CHAPTER 1
REDUCTIONS-IN-FORCE: AN OVERVIEW

Key Point

RIF procedures should afford a systematic approach for dealing uniformly with the need to downsize the workforce by applying competitive factors. 5 CFR 351.201(a)(2).

For years there has been widespread consensus that federal employment levels need to be cut as a way to reduce costs and deal with deficits. In the early 1980s there were significant RIF actions. In 1994 Congress passed the Federal Workforce Restructuring Act requiring a government-wide reduction of 290,000 FTEs (Full Time Equivalent positions) through FY 1999. Starting in 2013, budget sequesters forced numerous furloughs, and furlough appeals flooded MSPB's (Merit Systems Protection Board) docket. In 2012 the Republican candidate for president argued that considering pay, benefits, and other factors, the federal workforce was significantly more favored than the private sector. And in 2016, that sentiment coupled with concerns about the size, cost, and extent of government played a significant role in putting the Trump administration in power and the federal workforce on the chopping block. The new administration pursued a hiring freeze, severe budget and FTE cuts, reorganizations, and the elimination of programs.

Over the years, most agencies have coped with budget cuts and FTE reductions through hiring freezes, furloughs, attrition, early-outs (Voluntary Early Retirement Authorization or VERA), buyouts (Voluntary Separation Incentive Payment or VSIP), a combination of the latter two. To be eligible for an early-out, an employee must have at least 20 years of service and be at least 50 years old or have 25 years of service regardless of age. A VSIP is a lump sum payment, usually $25,000 (depending on length of service) or $40,000 at DoD. As noted, a VSIP is often offered with a VERA. At this writing, legislation is pending that could increase all VSIP payments to $40,000, depending upon length of service.

But buyouts, early-outs, attrition, and furloughs will no longer be enough to cope with the current and future reductions in budget, FTE.

The actual tool for downsizing the federal workforce is the RIF. 5 CFR Part 351. *Sharma v. Dept. of Navy*, DA-0351-15-0179-I-1 (NP 9/21/2016), described perfectly the essence of a RIF:

> A RIF is an administrative procedure by which an agency eliminates jobs for certain listed reasons, including lack of work or reorganization, and releases employees from their competitive levels by furlough of more than 30 days, separation, demotion, or reassignment requiring displacement.… An employee who has been furloughed for more than 30 days, separated, or demoted by a RIF may appeal to the Board.… Thus, to establish the Board's

jurisdiction over his RIF appeal, the appellant must show that he was either furloughed for more than 30 days, separated, or demoted by the RIF action.

In early 2017, OPM updated its RIF and furlough guidance, and many agencies started to put plans in place: indeed, agencies will have to move quickly and, truth be told, more quickly than the law allows.

RIFs are certain; RIFs are coming. In fact, RIFs are mandatory when positions are abolished and employees are separated or demoted for specific reasons related to funding.

RIFs are time-consuming, complicated, and fraught with issues, problems, as well as the certainty of litigation. The laws controlling RIFs are most charitably characterized as byzantine. And the controlling regulations are most charitably characterized as highly complex and technical, if not baffling.

On top of that, there is little, if any, experience, institutional knowledge on dealing with RIF actions. Most managers are clueless as to picking positions to abolish and think instead in terms of picking employees to jettison. Most HR employees have no idea how to run a RIF, advise managers, or counsel employees. And most lawyers, in fact, even most MSPB judges, have never had a RIF appeal. Although lawyers, judges, and HR professionals can dust-off the regulations and wrestle with the law, unless they have actually worked on a RIF action, they will be working without a net.

An unfortunate reality is that RIFs may beget little more than more RIFs, more litigation, decreases in productivity and morale, and few if any cost savings. At the end of the day, that is, when the RIF is over, the bottom line is often less work for more money. As explained below and in the following chapters, senior employees often bump or retreat down, displacing less senior (lower ranking) employees. Not only does that father a resentful senior, high pay employee doing lower-graded work (albeit at save pay), but it fathers a separated employee looking for work, looking for a lawyer.

Some bizarre examples resulting from the early 1980s RIFs (under different and earlier regulations) were recounted in a New York Times article "Reagan RIF Effect Puts Bosses In Typing Pools":

> As a secretary, Mr. McHugh, who once directed a staff of 10 people and administered $27 million in Federal grants, does not know his carbon paper from his Ko-Rec-Type. Yet the Federal Government is paying him $46,000 a year to type.
>
> "I guess I do about 50 words a minute," the 45-year-old Mr. McHugh said recently, puzzling over his status as one of the newest casualties of President Reagan's war on Federal spending.
>
> In a bizarre twist, the Federal use of the "reduction in force," or RIF, has turned thousands of highly paid specialists like Mr. McHugh into secretaries, file clerks and even animal handlers. A sampling:
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> —At the National Institute on Drug Abuse, H. Noble Jones, a

> $47,000-a-year public health adviser, has been demoted nine civil service grades to a job typing letters and photocopying reports.
>
> —At the Department of Health and Human Services, Gerri Minor, a $36,000-a-year legislative analyst, now spends her days filing correspondence.
>
> —At the Education Department, a $33,000-a-year graphic artist who once designed artwork for departmental publications has been reassigned as a clerk-typist.
>
> —At the Public Health Service, a psychologist who is a specialist on alcohol treatment now earns his salary by typing manuscripts on word-processing equipment.

New York Times, April 7, 1982. Again, the current regulations that went into effect in 1986 addressed some of these bizarre consequences and some of these situations cannot, under the 1986 RIF regulations, make a reappearance today.

Aside from such bizarre situations, there are still other oddities. Indeed, save pay, severance pay, unemployment compensation, administrative costs, including the cost of protracted, complex litigation, can erase or, at best, push out for years any cost savings.

Because of those downsides, agencies have, as said, relied on furloughs, buyouts, early-outs, and attrition. But those have their downsides as well. For one thing, agency managers have little control over who takes a buyout or early-out and may have to fill the vacancy or contract out the work. For another thing, just rumors of a buy-out will slow the normal attrition rate. And for another thing, buyouts and early-outs can be read as signaling that furloughs or RIFs are in the pipeline and with that the dedicated, salable employees leave.

While we will return to a discussion of furloughs, buyouts, and early-outs, we shift now to a brief overview of a RIF action; in later chapters we address the technical components of a RIF as well as the statutory, regulatory, and case law applicable to those components.

I. RIF OVERVIEW

Management is responsible for deciding if a RIF is necessary and, if so, what positions to abolish and when. 5 CFR 351.201(a). A decision to do a RIF may be driven by anything from an act of Congress to an agency reorganization. When an agency has to separate, demote, reassign to an occupied position, or furlough for more than 30 days because of a lack of work, shortage of funds, insufficient FTE (e.g., personnel ceiling), certain reclassifications, an exercise of restoration rights, or reorganization, an agency must use RIF procedures. 5 CFR 351.201(a)(2).

In doing that, the agency (management and personnel) will also be responsible arranging each step in the RIF process, that is, determining the competitive areas, competitive levels, the retention standings, notice period (60 days is the minimum), whether to use vacant positions, and what assistance or incentives to offer.

Management should and will always try to avoid a RIF. Management can always reassign an employee (assuming no reduction in pay or grade) to a vacant position and then abolish the vacated position. *See Cobert v. Miller*, 800 F.3d 1340, 1351 (Fed. Cir. 2015); *Talley v. Dept. of Army*, 50 MSPR 261 (1991) (Board without jurisdiction over lateral assignment—even if involuntary, assuming legitimate reason—taken in lieu of separation through RIF).

Again, the abolishment of a position with the separation or demotion of an employee for the following reasons must be done under controlling OPM RIF regulations:

Lack of funds

Shortage of work

Insufficient FTE

Reemployment, Restoration

Reclassification due to erosion of duties

Reorganization

5 CFR 351.201(2). All of these reasons are fairly straight forward; however, "reorganization" and furlough warrant some elaboration and that is provided in Chapter Two.

While management decides what positions to abolish, management has little to say about the fate of the employees occupying those positions. Who remains, who goes is a function of the RIF procedures, the controlling regulations, and that is a mechanical process with little, if any, management discretion as to who stays, who goes.

One other threshold point is that RIF coverage—especially as discussed here—is limited to positions, not employees, not incumbents of positions. Once management has decided to do a RIF, the matter will be turned over to personnel, HR. From there on, the process is fairly mechanical and management has little discretion. That is not to say that management does not seek to manipulate the process—for example, define competitive areas, competitive levels, change position descriptions, or tinker with performance ratings. These shenanigans seldom work and many of the cases discussed in the following chapters expose such shenanigans.

When management decides to do a RIF, there is often discussion of doing a dry run or issuing a general, advance notice. Neither are advisable. Even today when we have extensive databases in computers, RIFs are massively work-intensive and expensive. Managers often want dry runs as a predicate for playing games, manipulating the system. And advance notices only serve to heighten tensions and the result is that those who are marketable leave. On the other hand, an advance notice may serve to dampen the rumor mill.

After identifying the number and types of positions to be abolished, the employees affected are identified by the "scope of competition," that is, by the "competitive area" and the "competitive level."

The competitive area is the agency that an employee occupying a job to be eliminated is allowed to compete with other employees to see who will ultimately be retained. Geographical and organizational considerations define competitive areas. Put in more tangible terms, typically a competitive area could be a part of the agency under a single administrative authority (very roughly put, a chain of command) or in a particular commuting area. A competitive area can be an entire agency or a small section of an agency.

All positions in the competitive area are then put in competitive levels. In other words, all positions at the same grade or occupational level, same classification series and are similar enough so that an incumbent of one position may be placed, without undue disruption or without significant training, in another position in that competitive level.

As one can easily surmise, classification and position descriptions play the critical role in setting competitive levels. The driving force in setting the competitive level is the position description (PD) and almost everything flows from a proper classification process. Part of classifying a job is usually assigning it to a competitive level. In preparing for a RIF, all jobs should be reviewed and any necessary changes should be made.

Within each competitive level, employees compete for retention based on their relative retention standing, that is, their rank *vis-à-vis* others. An employee's rank is a function of four key factors: (1) tenure; (2) military preference; (3) length of service; and (4) performance. Military or veteran preference is an especially strong factor, and there is definitely a trend to stress importance of performance.

Each competitive level is then divided into three tenure groups: Group I—career; Group II—career-conditional; Group III—indefinite appointments.

Each group is then subdivided into three subgroups: Subgroup "AD" being veterans with preference and at least a 30% service-related disability; Subgroup "A" being veterans with preference but without a 30% or more service-related disability; Subgroup "B" being those without veteran preference.

Employees in each subgroup are then ranked according to length of service. Importantly, length of service is creditable service, usually the service comp date (SCD) adjusted for additional credit years based on the three most recent performance appraisals from a four-year lookback period. That sounds simple, straightforward but, as always, there are wrinkles and those wrinkles are discussed in subsequent chapters. But for now it is important to keep in mind that it is critical that HR and employees to make sure that OPFs, ratings, and PDs are up to date, complete and accurate.

Once this process has been completed, employees can be released—subject to their reassignment rights—in inverse order of their standing.

Generally speaking, reassignment rights include bumping rights and retention rights. Bumping allows a released employee to displace ("bump") an employee in a position in a lower subgroup in other competitive levels. For example, a released employee in Group I, subgroup A could bump an employee in Group I, Subgroup B

in another competitive level. OPM regulations allow, but do not require, an agency to permit bumping in the same Subgroup in other competitive levels.

Once affected employees are identified, they are entitled to at least a 60-day advance notice.

Employees then have appeal rights to MSPB, as discussed in the following chapters. In those appeals, an appellant may challenge the RIF as not *bona fide,* for example, a reorganization on paper only undertaken as a ruse to remove a certain employee and avoid adverse action procedures, attack the competitive area as too narrowly defined, or the competitive level as improperly configured.

To sum up, *Dept. of Air Force, Scott AFB and NAGE Local R7-23*, 35 FLRA 844, 853 (1990), states:

> [W]hen an agency decides to conduct a RIF, it must determine the numbers and types of positions to be eliminated and identify the employees who will be affected by the elimination of those positions. The agency makes those determinations by: (1) establishing the competitive area within which it will conduct the RIF; (2) categorizing positions within the competitive area into competitive levels so as to group employees who will compete against one another for retention when positions are abolished; (3) ranking employees within competitive levels according to their relative retention standing; and (4) releasing employees from their competitive level in reverse order of their retention standing, subject to applicable assignment rights.… Once the agency has made these determinations, the individual employees who will be reassigned, downgraded or separated from the Federal Service have been identified. Only after these employees are identified are specific notices issued to employees informing them that they are subject to a RIF.

The above discussion is a very abbreviated shorthand capsule of the RIF process and the process is not as simple as it may seem. In the following chapters you will find a detailed discussion of the technical components and the applicable law. Even there one must be extremely careful. This is a highly technical area laden with nuances and exceptions, in fact, exceptions to exceptions.

OPM's *Federal Employment Information Factsheet: Reduction In Force* is one of the better and more comprehensive, but slightly overtaken, accounts of the RIF process and is still worth reading:

> *REDUCTION IN FORCE*
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> The U.S. Office of Personnel Management's (OPM) Reduction In Force (RIF) regulations are derived from the Veterans' Preference Act of 1944 and are presently codified in Sections 3501–3503 of Title 5, United States Code. The law provides that OPM's RIF regulations must give effect to four factors in releasing employees: (1) tenure of employment (e.g., type of appointment); (2) veterans preference; (3) length of service; and (4) performance ratings. The law does not assign any relative weight to the four factors, or require that the factors be followed in any particular order. OPM implements the laws through regulations published in Part 351 of Title 5, Code of Federal Regulations, and instructions in OPM's Restructuring Information Handbook.

USE OF RIF PROCEDURES

An agency is required to use the RIF procedures when an employee is faced with separation or downgrading for a reason such as reorganization, lack of work, shortage of funds, insufficient personnel ceiling, or the exercise of certain reemployment or restoration rights. A furlough of more than 30 calendar days, or of more than 22 discontinuous work days, is also a RIF action. (A furlough of 30 or fewer calendar days, or of 22 or fewer discontinuous work days, is an adverse action.)

MANAGEMENT RESPONSIBILITY

The agency has the responsibility to decide whether a RIF is necessary, when it will take place, and what positions are abolished. However, the abolishment of a position does not always require the use of RIF procedures. The agency may reassign an employee without regard to RIF procedures to a vacant position at the same grade or pay, regardless of where the position is located.

APPLYING RIF REGULATIONS

Competitive Area. First, the agency defines the competitive area (e.g., the geographical and organizational limits within which employees compete for retention). A competitive area may consist of all or part of an agency.

The minimum competitive area is a subdivision of the agency under separate administration within a local commuting area. An agency must obtain approval from OPM before changing a competitive area within 90 days of a RIF.

Competitive Level. Next, the agency groups inter-changeable positions into competitive levels based upon similarity of grade, series, qualifications, duties and working conditions. Positions with different types of work schedules (e.g., full-time, part-time, intermittent, seasonal, or on-call) are placed in different competitive levels. Because of differences in duties and responsibilities, positions of supervisors and management officials are placed in competitive levels comprised only of those positions. Finally, competitive and excepted service positions are placed in separate competitive levels.

Retention Registers. Then, the four retention factors are applied and the competitive level becomes a retention register listing employees in the order of their retention standing:

1) *Tenure*. Employees are ranked on a retention register in three groups according to their types of appointment:

Group I: Career employees who are not serving on probation. (A new supervisor or manager who is serving a probationary period that is required on initial appointment to that type of position is not considered to be serving on probation if the employee previously completed a probationary period.)

Group II: Career employees who are serving a probationary period, and career-conditional employees.

Group III: Employees serving under term and similar nonstatus appointments. (An employee serving under a temporary appointment in the competitive service is not a competing employee for RIF purposes and is not listed on the retention register.)

2) *Veterans' Preference*. Each of these groups is divided into three subgroups reflecting their entitlement to veterans' preference:

Subgroup AD: Veterans with a compensable service-connected disability of 30% or more.

Subgroup A: Veterans not included in subgroup AD.

Subgroup B: Nonveterans.

Not all employees who served in the armed forces are entitled to veterans' preference for RIF purposes. A retired member of the armed forces is considered to be a veteran for RIF purposes only if one of the following conditions is met: (i) The armed forces retired pay is directly based upon a combat-incurred disability or injury; (ii) The armed forces retirement is based upon less than 20 years of active service; or (iii) The employee has been working for the Government since November 30, 1964, without a break in service of more than 30 days. (If the individual meets condition (iii) but retired at the rank of major or higher (or equivalent), he or she must also meet the general definition of disabled veteran in Section 2108(2) of Title 5, United States Code, in order to be a veteran for RIF purposes.)

3) *Length of Service*. Employees are ranked by service dates within each subgroup. The service dates include creditable civilian and military service, and additional service credit for certain performance ratings.

4) *Performance*. Employees receive extra RIF service credit for performance based upon the average of their last three annual performance ratings of record received during the 4-year period prior to the date the agency issues RIF notices. The 4-year period is the earlier of the date the agency issues RIF notices, or the date the agency freezes ratings before issuing RIF notices.

An employee is given additional service credit based on the mathematical average (rounded in the case of a fraction to the next whole number) of the value of the employee's last three annual ratings. If an employee received more than three annual ratings during the 4-year period, the three most recent annual ratings are used. If an employee received fewer than three annual ratings during the 4-year period, the actual ratings received are averaged and rounded up to a whole number. If an employee has received no ratings of record, they are given performance credit based on the most frequently assigned performance rating in their agency or organization. When

all employees in the competitive area have ratings earned under the same type of performance rating pattern, then the standard formula for assigning performance credit is:

20 Additional years for an "Outstanding" rating;

16 Additional years for an "Exceeds Fully Successful" rating;

12 Additional years for a "Fully Successful" rating.

For example, an employee with two years of Federal service has one annual rating of "Outstanding" (20) and one of "Exceeds Fully Successful" (16). The employee would receive additional RIF service credit based upon the two actual ratings, or 20+16=36, divided by 2=18 years of RIF credit for performance.

There are specific rules for using other crediting formulas when employees have performance ratings from different types of performance rating patterns.

5) *Release*. Employees are released from the retention register in the inverse order of their retention standing (e.g., the employee with the lowest standing is the individual who is actually reached for a RIF action). All employees in Group III are released before employees in Group II, and all employees in Group II are released before employees in Group I. Then within subgroups, all employees in Subgroup B are released before employees in Subgroup A, and all employees in Subgroup A are released before employees in Subgroup AD. Any employee reached for release out of this regular order must be notified of the reasons.

RIGHTS TO OTHER POSITIONS

Employees in Groups I and II with current performance ratings of "Unsuccessful," and all employees in Group III, have no assignment rights to other positions. Employees holding excepted service positions have no assignment rights unless their agency, at its discretion, chooses to offer these rights.

Employees in Groups I and II with current performance ratings of at least "Minimally Successful" are entitled to an offer of assignment if they have "bumping" or "retreating" rights to an available position in the same competitive area. An "available" position must: (1) last at least 3 months; (2) be in the competitive service; (3) be one the released employee qualifies for; and (4) be within three grades (or grade-intervals) of the employee's present position.

Bumping means displacing an employee in the same competitive area who is in a lower tenure group, or in a lower subgroup within the released employee's own tenure group. Although the released employee must be qualified for the position, it may be a position that he or she has never held. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position.

Retreating means displacing an employee in the same competitive area who has less service within the released employee's own tenure group and subgroup. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position. However, an employee in retention subgroup AD has expanded retreat rights to positions up to five grades or grade-intervals lower than the position held by the released employee. The position into which the employee is retreating must also be the same position (or an essentially identical position) previously held by the released employee in any Federal agency on a permanent basis.

An employee with a current annual performance rating of "Minimally Successful" only has retreat rights to positions held by employees with the same or lower ratings.

GRADE INTERVALS

The grade limits of an employee's assignment rights are determined by the grade progression of the position from which the employee is released. The difference between successive grades in a one-grade occupation is a grade difference, and the difference between successive grades in a multi-grade occupation is a grade-interval difference. The grade limits are based upon the position the employee holds at the time of the RIF. For example, an employee released from a GS-11 position that progresses GS-5–7–9–11 has bump and retreat rights to positions from GS-11 through GS-5. An employee released from a GS-9 position that progresses GS-6–7–8–9 has bump and retreat rights to positions from GS-9 through GS-6.

USE OF VACANT POSITIONS

An agency is not required to offer vacant positions in a RIF, but may choose to fill all, some, or none of them. When an agency chooses to fill a vacancy with an employee reached for a RIF action, it must follow subgroup retention standing. A RIF offer of assignment to a vacant position can only be in the same competitive area, and must be within three grades (or grade-intervals) of the employee's present position. At its discretion, the agency may offer employees reassignment, or voluntary change to a lower-graded position, in other competitive areas in lieu of a RIF.

RIF NOTICES

An agency must give each employee at least 60 days specific written notice before he or she is reached for a RIF action. In unforeseeable circumstances, an agency may, with OPM approval, give an employee 30 rather than 60 days specific written notice of a RIF action.

RIF APPEALS AND GRIEVANCES

Right to Appeal. An employee who has been separated, downgraded, or furloughed for more than 30 days by a RIF has the right to appeal to the Merit Systems Protection Board (MSPB) if he or she believes the agency did not properly follow the RIF regulations. The appeal must be filed during the 30-day period beginning the day after the effective date of the RIF action.

Right to Grieve. An employee in a bargaining unit covered by a negotiated grievance procedure that does not exclude a RIF must use the negotiated grievance procedure and may not appeal the RIF action to MSPB unless the employee alleges the action was based upon discrimination. The time limits for filing a grievance under a negotiated grievance procedure are set forth in the collective bargaining agreement.

CAREER TRANSITION ASSISTANCE AND SPECIAL SELECTION PRIORITY

Competitive service employees in Groups I and II who have received a specific notice of separation by a RIF are eligible for placement assistance in finding other positions.

On September 12, 1995, President Clinton directed all Executive Departments and Agencies to provide career transition assistance for their surplus displaced Federal employees, including policies that require the selection of well-qualified displaced employees for other positions in the Federal Government. As a result of that memorandum, OPM, in conjunction with the Interagency Advisory Group of Personnel Directors, and in partnership with labor unions, developed and issued career transition regulations to implement the President's directive.

Two types of career transition programs now exist. One is for employees before they separate, called the Career Transition Assistance Plan (CTAP). The other is for interagency assistance before and after separation, called the Interagency Career Transition Assistance Plan (ICTAP). These two procedures are currently in effect through September of 2001.

Under CTAP, if an employee receives a reduction in force notice, a certificate of expected separation, or notice of proposed removal for declining a directed reassignment or transfer of function outside the commuting area, and the employee is still on the agency's rolls, the employee is considered a surplus or displaced employee, which entitles the individual to selection priority for vacancies within his/her agency. Selection priority extends only to positions which are at or below the grade level from which the employee is being separated. As a surplus or displaced employee, if the employee is found well qualified for a job they apply for in the local commuting area, the agency is required to select the employee for the vacant position. CTAP eligibility ends on the earliest of either the RIF separation date, the cancellation of the RIF notice, or subsequent Federal employment (in another career, career conditional or excepted appointment without a time limit, in any agency).

The ICTAP covers displaced Federal employees who are seeking employment in other Federal agencies. Individuals are eligible for selection priority under ICTAP if they were separated from a career or career conditional position by reduction in force or because the employee declined a transfer or directed reassignment to another commuting area. Eligibility for special selection priority ends one year after separation, or when the employee receives a career-conditional, career or excepted appointment with no time limit. Displaced employees may exercise selection priority only in the local commuting area from which they were separated.