the Board to review the final decision under the negotiated grievance procedure. (5 CFR 1201.3(c)(3))
- **Explanation-In Armstrong v. International Trade Commission**, 74 M.S.P.R. 349 (1997), 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 (1994)). 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.
