

CHAPTER 18

REDUCTION-IN-FORCE

The purpose of this Chapter is to provide a general overview of the nature of Reductions in Force (RIFs) and the procedures which agencies must follow, including the rights of NTEU Chapters and affected employees, once an agency decides to implement a RIF. Keep in mind that regulations governing RIFs are complex and, therefore, Chapters are encouraged to work with their National Field Representative in the unlikely event your employing agency determines a RIF is in order.

I. WHAT IS A RIF?

- A. A RIF is a personnel action taken by an agency when, due to certain preconditions (lack of work, shortage of funds or agency reorganization, generally) the agency decides to eliminate positions and to take certain actions affecting the employees occupying those positions. International Federation of Professional and Technical Engineers and NASA, 8 FLRA 212, 213 (1982).
 - 1. Unlike adverse actions, a RIF is not aimed at individuals, but positions. Grier v. DHHS, 750 F.2d 944 (Fed. Cir. 1984). In other words, an agency cannot use RIFs to remove an employee for reasons personal to the employee.
- B. 5 U.S.C. Section 3502 requires the Office of Personnel Management (OPM) to issue regulations which agencies must follow once they decide to eliminate certain positions due to lack of work, a shortage of funds, or a reorganization. However, case law has generally held that the agency's actual decision to reorganize, or contract out, and the identification of which positions must be eliminated as a consequence, is an area of reserved management discretion, as long as it is not improperly motivated (e.g., done for discriminatory reason) and is carried out in accordance with OPM and agency procedures. See AFGE Local 2855 v. U.S., 602 F.2d 574 (3rd Cir. 1979); Griffin v. Dept. of Agriculture, 2 MSPB 335 (1980).

II. PROCEDURES FOR IMPLEMENTING A RIF

RIF procedures are broken down into two steps: 1) identifying employees for release due to elimination of certain positions and 2) once identified, affording those employees certain assignment ("bump and retreat") rights prior to terminating their employment entirely.

- A. Identifying Employees for Release: Affected employees are identified two ways: 1) by their location within a competitive area and 2) by their competitive level within the competitive area.

1. Competitive Areas are organizational and geographic areas within which certain positions will be eliminated and within which affected employees will compete for the remaining positions. 5 C.F.R. 351.402.
 - a) The area for competition has been held to be negotiable by the FLRA. (Union proposed that competitive areas be the commuting area). NTEU and NRC, 33 FLRA No. 52 (1988).
2. Competitive Levels, within competitive areas, consist of all positions at the same grade (or occupational level) and classification series which are sufficiently alike that the incumbent of one can be assigned to another without 1) changing the terms of the incumbent's appointment or 2) unduly interrupting the work program. 5 C.F.R. 351.403(a).
 - a) Separate competitive levels must be established by service (competitive or excepted); by appointment authority (Schedules A, B or C); by pay schedule; by work schedule (full-time, part-time, intermittent, seasonal, or on-call); by supervisory or non-supervisory status; and by tenure status. 5 C.F.R. 351.403(b).
 - b) Competitive levels are then broken down into tenure groups; I, II and III. 5 C.F.R. 351.501.

Tenure Group I - career employees not serving a probationary period.

Tenure Group II - career conditional employees (employees with less than 3 years of service) and career employees serving a probationary period.

Tenure Group III - employees serving indefinite appointments.
 - c) Next, these tenure groups are further broken down into subgroups according to veteran preference as follows:

Subgroup "AD" - employees with veterans preference and a 30% disability rating.

Subgroup "A" - employees with veterans preference but less than a 30% disability rating.

Subgroup "B" - non-veteran employees.
 - d) Once the tenure and subgroups are established, employees in these groups are ranked (given retention standing) according to their length of service. 5 C.F.R. 351.503.

- e) Employees' length of service can be increased based upon their last three annual performance ratings of record (5 C.F.R. 351.504) as follows:

Average rating of 5 (outstanding) - entitles the employee to credit for 20 additional years of service.

Average rating of 4 (exceeds fully successful) - 16 additional years.

Average rating of 3 (fully successful) -12 additional years.

3. Release from a Competitive Level: Employees in the various subgroups are released from their competitive level in the inverse order of their retention standing, i.e., those with the lowest number of years of service (including service enhancement based upon performance) are released first and so on, until the desired number of positions are eliminated. 5 C.F.R. 351.601.

- a) If there is a tie in retention standing, the agency may select either employee for release. 5 C.F.R. 351.601(b). Since this matter is left to agency discretion, unions may bargain additional tie-breaking procedures.
- b) Also, an agency cannot release an employee from a competitive level while retaining employees in that level who are serving limited temporary appointments or employees serving temporary promotions. 5 C.F.R. 351.602.
- c) Keep in mind that there are other exceptions to this order of release, listed at 5 C.F.R. 351.606-608.

- B. Assignment Rights for Employees Identified for Release: Once an employee has been identified for release under the above procedures that does not necessarily mean the individual's employment will be terminated. Rather, that employee may be allowed to displace other employees from their positions through methods commonly known as "bumping" and "retreating". See 5 C.F.R. 351.701 et. seq.

1. Bumping: OPM's regulations require that agencies allow employees identified for release in one competitive level to displace employees in another competitive level but the same competitive area, and who are in lower tenure or subgroups.
 - a) For example, a career employee (Tenure Group I) who is a veteran without a 30% disability rating (Subgroup A) could "bump" another non-veteran career employee in a different competitive level.
 - b) There are basically 4 prerequisites to "bumping" (5 C.F.R. 351.701,

702);

- 1) the position in the other competitive level must be at the same representative rate;
- 2) the released employee must be qualified for the position;
- 3) the position offered must be in the same competitive area and be expected to last for at least 3 months;
- 4) the employee must have a current performance rating of minimally successful (2) or better. (If the rating is only "2", the employee can only displace an employee with a rating of "2".)

2. Retreating: OPM regulations also require that an employee identified for release be offered the right to displace another employee holding a position identical to, or substantially the same as, a position previously held by the employee. 5 C.F.R. 351.701(c).

- a) There are a number of prerequisites which must be met before "retreat" rights apply. They are:
 - 1) The incumbent of the position the employee is retreating to must:
 - a) be in the same tenure and subgroup as the employee;
 - b) have lower retention standing.
 - 2) The position can be no more than 3 grades below the position held before being released. (If the employee being released is in subgroup AD [veteran with 30% disability rating] he/she can retreat to a position 5 grades lower).
 - 3) The released employee must have a current performance rating of minimally successful or higher (2). (Again, if the rating is "2", he/she can only displace an employee with a rating of "2".)
 - 4) Employee must be qualified for the position. See 5 C.F.R. 702(a)(1), (2), (3).
 - 5) The employee must be able to perform, after a normal orientation, without an undue interruption of work or loss of productivity.
 - 6) The position must be identical to or substantially the same as

one previously held by the employee.

3. If bumping and retreating procedures are employed, the agency must:
 - a) Apply them uniformly in any one RIF action;
 - b) Treat full-time and part-time positions separately (full-time employees cannot "bump" into or "retreat" to part-time positions and vice versa); and
 - c) Treat competitive service and excepted service employees separately (competitive service employees cannot bump or retreat to positions held by excepted service employees and vice versa).

5 C.F.R. 351.705(b).

III. RE-EMPLOYMENT RIGHTS

An employee who is displaced by bumping or retreating or an employee originally identified for release that has no bump and retreat rights will be separated. However, the employee may still retain certain re-employment rights. Under 5 C.F.R. 330.201, an agency must maintain a re-employment priority list (RPL) for "RIF'd" employees.

- A. To be placed on the RPL, the employee must:
 - 1) Submit an application (provided by the agency) within 30 days after the RIF separation date;
 - 2) Be serving under a career or career conditional appointment;
 - 3) Have received a performance rating of minimally acceptable or better in his/her last annual appraisal; and
 - 4) Not have declined a reassignment offer pursuant to his/her bump and retreat rights.
- B. The length of time an individual remains on the RPL depends upon the employee's tenure group.
 - 1) Group I - (career status) - 2 years
 - 2) Group II - (career-conditional status) - 1 year
- C. An individual loses his/her right to RPL consideration if, before the expiration of the time limits in B. above, one of the following occurs:

- 1) If the individual declines an offer of, or fails to respond to an inquiry concerning, a position meeting the acceptable conditions on the individual's RPL application, he/she will no longer be considered for positions at that rate of pay or lower.
- 2) An individual will be taken off the RPL if he/she receives a competitive or excepted service appointment with no time limitation.
- 3) An individual will be removed from the RPL if he/she declines an offer of, or fails to respond to an inquiry concerning, a position with an equal or higher rate of pay as his/her previous job and with the same work schedule.

IV. DUE PROCESS RIGHTS OF EMPLOYEES AFFECTED BY RIFS

- A. Advance Notice: Effective November 5, 1991, an employee selected for release from a competitive level is entitled to written notice at least 60 days before the effective date of the release. 5 C.F.R. 351.801(a).
1. When an agency cannot determine which individual employees will be released at the beginning of the minimum 60 day notice period, it may issue a general notice followed by a specific notice. 5 C.F.R. 351.802.
 2. Contents of the notice: 5 C.F.R. 351.803.
 - a) General notice: The general notice must inform the employee that his/her release pursuant to a RIF may be necessary; that once the specific individual actions are determined, a specific notice will follow; and contain an expiration date.
 - b) Specific notice: The specific notice, or only notice if no general notice is issued, must contain the following:
 - 1) The action to be taken and the effective date;
 - 2) The employee's competitive area and level, subgroup, service date and annual performance ratings of record received during the last 3 years;
 - 3) The place where the employee may inspect the regulations and records pertaining to the RIF. (These records must be maintained for at least one year from the date the RIF notice was issued and be made available for inspection by the employee and OPM. 5 C.F.R. 351.505);
 - 4) Information on reemployment rights;
 - 5) Information on job placement opportunities and

unemployment insurance; and

- 6) The employee's right to grieve under the negotiated grievance procedure or to appeal to the MSPB.

5 C.F.R. 351.803(a)

B. Appeal Rights: If an employee has been separated, reduced in grade, or furloughed for more than 30 days because of a RIF, the action can be appealed to the Merit Systems Protection Board but only if RIF actions are excluded from the negotiated grievance procedure. 5 C.F.R. 351.901, 1201.3(a)(10), 1201.3(b)(1).

1. Chapter representatives need to check their contract to see if RIFs are specifically excluded from the grievance procedure. If they are not, the RIF action must be grieved in accordance with the contractual time limits.
2. Bases for Appeal: Generally, the subject of the appeal will be the agency's failure to follow the RIF regulations promulgated by OPM and/or a failure to follow its own procedures, including those negotiated with NTEU.
 - a) A failure to follow RIF procedures is not considered a substantive error warranting reversal of the individual action unless the error affects the employee's substantive entitlements (i.e.,). Hill v. Dept. of Commerce 84 FMSR 6086 (1984). However, the burden is upon the agency to prove lack of an adverse affect.
 - b) Other possible bases for appeal include:
 - 1) RIF procedures are used as a pretext for taking action against an individual employee for reasons personal to the employee or to defeat the employee's adverse action rights. See Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980). No harmful error need be shown in this case;
 - 2) The RIF action is motivated by an intent to discriminate on the basis of race, sex, age, color, national origin, religion or handicap or the RIF action has a discriminatory impact on members of these protected classes;
 - 3) RIF regulations are not consistently or uniformly applied to all employees;
 - 4) Procedural defects such as a defective RIF notice. This type of challenge is subject to a harmful error analysis.

V. THE CHAPTER'S ROLE IN A RIF

- A. Bargaining RIFs: A RIF is a change in working conditions. Therefore, before implementation, the agency must give NTEU formal notice and an adequate opportunity to bargain prior to implementation. (See Chapter 14 of this manual.)
1. Upon receiving notice of a proposed RIF, the Chapter should immediately submit a formal request to bargain and further request a briefing so that informed proposals can be drafted.
 2. Next, a RIF bargaining committee should be established. The Committee's functions could include:
 - a) Reviewing RIF records for purposes of determining which employees will be affected;
 - b) Canvassing those employees to determine their needs and concerns. Also, determine which employees plan to retire in lieu of being released, resign, transfer or intend to decline potential job offers. Use this information to formulate "bump and retreat" proposals;
 - c) Draft and submit proposals addressing the following issues (this is not an exhaustive list):
 - 1) The extent of competitive areas. See NTEU and NRC, 33 FLRA No. 52 (1988);
 - 2) "Bump" and "retreat" rights consistent with OPM's regulations and management's reserved Section 7106 rights;
 - 3) Training for employees assigned to new positions as a result of the RIF;
 - 4) Counseling for employees considering retirement in lieu of being RIF'd;
 - 5) External placement efforts for employees separated as a result of a RIF. 5 C.F.R., Part 330.307(a) sets forth agencies minimum placement program responsibilities. NTEU is free to bargain more extensive obligations.
 - 6) Reassignment rights outside of the competitive area for employees displaced by other released employees exercising their bump or retreat rights, along with proper training;

- 7) Providing to the chapter annotated retention registers on a continuing basis reflecting separations, declination of job offers, etc.;
- 8) Providing the chapter with copies of all RIF notices given to individual employees; and
- 9) Arrangements for chapter/employee representatives to review RIF records.

B. Other Possible Actions: Besides bargaining, there are many other types of actions a RIF Committee can engage in order to protect or even enhance the rights of bargaining unit employees. Potential activities include:

- 1) Grass roots legislative lobbying during which congressional representatives are apprised of the adverse impact the RIF will have on the public and the agency operations, not to mention the lives of affected employees. As part of the Lobbying, ask the representatives to take action to eliminate the need for a RIF or lessen its impact;
- 2) Information picketing during which the public at large is educated about the negative impact the RIF will have on how the agency serves the public;
- 3) Educating affected employees about their rights and options during a RIF;
- 4) Monitoring the agency's compliance with RIF procedures;
- 5) Publicizing NTEU's efforts and achievements in limiting the adverse impact of the RIF on employees.

C. Summary

RIFs are not a common occurrence in agencies where NTEU is the exclusive representative. However, if one should be initiated by an agency, a well-planned and executed response by a chapter can serve to greatly reduce the potential adversity to affected employees. Further, if properly publicized, these efforts can serve as an effective membership recruitment tool.