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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 351

RIN 3206-AG77

#### Reduction in Force Retreat Right

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rulemaking.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations that clarify employees' "Retreat" rights. These final regulations also clarify the content of specific reduction in force notices.

**DATES:** These regulations are effective July 15, 1998.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

On August 25, 1995, OPM published interim retention regulations (60 FR 44254) that clarified the procedures agencies use to determine employees' rights to "retreat" to positions during a reduction in force. These regulations also clarified what information agencies must provide employees who receive a specific notice of reduction in force. Interested parties could provide OPM with written comments during the period covering 60 days from the date of publication.

##### Comments

OPM received seven comments on the retreat right provisions found in these interim regulations: four from agencies, and three from individual employees. OPM did not receive any comments on the revised notice provisions of the regulations.

One agency supported the regulations as written. Two agencies suggested that

OPM further clarify how agencies determine employees' retreat rights in specific situations. The fourth agency suggested that OPM limit employees' retreat rights only to positions that the present agency can readily document (i.e., positions in the employee's present agency).

Of the three comments from individual employees, two employees suggested that OPM provide additional material covering how agencies determine retreat rights, while the third employee believed that the interim regulations expanded rather than clarified employees' retreat rights.

The agency comment suggesting that the retreat right be redefined to provide a more restrictive standard was not adopted.

The comments from two of the agencies and all three of the employees asking for clarification of how agencies determine retreat rights are reflected in the following material that explains the scope and purpose of these final regulations on retreat.

#### Final Regulations—Retreat Rights

OPM is now publishing final retention regulations that further clarify employees' retreat rights. Final § 351.701(c)(3) provides that an employee has the right to retreat to the same position, or an essentially identical position, formerly held by the released employee on a permanent basis in a Federal agency. Final § 351.701(c)(3) further clarifies that the agency determines an employee's retreat right based only on former positions in any Federal agency that the released employee held as a competing employee, or equivalent (i.e., when held by the released employee, the position would have been placed in tenure group I, II, or III, or equivalent).

In defining what constitutes "an essentially identical position" for this purpose, 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 respective grade, 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.

Effective August 22, 1947, the retreat right was originally incorporated in 5 CFR part 20.9 of the former U.S. Civil Service Commission's retention regulations. In 1954 the Commission began to use the term "retreat" in referring to this form of same subgroup bumping that was limited to positions from which, or in the same line of work through which, a released employee had previously been promoted.

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

In final regulations published by OPM on January 3, 1986 (51 FR 319), the retreat right was expanded to include positions held on a permanent basis in the Federal service by the released employee without regard to whether the employee was promoted from that position (i.e., the retreat right now includes positions vacated because of reassignment and transfer). Consistent with this expansion of retreat rights, the January 3, 1986, revision also excludes positions that were simply in the same line of work through which a released employee had previously been promoted, but which the employee had not actually held.

These final retention 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 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 (1995), and *Pigford v. Department of the Interior*, 75 M.S.P.R. 251 (1996).

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.

At its discretion, an agency may provide a broader assignment opportunity to released employees that is primarily based on the personal qualifications set forth in section 351.702(a). However, this alternative is not applicable to a determination of an employee's retreat rights under authority of § 351.701(c).

As requested in several comments on the interim regulations, the following four examples of retreat rights are reprinted from the Supplementary Information material in the interim retention regulations that OPM published on August 25, 1995 (60 FR 44254).

#### *Examples of Retreat Rights*

Example number 1: A GS-7 employee formerly held a GS-322-5 position. Because of a new classification standard, the GS-322-5 is reclassified to a GS-326-5 with no change in duties, responsibilities, and qualifications. This regulation clarifies that the GS-7 employee would have a right to retreat to the GS-326-5 position held by a lower-standing employee if the agency determines that the employee's former GS-322-5 position and the GS-326-5 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

Example number 2: A WG-4204-10 employee formerly held a WG-4204-7 position. Because of classification error, the WG-4204-7 position is reclassified to a WG-4204-8 with no change in duties, responsibilities, and qualifications. This regulation clarifies that the WG-4204-10 employee would have a right to retreat to the WG-4204-8 position held by a lower-standing employee if the agency determines that the employee's former WG-4204-7 position and the WG-4204-8 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

Example number 3: A full-time GS-343-11 employee formerly held a part-time GS-343-7 position. This regulation clarifies that the full-time GS-343-11 employee would have a right to retreat

to a full-time GS-343-7 held by a lower-standing employee if the agency determines that the employee's former part-time GS-343-7 position and the GS-343-7 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

Example number 4: A GS-334-11 competitive service employee formerly held a GS-334-7 position under an excepted service Veterans Readjustment Appointment (VRA). This regulation clarifies that the GS-334-11 employee would have a right to retreat to a GS-334-7 position held by a lower-standing competitive service employee if the agency determines that the employee's former GS-334-7 VRA position and the GS-334-7 position are otherwise essentially identical using the competitive level test found in 5 CFR 351.403.

#### **Final Regulations—Reduction in Force Notices**

OPM is publishing final regulations on reduction in force notices with revision only to an applicable section of statute cited in § 351.801(a)(2). Section 351.801(a)(2) provides that, from January 20, 1993, through January 31, 2000, each competing employee of the Department of Defense is entitled, under implementing regulations issued by that agency, to a specific written notice at least 120 full days before the effective date of release when a significant number of employees will be separated from a competitive area by reduction in force. This provision is consistent with section 341(a) of Pub. L. 103-337. (§ 351.801(a)(2) had contained a reference to section 911(a) of Pub. L. 103-337.)

Section 351.802(a)(1) provides that a specific reduction in force notice must cover the action to be taken, the effective date of the action, and the reasons for the action. This provision is consistent with statutory requirements set forth in 5 U.S.C. 3502(d)(2)(A).

#### **Regulatory Flexibility Act**

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

#### **Executive Order 12866, Regulatory Review**

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

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

Administrative practice and procedure, Government employees.

Office of Personnel Management.

**Janice R. Lachance,**  
Director.

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

#### **PART 351—REDUCTION IN FORCE**

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

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

2. In § 351.701, paragraph (c)(3) is revised to read as follows:

#### **§ 351.701 Assignment involving displacement.**

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

3. In § 351.801, paragraph (a)(2) is revised to read as follows:

#### **§ 351.801 Notice period.**

(a) \* \* \*

(2) Under authority of section 4433 of Pub. L. 102-484, as amended by section 341(a) of Pub. L. 103-337, each competing employee of the Department of Defense is entitled, under implementing regulations issued by that agency, to a specific written notice at least 120 full days before the effective date of release when a significant number of employees will be separated by reduction in force. The 120 days notice requirement is applicable during the period from January 20, 1993, through January 31, 2000. The basic requirement for 60 full days specific written notice set forth in paragraph (a) of this section is still applicable when less than a significant number of employees will be separated by reduction in force.

\* \* \* \* \*

4. In § 351.802, paragraph (a)(1) is revised to read as follows:

**§ 351.802 Content of notice.**

(a)(1) The action to be taken, the reasons for the action, and its effective date;

\* \* \* \* \*

[FR Doc. 98-15860 Filed 6-12-98; 8:45 am]

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 831 and 842

RIN 3206-A125

#### Voluntary Early Retirement Authority

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule.

**SUMMARY:** The Office of Personnel Management is publishing interim regulations covering Federal employee voluntary early retirements to implement new procedures affecting the application of voluntary early retirements. These temporary provisions affect agency requests, OPM approval, and agency offers of voluntary early retirement as well as several eligibility requirements for early retirement during a major reorganization, major reduction in force, or major transfer of function. The basic age and service requirements for voluntary early retirement remain unchanged.

**DATES:** Sections 831.108 and 842.205 are suspended from June 15, 1998 until October 1, 1999. Sections 831.114 and 842.213 are added effective from June 15, 1998 through September 30, 1999. Comments must be received by August 14, 1998.

**ADDRESSES:** Send written comments to Mary Lou Lindholm; Associate Director for Employment; Office of Personnel Management; Room 6500; 1900 E Street, NW; Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Edward P. McHugh or Gregory P. Keller, 202-606-0960, FAX 202-606-2329.

**SUPPLEMENTARY INFORMATION:** 5 U.S.C. 8336(d)(2) and 8414(b)(1)(B) provide that OPM may approve voluntary early retirement authority for agencies undergoing a major reorganization, major reduction in force, or major transfer of function. 5 U.S.C. 8336(d)(2) authorizes the voluntary early retirement of employees under the Civil Service Retirement System (CSRS), while 5 U.S.C. 8414(b)(1)(B) authorizes the voluntary early retirement of employees under the Federal Employees Retirement System (FERS).

Section 7001 of Public Law 105-174, the Supplemental Appropriations and

Rescissions Act, FY 1998, enacted May 1, 1998, provided authority for OPM and agencies to apply special provisions affecting the manner in which voluntary early retirements may be administered and approved for the period from May 1, 1998, through September 30, 1999.

Under section 7001, an agency may request a determination from the Office of Personnel Management that the agency or agency component(s) is undergoing a major reorganization, major reduction in force, or major transfer of function and that such action will result in the separation or downgrading of a significant percentage of the employees in the agency or component(s).

The law allows OPM to prescribe regulations which permit the agency, after OPM approval, to determine the scope of voluntary early retirement offers on the basis of one or more organizational units; one or more occupational series or levels; one or more geographic locations; other similar nonpersonal factors; or any appropriate combination of such factors.

Additionally, the law imposes several restrictions on eligibility for voluntary early retirement. Employees who have not been employed continuously by the agency since at least 31 days prior to the date of the agency's requests to OPM for early retirement; employees serving under time-limited appointments; and employees who have been notified that such employee is to be involuntarily separated for misconduct or unacceptable performance are ineligible for voluntary early retirements during the period this law is effective.

These interim regulations describe agencies' requests to OPM for approval of a voluntary early retirement authority; the manner in which agencies may offer voluntary early retirements; the responsibilities of agencies in managing approved voluntary early retirement authorities; eligibility of employees for voluntary early retirement; and agencies' required reports to OPM on use of the authorities.

Public Law 105-174 provided for the application of voluntary early retirements under these provisions through September 30, 1999. Therefore, 5 CFR 831.108 and 842.205 are suspended until October 1, 1999. In lieu of those sections, §§ 831.114 and 842.213 are added. 5 CFR 831.114 covers voluntary early retirement for CSRS employees, while the new 5 CFR 842.213 covers voluntary early retirement for FERS employees. Notwithstanding any future changes in the voluntary early retirement statutes, §§ 831.114 and 842.213 will expire

September 30, 1999, at which time §§ 831.108 and 842.205 will be restored.

The special provisions in Public Law 105-174 do not affect the existing statutory requirements in 5 U.S.C. 8336(d) or 8414(b)(1) that, in order to be eligible for voluntary early retirement, an individual must have completed 25 years of service or have reached age 50 and completed 20 years of service.

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

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking because it would be contrary to the public interest. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to make this amendment effective in less than 30 days. The general notice of proposed rulemaking and delay in the effective date are being waived because these regulations allow OPM to immediately implement statutory language in Public Law 105-174 governing voluntary early retirements which was effective May 1, 1998, and to give full effect to benefits extended by that statute.

#### Regulatory Flexibility Act

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

##### 5 CFR Part 831

Administrative practice and procedure, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

##### 5 CFR Part 842

Air traffic controllers, Alimony, Firefighters, Government employees, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

**Janice R. Lachance,**  
Director.

Accordingly, OPM is amending parts 831 and 842 of title 5, Code of Federal Regulations, as follows: