

# Rules and Regulations

Federal Register

Vol. 65, No. 86

Wednesday, May 3, 2000

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 351

RIN 3206-A199

#### Reduction in Force Notices

**AGENCY:** Office of Personnel Management.

**ACTION:** Final regulation.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final rule to remove the regulations requiring 120 day reduction in force notices for certain Department of Defense employees because the implementing statute is expiring.

**EFFECTIVE DATE:** This regulation is effective on June 2, 2000.

**FOR FURTHER INFORMATION, CONTACT:** Jacqueline Yeatman on (202) 606-0960, FAX (202) 606-2329, TDD (202) 606-0023 or by email at jryeatma@opm.gov

**SUPPLEMENTARY INFORMATION:** The regulations in paragraph (a)(2) of section 351.801 of 5 CFR part 351 were published on June 8, 1993, implementing section 4433 of the National Defense Authorization Act for Fiscal Year 1993 (Pub. L. 102-484). The statute provided that Department of Defense employees who received reduction in force notices between January 20, 1993, and January 31, 1998, were entitled to a 120 day notice period if a significant number of employees were affected. Later, Public Law 103-337 was enacted. This law extended the requirement for a longer notice period until January 31, 2000. Because this section of the Public Law is expiring, OPM is deleting the regulatory material in 5 CFR part 351 that contains these requirements.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on

a substantial number of small entities because it affects only Federal employees.

#### Executive Order 12866, Regulatory Review

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

#### List of Subjects in 5 CFR Part 351

Administrative practice and procedure, Government Employees.

Office of Personnel Management.

**Janice R. Lachance,**

*Director.*

Accordingly, the Office of Personnel Management is amending 5 CFR part 351 as follows:

#### PART 351—REDUCTION IN FORCE

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

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

#### Subpart H—Notice to Employee

2. In § 351.801, paragraph (a)(1) is revised, paragraph (a)(2) is removed, paragraph (a)(3) is redesignated as paragraph (a)(2), and paragraph (b) is revised to read as follows:

##### § 351.801 Notice period.

(a)(1) Each competing employee selected for release from a competitive level under this part is entitled to a specific written notice at least 60 full days before the effective date of release.

(b) When a reduction in force is caused by circumstances not reasonably foreseeable, the Director of OPM, at the request of an agency head or designee, may approve a notice period of less than 60 days. The shortened notice period must cover at least 30 full days before the effective date of release. An agency request to OPM shall specify:

- (1) The reduction in force to which the request pertains;
- (2) The number of days by which the agency requests that the period be shortened;
- (3) The reasons for the request; and
- (4) Any other additional information that OPM may specify.

3. In § 351.805, paragraph (a) is revised to read as follows:

#### § 351.805 New notice required.

(a) An employee is entitled to a written notice of at least 60 full days if the agency decides to take an action more severe than first specified.

\* \* \* \* \*

[FR Doc. 00-10988 Filed 5-2-00; 8:45 am]

BILLING CODE 6325-01-P

## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1201

#### Practices and Procedures

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure with respect to the notice an agency must provide when it takes an appealable action against an employee who has both a right to appeal to the Board and a right to file a grievance under a grievance procedure. The amendment is intended to ensure that such an employee understands the consequences of making a choice between the MSPB appeal procedure and the grievance procedure. It also is intended to ensure that, where an employee may pursue both procedures (as in the case of preference eligible employees of the United States Postal Service), the employee understands that the Board's time limit for filing an appeal will not be modified or extended if the employee files a grievance. The amendment also clarifies that preference eligible employees of the United States Postal Service and other employees excluded from the coverage of the Federal Labor-Management Relations Statute may not seek Board review of a final decision on a grievance.

**EFFECTIVE DATE:** May 3, 2000.

**FOR FURTHER INFORMATION CONTACT:** Robert E. Taylor, Clerk of the Board, (202) 653-7200.

**SUPPLEMENTARY INFORMATION:** On November 1, 1999, the Board published a proposal to amend its rules of practice and procedure at 5 CFR 1201.21(d), regarding the notice an agency must provide when it takes an appealable action against an employee who has both a right to appeal to the Board and

a right to file a grievance under a grievance procedure, and 5 CFR 1201.154(d), regarding the procedures for seeking Board review of a final decision on a grievance (64 FR 58798). The proposed rule requested public comments and allowed 60 days, until January 3, 2000, for receipt of comments.

Comments were received from the Special Counsel, a Federal agency, a labor organization representing Postal Service employees, and a private practitioner who represents appellants before MSPB. The Special Counsel, the labor organization, and the practitioner all supported the proposed rule, and the Federal agency had no objection to it.

Both the Special Counsel and the practitioner suggested that the Board further amend the requirements for agency notices at 5 CFR 1201.21(d). The practitioner suggested that the Board require agencies to spell out the options for "other elections" to "make sure that each filing option and its preclusive effect is covered in the agency notice." The Special Counsel suggested that the Board require agencies to include notice of the right to file a prohibited personnel practice complaint with the Special Counsel and the requirement for making an election among a grievance, an appeal to MSPB, and a complaint to the Special Counsel.

Each of these suggestions would expand the proposed amendment to 5 CFR 1201.21(d) beyond what it was originally meant to do—require agencies to spell out the options available between the MSPB appeal procedure and any applicable grievance procedure, and the consequences of choosing one or the other. The proposed rule was directed at a problem with notices identified in Board cases involving Postal Service employees. The Board has not identified a pattern of cases where such problems occur with any regularity with other agencies or in situations other than where an appellant has a right to challenge an agency personnel action under both the MSPB appeal procedure and a grievance procedure.

In particular cases, statutory complaint procedures other than the MSPB appeal procedure also may be available, depending on the nature of the claims raised by the appellant. For example, an appellant who claims prohibited discrimination may be able to file a complaint under the regulations of the Equal Employment Opportunity Commission. An appellant who claims that the agency's action was the result of a prohibited personnel practice may be able to file a complaint with the Special Counsel. An appellant who

claims that the action was the result of an unfair labor practice may be able to pursue the matter before the Federal Labor Relations Authority.

Imposing a generally applicable all-inclusive notice requirement that would cover all of the possible situations that could occur would place a major burden on agencies to somehow anticipate all options for all claims that an employee might raise. It would also produce more complex notices that could prove extremely confusing to appellants and result in filings under one or more statutory procedures that do not apply to the appellant's particular case.

Therefore, the Board is amending 5 CFR 1201.21(d) as proposed, without change. The Federal agency asked if the Board could provide specific language for agencies to use in their notices. We believe that the regulations sufficiently spell out the requirements for agency notices and that further advice goes beyond our adjudicatory role.

The practitioner also suggested that the references to 5 U.S.C. 7121 and 7702 in 5 CFR 1201.154(d) be expanded to include explanations of what the statutes require and how they operate. While it is impractical for the Board to spell out in detail the grievance procedures set out in 5 U.S.C. 7121, the Board agrees that 5 CFR 1201.154(d) can be clarified. This subsection is amended in the final rule to specify that it applies where an appellant, other than an employee of the Postal Service or an employee otherwise excluded from the Federal Labor-Management Relations Statute, requests Board review of a final decision on a grievance and alleges prohibited discrimination before the Board. The amendment also includes a clarifying statement that a final decision on a grievance is usually the decision of an arbitrator. As to explaining the mixed case procedures of 5 U.S.C. 7702, this is accomplished by subpart E of part 1201, of which section 1201.154 is a part.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

**List of Subjects in 5 CFR Part 1201**

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

**PART 1201—PRACTICES AND PROCEDURES**

1. The authority citation for part 1201 continues to read as follows:

**Authority:** 5 U.S.C. 1204 and 7701, unless otherwise noted.

2. Amend § 1201.21 by revising paragraph (d) to read as follows:

**§ 1201.21 Notice of appeal rights.**

\* \* \* \* \*

(d) Notice of any right the employee has to file a grievance, including:

(1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).

3. Amend § 1201.154 by revising the introductory text of paragraph (d) to read as follows:

**§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.**

\* \* \* \* \*

(d) This paragraph does not apply to employees of the Postal Service or to other employees excluded from the coverage of the federal labor-management relations laws at chapter 71 of title 5, United States Code. If the appellant has filed a grievance with the agency under a negotiated grievance procedure, he may ask the Board to review the final decision on the grievance if he alleges before the Board that he is the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. The appellant must file the request with the Clerk of the Board, Merit Systems

Protection Board, Washington, DC 20419. The request for review must contain:

\* \* \* \* \*

Dated: April 26, 2000.

**Robert E. Taylor,**  
*Clerk of the Board.*

[FR Doc. 00-10959 Filed 5-2-00; 8:45 am]