

Bureau of Indian Affairs, Interior

§ 38.1

§ 36.77 Waivers and revisions.

(a) The tribal governing body (tribe), or the local school board (LSB), if so designated by the tribe, shall have the local authority to waive or revise in part or in whole, the standard(s) established in this part if the standard(s) are determined to be inappropriate or if they fail to take into account specific needs of the tribe's children. This provision includes both tribal and Bureau-operated schools. When the tribe or LSB, if designated by the tribe, waives or revises a standard, it shall submit the waiver or revision to the Assistant Secretary for approval within 60 days. Until this approval is obtained, the standard of this part or minimum state standards shall apply to the affected school(s).

(b) All revised standards shall be submitted to the Assistant Secretary in writing in accordance with the following procedure:

(1) Waivers and revisions shall be submitted by November 15 each school year to accompany the dormitory's annual standards compliance report.

(2) The section or part to be waived shall be specified, and the extent to which it is to be deviated from shall be described.

(3) A justification explaining why the alternative standard is determined necessary shall be included with the revised standard.

(4) Measurable objectives and the method of achieving the alternative standard along with the estimated cost of implementation shall be stated.

(c) The Assistant Secretary shall respond in writing within 45 days of receipt of the waiver or revision. The waiver shall be granted or the revision shall be accepted by the Assistant Secretary unless specifically rejected for good cause and in writing. The written rejection shall be sent to the affected tribe(s) and LSB. This rejection shall be final. The waiver is granted or revision is established automatically on the 46th day of receipt if no written response is provided by the Assistant Secretary.

(d) The Assistant Secretary shall assist the school board of an Indian-controlled contract school in the implementation of the standards established in this part if the school board requests

that these standards, in part or in whole, be implemented. At the request of an Indian-controlled contract school board, the Assistant Secretary shall provide alternative or modified standards to those established in this part to take into account the needs of the Indian children and Indian-controlled contract school.

[59 FR 61766, Dec. 1, 1994]

PART 38—EDUCATION PERSONNEL

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AUTHORITY: 25 U.S.C. 2011 and 2015, Secs. 1131 and 1135 of the Act of November 1, 1978, 92 Stat. 2322 and 2327; Secs. 511 and 512, Pub. L. 98-511; Secs. 8 and 9, Pub. L. 99-89; Title V of Pub. L. 100-297; Pub. L. 105-337.

SOURCE: 53 FR 37678, Sept. 27, 1988, unless otherwise noted.

§ 38.1 Scope.

(a) *Primary scope.* This part applies to all individuals appointed or converted to contract education positions as defined in § 38.3 in the Bureau of Indian Affairs after November 1, 1979. This part applies to elementary and secondary school positions and agency education positions.

(b) *Secondary scope.* Section 38.13 applies to employees with continuing tenure in both the competitive and excepted service who encumber education positions.

(c) *Other.* Where 25 CFR part 38 and a negotiated labor relations agreement conflict, the negotiated agreement will govern.

§ 38.2 Information collection.

(a) The information collection requirements contained in § 38.5 use Standard Form 171 for collection, and have been approved by OMB under 25 U.S.C. 2011 and 2015 and assigned approval number 3206–0012. The sponsoring agency for the Standard Form 171, is the Office of Personnel Management. The information is being collected to determine eligibility for employment. The information will be used to rate the qualifications of applicants for employment. Response is mandatory for employment.

(b) The information collection requirement for § 38.14, Voluntary Services has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076–0116. The information is being collected to determine an applicant's eligibility and selection for appropriate volunteer assignments. Response is voluntary.

§ 38.3 Definitions.

As used in this part, the term:

Agency means the current organizational unit of the Bureau, which provides direct services to the governing body or bodies and members of one or more specified Indian Tribes.

Agency school board as defined in section 1139(1), of Pub. L. 95–561, means a body, the members of which are appointed by the school boards of the schools located within such Agency. The number of such members shall be determined by the Director in consultation with the affected tribes. In Agencies serving a single school, the school board of that school shall function as the Agency School Board.

Agency Superintendent for Education (ASE) means the Bureau official in charge of education functions at an Agency Office and to whom the school supervisor(s) and other educators under the Agency's jurisdiction, report.

Area Education Programs Administrator (AEPA) means the Bureau official in charge of an Area Education Office that provides services to off-reservation residential schools, peripheral dormitories or on-reservation BIA funded schools that are not served by an Agency Superintendent for Education. The AEPA may also provide education pro-

gram services to tribes not having an Agency Superintendent for Education at their agency. The AEPA has no line authority over agency education programs that are under the jurisdiction of an Agency Superintendent for Education.

Assistant Secretary means the Assistant Secretary for Indian Affairs of the Department of the Interior.

Bureau means the Bureau of Indian Affairs of the Department of the Interior.

Consult, as used in this part and provided in section 1131(d)(1) (B) and (C) of Pub. L. 95–561, means providing pertinent information to and being available for discussion with the school board, giving the school board the opportunity to reply and giving due consideration to the school board's response, subject to appeal rights provided in § 38.7 (a), (b) and (c), and § 38.9(e)(3).

Director means the Deputy to the Assistant Secretary/Director—Indian Affairs (Indian Education Programs) in the Bureau.

Discharge means the separation of an employee during the term of the contract.

Education function means the administration and implementation of the Bureau's education programs and activities (including school operations).

Education position, means a position in the Bureau the duties and responsibilities of which:

(a) Are performed on a school term basis principally in a Bureau elementary and secondary school which involve:

(1) Classroom or other instruction or the supervision or direction of classroom or other instruction;

(2) Any activity (other than teaching) that requires academic credits in educational theory and practice equal to the academic credits in educational theory and practice required for a bachelor's degree in education from an accredited institution of higher education; or

(3) Any activity in or related to the field of education notwithstanding that academic credits in educational theory and practice are not a formal requirement for the conduct of such activity; or

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(4) Support services at or associated with the site of the school; or

(b) Are performed at the Agency level of the Bureau and involve the implementation of education-related Bureau programs. The position of Agency Superintendent for Education is excluded.

Educator, as defined in section 1131(n)(2) of Pub. L. 95-561 means an individual whose services are required, or who is employed, in an education position as defined in § 38.3.

Employment contract means a signed agreement executed by and between the Bureau and the individual employee hired or converted under this part, that specifies the position title, period of employment, and compensation attached thereto.

Involuntary change in position means the release of an employee from his/her position instigated by a change in program or other occurrence beyond the control of the employee.

Local school board, as used in this part and defined in section 1139(7) of Pub. L. 95-561, means a body chosen in accordance with the laws of the tribe to be served or, in the absence of such laws, the body elected by the parents of the Indian children attending a Bureau-operated school. In schools serving a substantial number of students from different tribes, the members shall be appointed by the governing bodies of the tribes affected and the number of such members shall be determined by the Director in consultation with the affected tribes.

Probationary period means the extension of the appointed process during which a person's character and ability to satisfactorily meet the requirements of the position are reviewed.

School board means an Agency school board or a local school board.

School supervisor means the Bureau official in charge of a Bureau school who reports to an Agency Superintendent for Education. In the case of an off-reservation residential school(s), and, in some cases, peripheral dormitories and on-reservation day schools, the school supervisor shall report to the Area Education Programs Administrator.

School term is that term which begins usually in the last summer or fall and

ends in the Spring. It may be interrupted by one or more vacations.

§ 38.4 Education positions.

(a) The Director shall establish the kinds of positions required to carry out the Bureau's education function. No position will be established or continued for which:

(1) Funds are not available; or

(2) There is not a clearly demonstrable need and intent for it to carry out an education function.

(b) Positions established for regular school operations will be restricted to school term or program duration. Particular care shall be taken to insure that year-long positions are not established unless they are clearly required and involve essential 12-month assignments.

§ 38.5 Qualifications for educators.

(a) *Qualifications related to positions.* Job qualification requirements shall be at least equivalent to those established by the appropriate licensing and certification authorities of the State in which the position is located.

(b) *Qualifications related to individuals.* An applicant for an education position must establish that he/she meets the requirements of the position by submitting an application and a college transcript, as appropriate, to the local school supervisor, Agency Superintendent for Education (ASE), Area Education Programs Administrator (AEPA), or Director and appearing for an interview if requested by the official involved. The applicant's education and experience will be subject to verification by the ASE or the AEPA. Employees who falsify experience and employment history may be subject to disciplinary action or discharge from the position to which he/she is appointed.

(1) School boards may waive formal education and State certification requirements for tribal members who are hired to teach tribal culture and language.

(2) Tribal members appointed under this waiver may not have their basic pay rate set higher than the rate paid to qualified educators in teaching positions at that school.

(c) *Identification of qualified individuals.* The Director shall require each ASE, AEPA, and other appropriate local official in the education program organization to maintain lists of qualified and interviewed applicants for each of the kinds of established positions. Applications on file shall be purged annually. Applicants whose qualifications are established and who indicate an interest in working in specified locations will be included on those local applicant lists. The Director shall maintain a national list of qualified applicants for each of the kinds of positions established. Applicants whose qualifications are established and who either do not indicate an interest in a specific location or indicate an interest in working in any location will be entered on the national list. The national list is a secondary source of applicants.

(d) *Special recruitment and training for Indian educators.* The Director shall review annually the Bureau's "Recruitment of Indian Educators Program" and update as necessary. The Director will define individual training plans for trainees and subsequent promotional opportunities for advancement based upon satisfactory job performance in this program.

§ 38.6 Basic compensation for educators and education positions.

(a) *Schedule of basic compensation rates.* The Director shall establish a schedule for each pay level specified in part 62 of the Bureau of Indian Affairs Manual (BIAM). The schedule will be revised at the same time as and be consistent with rates in effect under the General Schedule or Federal Wage System for individuals with comparable qualifications, and holding comparable positions.

(b) *Range of pay rates for positions within pay levels.* The range of basic compensation rates for positions assigned to each pay level will be consistent with the General Schedule or Federal Wage System rates that would otherwise be applicable if the position were classified under chapter 51 or subchapter IV of chapter 53 of title 5 of the United States Code (U.S.C.). The maximum pay shall not exceed step 10 of

the comparable General Schedule position by more than ten percent.

(c) *Schedule of compensation rates for teachers and counselors.* The basic compensation for teachers and counselors, including dormitory counselors and homeliving counselors, shall be determined in accordance with rates set by the Defense Department Overseas Teachers Pay and Personnel Practices Act. The schedule used shall be the current published schedule for the school year beginning on or after July 1 of each year.

(d) *Adjusting employee basic compensation rates.* (1) Except for employees occupying positions of teachers and counselors, including dormitory counselors and homeliving counselors, adjustments in an employee's basic compensation made in connection with each contract renewal will be based on the following:

(i) Contract renewal incentive—one pay increment for each renewal, not to exceed four increments, unless the educator is covered by a negotiated labor union agreement.

(ii) Performance—employees whose performance is rated "above satisfactory"; one pay increment; employees whose performance is rated "outstanding"; two pay increments.

(2) Pay increments based on education may be awarded as outlined in 62 BIAM.

(e) *Special additions to basic compensation.* The Director is authorized to establish the following special additions to rates of basic compensation:

(1) The Director may authorize payment of a staffing differential not exceeding 25 per centum of the rate of basic compensation based on a formally-documented request by an ASE or AEPA. Such a staffing differential shall only be authorized in writing when the Director determines that:

(i) It is warranted by the geographic isolation of the work site or other unusually difficult environmental working or living conditions and/or,

(ii) It is necessary as a recruitment or retention incentive. This staffing differential is to be computed on the basic schedule rate before any other additions are computed.

(2) Special rates may be established for recruitment and retention applicable only to a specific position or to specific types of positions in specific locations based on a formally documented request by an ASE or AEPA and submitted to the Director for approval.

(f) *Payment of compensation to educators.* This section applies to those individuals employed under the provisions of section 1131(m) of Pub. L. 95-561 or title 5 U.S.C.

(1) *Pay periods.* Educators shall be paid on the basis of a biweekly pay period during the term of the contract. Chapter 55 of title 5 U.S.C. applies to the administration of pay for educators, except that section 1131(m) of Pub. L. 95-561 provides that 5 U.S.C. 5533 does not apply with respect to the receipt of pay by educators during summer recess under certain circumstances.

(2) *Pay for contract educators.* When an educator is appointed, payment under the contract is to begin as of the effective date of the contract. If an educator resigns or is discharged before the expiration of the term of the contract, pay ceases as of the date of resignation or discharge.

(3) *Prorating of pay.* Within 30 days prior to the beginning of the academic school term, each educator must elect whether to have the annual contractual rate or basic pay prorated over the contractual academic school term, or to have the basic pay prorated over a 12-month period.

(i) Each educator may change such election once during the academic school term, provided notice is given two weeks prior to the end of the fifth month after the beginning of the academic school term.

(ii) An educator who elects a 12-month basis of prorated pay may further elect to be paid in one lump sum at the end of the academic school term for the then remaining amount of rate of basic pay otherwise due, provided notice is given four weeks prior to the end of the academic school term.

(iii) No educator shall suffer a loss of pay or benefits because of elections made under this section.

(4) *Stipends for extracurricular activities.* An employee, if assigned to sponsor an approved extracurricular activ-

ity, may elect annually at the beginning of the contract to be paid a stipend in lieu of overtime premium pay or compensatory time when the employee performs additional activities to provide services to students or otherwise support the school's academic and social programs.

(i) The Director is authorized to establish a schedule of stipends for each Bureau Area, taking into consideration types of activities to be compensated and payments provided by public school districts in or near the Area.

(ii) The stipend shall be a supplement to the employee's base pay and is not a part of salary for retirement computation purposes.

(iii) The employee shall be paid the stipend in equal payments over the period of the extracurricular activity.

[53 FR 37678, Sept. 27, 1988, as amended at 54 FR 46374, Nov. 3, 1989]

§ 38.7 Appointment of educators.

(a) *Local school employees.* Local Bureau school employees shall be appointed only by the school supervisor. Before the local school employee is employed, the school board shall be consulted. An individual's appointment may be finalized only upon receipt of a formal written determination certified by the local school board under such uniform procedures as it may adopt. Written determination by the school board should be received within a reasonable period, but not to exceed 30 days. Failure of the school board to act within this period shall have the effect of approving the proposed appointment. The local school board shall use the same written procedure to disapprove an appointment. The school supervisor may appeal to the ASE, or, where appropriate, to the AEPA, any determination by the local school board concerning an individual's appointment. A written statement of appeal describing the action and the reasons the supervisor believes such action should be overturned must be filed within 10 days of receipt of the action from the local school board. A copy of such statement shall be submitted to the school board and the board shall be afforded an opportunity to respond, not to exceed 10 calendar days, in writing, to the appeal. After reviewing such

written appeal and response, the ASE or AEPA may, for cause, overturn the action of the local school board. The ASE or AEPA must transmit the determination of the appeal (in the form of a written opinion) to the board and to the supervisor identifying the reasons for overturning the action within 10 calendar days. Failure to act within the 10 calendar day period shall have the effect of approving the local school board's determination.

(b) *School supervisors.* School supervisors may be appointed only by the ASE, except the AEPA shall appoint school supervisors for off-reservation boarding schools and those few other schools supervised by the AEPA. The school board shall be consulted before the school supervisor is employed. The appointment may be finalized upon receipt of a formal written determination certified by the school board under any uniform procedures as it may adopt. Written determination by the school board shall be received within a reasonable period, but not to exceed 30 days. Failure of the school board to act within this period shall have the effect of approving the proposed appointment. The school board shall use the same procedure to disapprove an appointment. Within 20 calendar days of receipt of any determination by the school board concerning an individual's appointment, the ASE or AEPA, as appropriate, may appeal to the Director by filing a written statement describing the determination and the reasons the supervisor believes the determination should be overturned. A copy of the statement shall be submitted to the local school board and the board shall be afforded an opportunity to respond, within 10 calendar days, in writing, to such an appeal. The Director may reverse the determination for cause set out in writing to the school board. Within 20 calendar days of the school board's response, the Director shall transmit the determination of the appeal (in the form of a written opinion) to the board and to the ASE or AEPA identifying the reasons for overturning the determination. Failure by the Director to act within the 20 calendar day period shall have the effect of approving the school board's determination.

(c) *Agency office education program employees.* Appointments to Agency office education positions may be made only by the ASE. The Agency school board shall be consulted before the agency education employee is employed, and the appointment may be finalized upon receipt of a formal, written determination certified by the Agency school board under any uniform procedures as it may adopt. Written determination by the school board shall be received within a reasonable period, but not to exceed 30 days. Failure of the school board to act within this period shall have the effect of approving the proposed appointment. The Agency school board shall use the same written procedure to disapprove an appointment. Within 20 calendar days of receipt of any determination by the school board concerning an individual's appointment, the ASE may appeal to the Director by filing a written statement describing the determination and the reasons the supervisor believes the determination should be overturned. A copy of the statement shall be submitted to the Agency school board and the board shall be afforded an opportunity to respond, within 10 calendar days, in writing, to such appeal. After reviewing the written appeal and response, the Director may, for cause, overturn the determination of the Agency school board. Within 20 days of the board's response, the Director shall transmit the determination of the appeal (in the form of a written opinion) to the board and to the ASE identifying the reasons for overturning the determination. Failure of the Director to act within the 20 calendar day period shall have the effect of approving the school's board's determination.

(d) *Employment contracts.* The Bureau shall issue employment contracts each year for individuals employed in contract education positions at the Agency or school levels.

(e) *Absence of local school boards.* Where a local school board has not been established in accordance with section 1139(7) Pub. L. 95-561 with respect to a Bureau school, or where a school board is not operational, and the local school board is required to be given a notice or required to be consulted by statute or these regulations,

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the official involved shall notify or consult with the Agency school board serving the tribe(s) to which the parents of the Indian children attending that school belong, or, in that absence, the tribal organization(s) of the tribe(s) involved.

(f) *Provisional contracts.* Provisional certification or other limited certificates from the State are not considered full certification and only a provisional contract may be issued. There may be circumstances when no individual who has met the full certification or experience requirements is available for a professional position or when a status quo employee who does not meet full certification or experience requirements desires to convert to contract. When this situation exists, a provisional contract may be issued in accordance with the following:

(1) The contract will be made only:

(i) After it is determined that an individual already meeting certification or experience requirements is not available; or

(ii) For conversion of a status quo employee who does not yet meet all established position requirements.

(2) Consultation with the appropriate school board is required prior to the contract.

(3) The contract may be of 12-month or school-term duration.

(4) The employee will be required to make satisfactory progress toward meeting full qualification requirements.

(5) If the employee fails to meet the requirements established under § 38.7(f)(4), the contract will be terminated. Such termination cannot be grieved or appealed.

(g) *Conditional appointment.* As provided in section 1131(d)(4), Pub. L. 95-561, if an individual who has applied at both the national and local levels is appointed from a local list of applicants, the appointment shall be conditional for 90 days. During that period, the individual's application and background shall be examined to determine if there is a more qualified individual for the position. Removal during this period is not subject to discharge, hearing or grievance procedures.

(h) *Short-term contracts.* (1) There may be circumstances where immediate ac-

tion is necessary and it is impossible to consult with the local school board. When this situation exists short-term contracts may be made by the school supervisor in accordance with the following:

(i) The length of the contract will not exceed 60 days, or the next regularly scheduled school board meeting, whichever comes first.

(ii) If the board meets and does not take action on the individual in question, the short-term contract may be extended for the duration of the school year.

(iii) It shall be the responsibility of the school supervisor to fully inform the local school board of all such short-term contracts. Failure to do so may be cited as reason to discharge the school supervisor if so requested by the board.

(2) The local school board may authorize the school supervisor to make an emergency short-term contract to classroom, dormitory and other positions directly related to the health and safety of students. When this situation exists, short-term contracts may be made in accordance with the following:

(i) If local and agency lists of qualified applicants are exhausted, short-term contracts may be made without regard to qualifications for the position;

(ii) The pay level will be based on the qualifications of the individual employed rather than the requirements of the position, if the qualifications of the individual are lower than required;

(iii) The short-term contract may not exceed the school term and may not be renewed or extended;

(iv) Every 60 days the school supervisor will determine if qualified individuals have been placed on the local or agency lists. If a qualified individual on the list accepts employment, the school supervisor must terminate the emergency appointment at the time the qualified individual is appointed.

(i) *Temporary contracts.* There may be circumstances where a specific position is needed for a period of one year or less. Under these conditions a position may be advertised as a temporary position and be filled under a temporary contract. Such contract requires the same school board approval as a school

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year contract. If required for the completion of the activities specified in the original announcement, the position, may with school board approval be extended for up to one additional year. Temporary contracts may be terminated at any time and this action is not subject to approval or grievance procedures.

(j) *Waiver of Indian preference.* Notwithstanding any provision of the Indian preference laws, such laws shall not apply in the case of any personnel action within the purview of this section respecting an application or employee not entitled to Indian preference if each tribal organization concerned grants, in writing, a waiver of the application of such laws with respect to such personnel action, where such a waiver is in writing deemed to be a necessity by the tribal organization, except that this shall in no way relieve the Bureau of its responsibility to issue timely and adequate announcements and advertisements concerning any such personnel action if it is intended to fill a vacancy (no matter how such vacancy is created). When a waiver is granted, it shall apply only to that particular position and as long as the employee remains in that position.

(k) *Prohibited reappointment.* An educator who voluntarily terminates employment before the end of the school term may not be appointed to another Bureau education position before the beginning of the following school term. An educator will not be deemed to have voluntarily terminated employment if transferred elsewhere with the consent of the local school or Agency boards.

(l) *Contract renewals.* The appropriate school board shall be notified in writing by the school supervisor and/or ASE or AEPA not less than 90 days before the end of the school term whether or not an individual's contract is recommended for renewal.

(1) If the school board disagrees with the school supervisor's or ASE's or AEPA's recommendations, the board will submit a formal, written certification of its determinations to the school supervisor or ASE or AEPA within 25 days. If the board's determinations are not received within the 25 days, the school supervisor or ASE or AEPA shall issue the 60 day noti-

cation of renewal or nonrenewal to the individual as required under § 38.8.

(2) When the school board submits its determination within the 25 days and determines that a contract will be renewed, or nonrenewed, the appropriate official shall issue the required renewal notice, or nonrenewal, or appeal the determination of the school board to the appropriate official who will make a determination in accordance with the appeal procedure is § 38.7(a) of this part. After the probationary period, if the determination is that the contract will not be renewed, the procedures specified in § 38.8 shall apply.

§ 38.8 Nonrenewal of contract.

Where the determination is made that an employee's contract shall not be renewed for the following year, the following procedure will apply to those employees who have completed three full continuous school terms of service under consecutive contract appointments and satisfactory performance in the same or comparable education positions.

(a) The employee will be given a written notice of the action and the reasons thereof not less than 60 days before the end of the school term.

(b) The employee will be given 10 calendar days to request an informal hearing before the appropriate official or body. Upon request, the employee may be given official time, not to exceed eight hours, to prepare a written response to the reason(s).

(c) If so requested, an informal hearing shall be held within 30 calendar days of receipt of the request.

(d) The appropriate official or body will render a written determination within seven calendar days after the informal hearing.

(e) The employee has a right to request an administrative review by the ASE or AEPA of the determination within 10 calendar days of that determination. The ASE or AEPA then has 20 calendar days to render a final decision. Where the employee is the supervisor of the school or an agency education employee, any appeal of the ASE or AEPA would be addressed to the Director for a decision. If the Director or ASE's or AEPA's decision overturns the appropriate official or

bodies determination, the appropriate official or body will be notified of the reasons in writing. Failure by the Director or ASE or AEPA to act within the 20 days will sustain the determination. This completes the administrative appeal process.

(f) Failure of any of the parties to meet the requirements of the above procedures will serve to negate the particular action sought by the negligent party.

(g) Those employees with less than three full continuous school terms of consecutive contract appointments are serving a probationary period. Nonrenewal of his/her contract will be considered a continuation of the examining process. This action cannot be appealed or grieved.

(h) Independent of the procedures outlined in this section, the school supervisor or ASE or AEPA, for applicable positions, shall be required to submit to the ASE or AEPA or appropriate higher authority all nonrenewal actions. Within 60 days, the ASE or AEPA shall review the nonrenewal actions and may overturn the determination of nonrenewal. In the event that the ASE or AEPA makes a decision to overturn the school board determination, the ASE or AEPA shall notify the school board in writing of his/her reasons for doing so.

(i) No more than the substantial standard of evidence shall be required to sustain the nonrenewal.

(j) A procedural error shall not be grounds for overturning a determination of nonrenewal unless the employee shows harmful error in the application of the Agency's procedures in arriving at such a decision. For purposes of this section, "harmful error" means error by the Agency in the application of its procedures which, in the absence or cure of the error, might have caused the Agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole, the error was harmful. i.e., caused substantial harm or prejudice to his/her rights.

(k) Nonrenewal of a contract is not discharge and will not follow the discharge procedures.

§ 38.9 Discharge of educators.

(a) *Discharge for cause.* Educators covered under the provision of this section are excluded from coverage under 5 U.S.C. 7511 and 4303. In order to provide due process for educators, the Director shall publish in 62 BIAM representative conditions that could result in the discharge of educators for cause and procedures to be followed in discharge cases.

(b) *Discharge for inadequate performance.* Action to remove educators for inadequate performance will be taken for failure to meet performance standards established under 5 U.S.C. 4302. Performance standards for all educators will include, among others, lack of student achievement. Willful failure to exercise properly assigned supervisory responsibilities by supervisors shall also be cause for discharge.

(c) *Other discharge.* The Director shall publish in 62 BIAM a description of the budgetary and programmatic conditions that may result in the discharge of educators for other than cause during the school term. The individual's personnel record will clearly reflect that the action taken is based upon budgetary or programmatic restraints and is not a reflection on the employee's performance.

(d) *Procedures for discharge for cause.* The Director shall publish in 62 BIAM the procedural steps to be followed by school supervisors, ASE's, and AEPA's in discharge for cause cases. These procedures shall provide (among other things) for the following:

(1) The educator to be discharged shall receive a written notice of the proposal, specifying the causes or complaints upon which the proposal is based, not less than 30 calendar days before the discharge. However, this shall not prohibit the exclusion of the individual from the education facility in cases where exclusion is required for the safety of the students or the orderly operation of the facility.

(2) A reasonable time, but not less than 10 calendar days, will be allotted for the individual to make written and/or oral responses to the charge.

(3) An opportunity will be afforded the individual to review the material relied upon to support the charge.

(4) Official time, not to exceed eight hours, will be provided to the individual to prepare a response to the charge.

(5) The educator may elect to have a representative and shall furnish the identity of any representative to the ASE or AEPA. The ASE or AEPA may disallow, as an employee representative, any individual whose activities as a representative would cause a conflict of interest or position, or an employee whose release from his or her official position would give rise to unreasonable costs to the Government, or when priority work assignment precludes his or her release from official duties. The terms of any applicable collective bargaining agreement and 5 U.S.C. 7114(a)(5) shall govern representation of employees in an exclusive bargaining unit.

(6) The individual has a right to a final decision made by the appropriate level of supervision.

(7) The individual has a right to appeal the final decision and have the merits of the case reviewed by a Departmental official not previously involved in the case. This right includes entitlement to a hearing upon request under procedures in accordance with the requirements of due process under section 1131(e)(1)(B) of Pub. L. 95-561.

(e) *School board action.* (1) The appropriate school board shall be notified as soon as possible, but in no case later than 10 calendar days from the date of issue of the notice of intent to discharge.

(2) The appropriate school board, under any uniform procedure as it may adopt, may issue a formal written certification to the school supervisor, ASE, or AEPA either approving or disapproving the discharge before the expiration of the notice period and before actual discharge. Failure to respond before the expiration of the notice period will have the effect of approving the discharge.

(3) The school supervisor initiating a discharge action may appeal the board's determination to the ASE or AEPA within 10 calendar days of receipt of the board's notice. The ASE or AEPA initiating a discharge may appeal the board's determination to the Director within 10 calendar days of re-

ceipt of the board's notice. Within 20 calendar days following the receipt of an appeal, the reviewing official may, for good cause, reverse the school board's determination by a notice in writing to the board. Failure to act within 20 calendar days shall have the effect of approving the board's determination.

(f) *School board recommendations for discharge.* School boards may recommend in writing to school supervisors, ASE's, or AEPA's, and the Director that individuals in the education program be discharged. These written recommendations may follow any procedures formally established internally by the school board or tribal government. However, the written recommendations must contain specific causes or complaints that may be verified or established by investigation of factual situations. The official receiving a board recommendation for discharge of an individual shall acknowledge the recommendation in writing within 10 calendar days of receipt and proceed with a fact finding investigation. The official who finally disposes of the recommendation shall notify the school board of the disposition in writing within 60 calendar days of initiation of the fact finding investigation.

§ 38.10 Conditions of employment of educators.

(a) *Supervision not delegated to school boards.* School boards may not direct, control, or interrupt the day-to-day activities of BIA employees carrying out Bureau-operated education programs.

(b) *Employee handbook.* Employee handbook and recruiting guides shall be developed by each local school or agency to provide specific information regarding:

(1) The working and hiring conditions for various tribal jurisdictions and Bureau locations;

(2) The need for all education personnel to adapt to local situations; and

(3) The requirement of all education personnel to comply with and support duly adopted school board policies, including those relating to tribal culture or language.

(c) *Contract renewal notification.* Employees will be notified 60 calendar

days before the end of the school term of the intent to renew or not renew their contract. If an individual's contract is to be renewed, the individual must agree in writing to serve for the next school term. This agreement must be received within 14 calendar days of the date of the notice in order to complete the contract renewal. If this agreement is not received by the fourteenth day, the employee has voluntarily forfeited his or her right to continuing employment. If an individual agrees to serve for the next school term and fails to report for duty at the beginning of the next school term, the contract will be terminated and the individual's future appointment will be subject to the restriction in §38.7(k) of this part.

(d) *Dual compensation.* An employee accepting a renewal of a school term contract may be appointed to another Federal position during the school recess period without regard to the dual compensation regulations in 5 U.S.C. 5533.

(e) *Discrimination complaints.* Equal Employment Opportunity (EEO) procedures established under 29 CFR part 1613 are applicable to contract employees under this part. It is the policy of the BIA that all employees and applicants for employment shall be treated equally when considered for employment or benefits of employment, regardless of race, color, sex, religion, national origin, age, or mental or physical health (handicap), within the parameters of Indian preference.

(f) *Grievance procedures.* The Director shall publish in 62 BIAM procedures for the rapid and equitable resolution of grievances. In locations and for positions covered by an exclusive bargaining agreement, the negotiated grievance procedure is the exclusive avenue of redress for all matters within the scope of the negotiated grievance procedure.

(g) *Performance evaluation.* The minimum number of times a supervisor shall meet with an employee to discuss performance and suggest improvements shall be once every three months for the educator's first year at a school or Agency, and twice annually thereafter during the school term.

§38.11 Length of the regular school term.

The length of the regular school term shall be at least 180 student instructional days, unless a waiver has been granted under the provisions of 25 CFR 36.61.

§38.12 Leave system for education personnel.

(a) *Full-time school-term employees.* Employees on a full-time school-term contract are authorized the following types of leave:

(1) *Personal leave.* A school-term employee will receive 28 hours of personal leave to be used for personal reasons and 12 hours of emergency leave. This leave only accrues provided the length of the contract exceeds 24 weeks.

(i) The school-term employee will request the use of this leave in advance when it is for personal use or personal business (e.g., going to the bank, etc.). When this leave is requested for emergency purposes (e.g., death in immediate family), it will be requested immediately after the emergency is known, if possible, by the employee and before leave is taken or as soon as the supervisor reports to work on the official work day.

(ii) Final approval rests with the supervisor. This leave shall be taken only during the school term. No compensation for or carryover of unused leave is authorized.

(2) *Sick leave.* Sick leave is an absence approved by the supervisor for incapacity from duty due to injury or illness, not related to or incurred on-the-job and not covered by the Federal Employee's Compensation Act Regulations. Medical and dental appointments may be included under this part. However, whenever possible, medical and dental appointments should be scheduled after instructional time.

(i) Sick leave shall accrue at the rate of four hours each biweekly pay period in pay status during the term of the contract; and no precredit or advance of sick leave is authorized.

(ii) Accumulated sick leave at the time of separation will be recredited to an educator who is reemployed within three years of separation.

(3) *School vacation.* School term employees may receive up to 136 hours of

school vacation time for use when school is not in session. School vacations are scheduled on the annual school calendar during the instructional year and may not be scheduled before the first day of student instruction or after the last day of student instruction. School vacations are not a right of the employee and cannot be paid for or carried over if the employee is required to work during the school vacation time or if the program will not permit school term employees to take such vacation time.

(b) *Leave for full-time, year-long employees.* Employees who are on a full-time, year-long contract are authorized the following types of leave:

(1) *Vacation leave.* Absence approved in advance by the supervisor for rest and relaxation or other personal reasons is authorized on a per year basis of Federal Government service as follows: years 1 and 2 of employment—120 hours; years 3-5 of employment—160 hours; 6 or more years—200 hours. The supervisor will determine when vacation leave may be used. Vacation leave is to be scheduled and used to the greatest extent possible during periods when school is not in session and the students are not in the dormitories. Vacation leave is credited to an employee on the day following his or her date of employment, provided the length of the contract exceeds 24 weeks. An employee may carry into succeeding years up to 200 hours of vacation leave. Leave unused at the time of separation is forfeited.

(2) *Sick leave.* Sick leave accumulation and use is authorized on the same basis as for school term employees under § 38.12(a)(2) of this part.

(c) *Leave for part-time year-long employees.* Employees who are on part-time year-long contracts exceeding 20 hours per week are authorized the following types of leave:

(1) *Vacation leave.* Absence approved in advance by the supervisor for rest and relaxation or other personal reasons is authorized on a per year basis of Federal Government service as follows: years 1 and 2 of employment—64 hours; years 3-5 of employment—80 hours; 6 or more years—104 hours. The supervisor shall determine when vacation leave may be used. Vacation leave

is to be scheduled and used to the greatest extent possible during periods when school is not in session and the students are not in the dormitories. Vacation leave is credited to an employee on the day following his or her date of employment provided the length of the contract exceeds 24 weeks and may not be accumulated in excess of 104 hours from year to year. An employee may carry over up to 104 hours from one contract year to the next. Leave unused at the time of separation is forfeited.

(2) *Sick leave.* Sick leave is accumulated on the basis of three hours each biweekly pay period in pay status; no precredit or advance of sick leave is authorized. Accumulated sick leave at the time of separation will be recredited to an educator who is reemployed within three years of separation.

(d) *Leave for school term employees on a part-time work schedule in excess of 20 hours per week.* (1) Employees on a part-time work schedule in excess of 20 hours per week may receive a maximum of 102 hours of school vacation time; 20 hours of personal/emergency leave; and 63 hours of sick leave accrued at three hours per pay period for the first 21 pay periods of their contracts. Personal/emergency leave only accrues provided the length of the contract exceeds 24 weeks.

(2) The part-time employee will request the use of this leave in writing in advance when it is for personal use or personal business (e.g., going to the bank, etc.). When this leave is requested for emergency purposes (e.g., death in immediate family), it will be requested immediately after the emergency is known, if possible, by the employee and before leave is taken or as soon as the supervisor reports to work on the official work day.

(3) Final approval rests with the supervisor. This leave shall be taken only during the school year. No compensation for or carryover of unused leave is authorized.

(4) *Sick leave.* Sick leave is an absence approved by the supervisor for incapacity from duty due to injury or illness, not related to or incurred on-the-job and not covered by the Federal Employee's Compensation Act Regulations. Medical and dental appointments

may be included under this part. However, whenever possible, medical and dental appointments should be scheduled after instructional time.

(i) Sick leave shall accrue at the rate of three hours each biweekly pay period in pay status for the first 21 pay periods of their contract; no precredit or advance for sick leave is authorized.

(ii) Accumulated sick leave at the time of separation will be recredited to an educator who is reemployed within three years of separation.

(5) *School vacation time.* Part-time employees may receive up to 102 hours of school vacation time for use when school is not in session. Approval for the use of this time will be administratively determined by the school supervisor, ASE or AEPA, and this time may not be scheduled before the start of school or after the end of school.

(i) All school vacation time for part-time employees will be approved at the convenience of the program and not as a right of the employee.

(ii) Vacation time cannot be paid for or carried over for a part-time employee if the employee is required to work during the school vacation time or if the program will not permit part-time employees to take such vacation time.

(e) *Accountable absences for all contract employees.* The following are considered accountable absences:

(1) *Approved absence.* If prescheduled and approved by the school supervisor, ASE or AEPA, as appropriate, an employee may be on leave without pay.

(2) *Absence without leave.* Any absence is not prescheduled or approved in advance or excused by the supervisor is considered absence without leave.

(3) *Court and military leave.* Employees are entitled to paid absence for jury or witness service and military duty as a member of the National Guard or Reserve under the same terms or conditions as outlined in sections 6322 and 6323 of title 5 U.S.C., and corresponding provisions of the Federal Personnel Manual, when the absence occurs during the regular contract period. Employees may be requested to schedule their military leave at times other than when school is in session.

(4) *Administrative leave.* Administrative leave is an excused absence from

duty administratively authorized without loss of pay or without charge to leave. This leave is not a substitute for other paid or unpaid leave categories. Administrative leave usually is authorized on an individual basis except when a school is closed or a group of employees are excused from work for a particular purpose. The school supervisor, ASE or AEPA will grant administrative leave. A school closing must be approved by the ASE or AEPA.

(f) Educators serving with contracts with work weeks of 20 hours a week or less are not eligible for any type of paid leave.

(g) For school term educators, no paid leave is earned nor may accumulated leave be used during any period of employment with the Bureau between school terms.

(h) Employees issued contracts for intermittent work are not eligible for any type of paid leave.

(i) *Leave transferred in.* Annual leave credited to an employee's accrued leave balance immediately before conversion to a contract education position or appointment under this part will be carried over and made available to the employee. Sick leave credited to an employee's accrued sick leave balance immediately before conversion to a contract education position or appointment under this part shall be credited to the employee's sick leave account under the system in §38.12(a)(2) and (b)(2).

§38.13 Status quo employees in education positions.

(a) *Status quo employees.* Individuals who were Bureau employees on October 31, 1979, with an appointment in either the competitive or excepted service without time limitation, and who are serving in an education position, shall be continued in their positions under the terms and conditions of that appointment with no change in their status or positions. Such employees are entitled to receive any changes in compensation attached to the position. Although such employees occupy "education positions" as defined in this part, the terms and conditions of their appointment, status, and entitlements are determined by competitive service

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regulations and procedures. Under applicable procedures, these employees are eligible for consideration for movement to other positions that are defined as “contract education” positions. Such movement shall change the terms and conditions of their appointment to the terms and conditions of employment established under this part.

(b) If the tribe or school board waives the Indian preference law, the employee loses the early-out retirement eligibility under Pub. L. 96-135, “early-out for non-Indians,” if they are entitled to the early-out retirement. A memorandum for the record on BIA letterhead shall be signed by the employee and placed on the permanent side of his/her Official Personnel Folder, along with the tribal resolution, if the tribe/school board has waived the Indian preference law to employ the non-Indian.”

(c) *Conversion of status quo employees to contract positions.* Status quo employees may request in writing to the school supervisor, ASE or AEPA, as applicable, that their position be converted to contract. The appropriate school board will be consulted and a determination made by such school board whether such individual should be converted to a contract employee.

(1) Written determination by the school board should be received within a reasonable period, but not to exceed 30 days from receipt of the request. Failure of the school board to act within this period shall have the effect of disapproving the proposed conversion.

(2) With school board approval, an involuntary change in position shall not affect the current status of status quo education employees.

§ 38.14 Voluntary services.

(a) *Scope.* An ASE or AEPA may, subject to the approval of the local school board concerned, accept voluntary services on behalf of Bureau schools from the private sector, including individuals, groups, or students. Voluntary service shall be for all non-hazardous activities where public services, special projects, or school operations are improved and enhanced. Volunteer service is limited to personal services received without compensation (salary or

wages) by the Bureau from individuals, groups, and students. Nothing in this section shall be construed to require Federal employees to work without compensation or to allow the use of volunteer services to displace or replace Federal employees.

(b) *Volunteer service agreement.* An agreement is a written document, jointly completed by the volunteer, the Bureau school supervisor, and the school board, that outlines the responsibilities of each. In the case of students receiving credit for their work (i.e., student teaching) from an education institution, the agreement will be jointly completed by the student, a representative of the institution, and the Bureau school supervisor. In the case of volunteer groups, the agreement shall be signed by an official of the volunteering organization, the Bureau school supervisor, and the school board and a list of signatures and emergency telephone numbers of all participants shall be attached.

(c) *Eligibility.* Although no minimum age requirement exists for volunteers, schools shall comply with appropriate Federal and State laws and standards on using the services of minors. All volunteers under the age of 18 must obtain written permission from their parents or guardians to perform volunteer activities.

(d) *Status.* Volunteers participating under this part are not considered Federal employees for any purpose other than:

(1) Title 5 U.S.C. chapter 81, dealing with compensation for injuries sustained during the performance of work assignments.

(2) Federal tort claims provisions published in 28 U.S.C. chapter 171.

(3) Department of the Interior Regulations Governing Responsibilities and Conduct.

(e) *Travel and other expenses.* The decision to reimburse travel and other incidental expenses, as well as the amount of reimbursement, shall be made by the school supervisor, ASE, AEPA, and the respective school board. Payment is made in the same manner as for regular employees. Payment of travel and per diem expenses to a volunteer on a particular assignment must be supported by a specific travel

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authorization and cannot exceed the cost of employing a temporary employee of comparable qualification at the school for which a travel authorization is considered.

(f) *Annual report.* School supervisors shall submit reports on volunteers to the ASE or AEPA by October 31 of each year for the preceding year.

§ 38.15 Southwestern Indian Polytechnic Institute.

(a) The Southwestern Indian Polytechnic Institute has an independent personnel system established under Public Law 105-337, the Administrative Systems Act of 1998, 112 Stat. 3171. The details of this system are in the Indian Affairs Manual (IAM) at Part 20. This manual system may be found in Bureau of Indian Affairs Regional and Agency Offices, Education Line Offices, and the Central Office in Washington, DC.

(b) The personnel system is in the accepted service and addresses the areas of classification, staffing, pay, performance, discipline, and separation. Other areas of personnel such as leave, retirement, life insurance, health benefits, thrift savings, etc., remain under the jurisdiction of the Office of Personnel Management.

[65 FR 58183, Sept. 27, 2000]

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