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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 330 and 351

Recruitment, Selection, and Placement (General); Reduction in Force

AGENCY: Office of Personnel
Management.

ACTION: Final regulations.

SUMMARY: These regulations clarify OPM's policies concerning the establishment and maintenance of reemployment priority lists. Also, these regulations clarify how agencies make appointments from reemployment priority lists. These changes were developed in response to requests by agencies that OPM clarify its material covering the operation of agency reemployment priority lists.

EFFECTIVE DATE: January 29, 1981.

FOR FURTHER INFORMATION CONTACT:
Ted Dow or Tom Glennon, (202) 632-4422.

SUPPLEMENTARY INFORMATION:

Background

On July 22, 1980, OPM published proposed regulations in the Federal Register (45 FR 48904) that would amend Parts 330 and 351 of this title to clarify how agencies establish, maintain, and make appointments from reemployment priority lists. The proposed regulations were derived from Section 15 of the Veterans Preference Act of 1944, as presently codified in 5 U.S.C. 3315. Subpart J of Part 351 of this title covers the establishment and maintenance of reemployment priority lists, while Subpart B of Part 330 of this title covers appointment from reemployment priority lists. Additional material that implements the reemployment priority list is contained in Federal Personnel Manual (FPM) Chapters 330 and 351.

The 60-day period for interested parties to submit written comments ended on September 22, 1980.

Discussion of Comments

Fourteen comments were received concerning the proposed regulations: twelve from agencies and two from unions. Five agencies had no objection to the proposed regulations while the other seven agencies and both of the unions suggested specific revisions to the material.

One agency suggested that we clarify in Part 330 of this title that appointments from the reemployment priority list are made in subgroup order. We agree that this revision would be helpful in explaining how agencies make appointments from the reemployment priority list. Accordingly, we have revised § 330.201(c) to explain that, in selecting persons from a reemployment priority list, an appointing officer follows subgroup order without regard to the order of retention standing within the subgroup.

Three agencies and one of the unions were concerned that proposed § 330.201(f) might unnecessarily limit agency efforts to reemploy persons who were separated because of reduction in force. For reference, proposed § 330.201(f) provided that agencies, in making appointments from reemployment priority lists, would consider full-time employees for full-time positions, and other-than-full-time employees for other-than-full-time positions. Specifically, these respondents believed that agencies should be able to have increased flexibility in making appointments from reemployment priority lists and to thus minimize any hardship to separated employees.

Our purpose in drafting § 330.201(f) was to ensure that other-than-full-time employees who have received reduction in force separation notices must receive first consideration for appointment from the reemployment priority list to other-than-full-time positions. After consideration of these comments, we have revised § 330.201(f) to include provisions which permit an agency, at its discretion, to consider full-time employees for appointment from the reemployment priority list to other-than-full-time positions if there are no other-than-full-time employees on the list who are qualified and available for the

positions. Similarly, we have revised § 330.201(f) to also provide that an agency, again at its discretion, may consider other-than-full-time employees for appointment from the reemployment priority list to full-time positions if there are no full-time employees on the list who are qualified and available for the positions. We believe that the revised § 330.201(f) will achieve our original goal while allowing agencies additional flexibility in making appointments from the reemployment priority list and improving reemployment opportunities for separated employees.

In a further effort to clarify how the reemployment priority list operates, we have included new § 330.201(g) in the final regulations. Specifically, § 330.201(g) states, for reference, that Subpart J of Part 351 of this title covers the establishment and maintenance of the reemployment priority list. New § 330.201(g) is intended to serve the same purpose as proposed § 351.1002(c) which states, for reference, that Subpart B of Part 330 of this title covers appointment from the reemployment priority list.

Although we did not receive any specific written comments on the subject, we did receive several telephone inquiries asking about the relationship of the reemployment priority list to mandatory material presently contained in Section B-2a of Appendix B of FPM Chapter 351. Specifically, Section B-2a of Appendix B, in part, contains longstanding provisions that require agencies to advise employees who have received specific reduction in force notices of their right to priority consideration under the reemployment priority list and the Displaced Employee Program. (For reference, the Displaced Employee Program is covered in Subpart C of Part 330 of this title.)

After consideration of the material in Section B-2a of Appendix B, we found that there was a need to properly implement these mandatory provisions through Part 351 of this title. Accordingly, we have added a new § 351.808 which provides that each employee who receives a specific notice of separation under Part 351 of this title must be given information concerning his or her right to priority consideration for reemployment under the provisions of Subparts B and C of Part 330 of this title.

Two agencies suggested that we further clarify the conditions under which employees become eligible to be entered on the reemployment priority list. We agree that further clarification would be useful since we generally receive a significant number of inquiries asking for this information. Accordingly, we have revised proposed § 351.1002(a) to state that each group I or group II employee who receives a specific notice of separation from a competitive position under Part 351 of this title is entered on the reemployment priority list. We also clarify that the reemployment priority list only includes employees separated from competitive, as distinguished from excepted, positions. To further clarify the conditions under which the names of employees are entered on the reemployment priority list, we subdivided certain material set forth in proposed § 351.1003 (a) and (b) into new paragraphs § 351.1003(a)(1)-(4) and § 351.1003(b)(1)-(5).

One agency suggested that we revise proposed § 351.1003(b) to provide that an other-than-full-time employee would be entered on the reemployment priority list if the employee declined assignment under Subpart G of Part 351 of this title to a position with the same type of work schedule (e.g., part-time, intermittent, or seasonal). The same agency recommended that we revise proposed §§ 351.1003(b) and 351.1004(d)(2) to provide that the eligibility of an other-than-full-time employee to be entered or maintained on the reemployment priority list would not be based upon the employee's regularly scheduled administrative workweek. For reference, our proposed §§ 351.1003(b) and 351.1004(b)(2) both made reference to the regularly scheduled administrative workweek, but not the type of work schedule, of an other-than-full-time employee.

After consideration of the agency's suggestions, we have revised § 351.1003(b) to provide, in § 351.1003(b)(1), that a group I or group II other-than-full-time employee is entered on the reemployment priority list unless he or she has declined assignment to a position that is of the same type work schedule as the position from which the employee was separated. However, we also believe that the reemployment priority list should include an other-than-full-time employee who has declined assignment to a position with a regularly scheduled administrative workweek that is lower than that of the position from which the employee was separated. Therefore, we did not delete the references to

"regularly scheduled administrative workweek" that were set forth in §§ 351.1003(b) and 351.1004(b)(2).

One agency suggested that we revise proposed § 351.1005(a) to clarify that the name of a group I or group II employee who receives a notice of separation under Part 351 of this title from a competitive position located in Alaska or overseas, except in certain circumstances, is entered on the reemployment priority list for the area in which the position from which the employee was separated is located. We agree that a further revision of this material would be useful and have accordingly clarified the material.

One union suggested that we revise proposed § 351.1004(a) to provide that a group II employee remains on the reemployment priority list for two years from the date he or she is separated under Part 351 of this title. For reference, OPM's present provisions in § 351.1001(a) covering the establishment and maintenance of the reemployment priority list provide that the name of a group I employee remains on the reemployment priority list for two years, and the name of a group II employee remains on the list for one year.

After consideration of this union's suggestion, we have decided not to revise § 351.1004(a) to change the duration of eligibility for an employee in group II. The provisions in proposed § 351.1004(a) reflect longstanding OPM policy, and are based upon the principle that an employee in group I has permanent status and is thus entitled to additional consideration for reemployment over that given to an employee in group II.

The same union and one agency also noted that the reemployment priority list only covers positions in any agency within a particularly commuting area. The union suggested that OPM develop regulations providing for an agency-wide reemployment priority list while the agency suggested that OPM permit agencies to place employees on the reemployment priority list in any locations for which the employee is available.

At present we see no need to require agencies to extend the coverage of the reemployment priority list beyond the commuting area of a particular agency. However, certain agencies, such as the Department of Defense, have developed extensive placement programs and systems. OPM is available to assist any agencies who wish to extend the scope of their placement programs beyond that required under Subparts B and C of Part 330 of this title, and Subpart J of Part 351 of this title.

Explanation of Final Regulations

The following changes in Title 5, Code of Federal Regulations, are now made final:

(1) Section 330.201(c) is revised to clarify that, in making appointments from the reemployment priority list, the appointing officer may select persons in a subgroup without regard to the order of retention standing within the subgroup.

(2) Section 330.201(f) is added. Section 330.201(f)(1) provides that, in making appointments from the reemployment priority list, an agency considers full-time employees only for full-time positions, and other-than-full-time employees only for other-than-full-time positions, except as provided in § 330.201(f)(2).

Section 330.201(f)(2) provides that an agency, at its discretion, may adopt administrative assignment provisions to consider employees for selection from the reemployment priority list under the following conditions:

(a) Full-time employees may be considered for other-than-full-time positions if there are no other-than-full-time employees on the reemployment priority list who are qualified and available; and

(b) Other-than-full-time employees may be considered for full-time positions if there are no full-time employees on the reemployment priority list who are qualified and available.

(3) Section 330.201(g) is added for reference. Specifically, § 330.201(g) explains that Subpart J of Part 351 of this title covers the establishment and maintenance of the reemployment priority list.

(4) Section 351.808 is added. Section 351.808 provides that an employee who receives a specific notice of separation under Part 351 of this title must be given information concerning his or her right to consideration for reemployment under the provisions of Subparts B and C of Part 330 of this title. The information concerning consideration for reemployment should be included in or with the specific reduction in force notice; otherwise, a separate supplemental notice containing this information is given to the employee.

(5) Subpart J of Part 351 is revised. Subpart J formerly consisted of § 351.1001 (a) and (b). The new § 351.1001 reorganizes material formerly contained in § 351.1001(a) to clarify agency responsibility for the establishment and maintenance of the reemployment priority list.

(6) Section 351.1002 (a), (b), and (c) are added. Section 351.1002 (a) and (b)

reorganize and clarify material formerly contained in § 351.1001(a). In addition, § 351.1002(a) now clearly provides that the name of each group I and group II employee who receives a specific reduction in force notice of separation from a competitive service position is entered on the reemployment priority list.

Section 351.1002(c) explains that Subpart B of Part 330 of this title covers appointment from the reemployment priority list. This change is being proposed in response to requests by agencies that OPM provide a reference to Subpart B of Part 330 of this title in Subpart I of Part 351.

(7) Section 351.1003 (a) and (b) are added. Section 351.1003(a) reorganizes and clarifies material formerly contained in § 351.1001(a). In addition, § 351.1003(a) contains new material clarifying that an employee's eligibility to be placed on the reemployment priority list is, in part, based upon an offer of assignment under Subpart G of this part. This proposed change reflects present policy, and clarifies the purpose and applicability of the reemployment priority list.

Section 351.1003(b) contains new material clarifying that an other-than-full-time employee's eligibility to be placed on the reemployment priority list is also, in part, based upon an offer of assignment under Subpart G of this part. Again, this proposed change reflects current policy, and clarifies the purpose and applicability of the reemployment priority list.

Final § 351.1003(b) also provides that the name of an other-than-full-time employee is entered on the reemployment priority list unless the employee, in part, declined assignment to an other-than-full-time position that is of the same type work schedule (i.e., part-time, intermittent, or seasonal) as the position from which the employee was separated. This provision was developed from comments received concerning the proposed regulations published on July 22, 1980, and is another effort to ensure that other-than-full-time employees have the same rights under Part 351 as full-time employees.

(8) Section 351.1004 (a), (b), (c), and (d) are added. Section 351.1004 reorganizes and clarifies material formerly contained in § 351.1001(a).

(9) Section 351.1005 (a), (b), and (c) are added. Section 351.1005 reorganizes and clarifies material formerly contained in § 351.1001(b).

Information Concerning Other Recent Changes to Part 351 of This Title

On August 27, 1980, OPM issued FPM Bulletin 351-18, which listed all of the

proposed and final changes to the regulations in Part 351 of this title that were published in the **Federal Register** in 1979 and to that date in 1980. As noted in the FPM Bulletin, OPM plans to publish the revised Part 351 of this title in the **Federal Register** after these regulations covering the reemployment priority list become final. Agencies will then have access to all of the substantive changes in Part 351 of this title with a minimum of delay.

OPM has determined that this is a significant regulation for the purposes of E.O. 12044.

Office of Personnel Management.

Beverly M. Jones,

Issuance System Manager.

Accordingly, Title 5, Code of Federal Regulations, is amended as follows:

PART 330 RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL)

1) In § 330.201 paragraph (c) is revised and paragraphs (f) and (g) added to read as follows:

§ 330.201 Priority in filling vacancies.

(c) In selection from a reemployment priority list, an agency shall give preference to tenure group I employees over tenure group II employees, and to qualified preference eligibles over nonpreference eligibles within each tenure group. An appointing officer may select persons in a subgroup without regard to order of retention standing within the subgroup.

(f)(1) In selection from a reemployment priority list, an agency considers full-time employees only for full-time positions, and other-than-full-time employees only for other-than-full-time positions, except as provided in subparagraph (2) of this section.

(2) An agency, at its discretion, may adopt administrative provisions to consider employees for selection from a reemployment priority list under the following conditions:

(i) Full-time employees may be considered for other-than-full-time positions if there are no other-than-full-time employees on the reemployment priority list who are qualified and available; and

(ii) Other-than-full-time employees may be considered for full-time positions if there are no full-time employees on the reemployment priority list who are qualified and available.

(g) Subpart J of Part 351 of this title covers the establishment and maintenance of the reemployment priority list.

(5 U.S.C. 3315)

2) Section 351.808 is added to read as follows:

§ 351.808 Notice concerning consideration for reemployment.

An employee who receives a specific notice of separation under this part must be given information concerning his or her right to consideration for reemployment under the provisions of Subparts B and C of Part 330 of this title. This information is in addition to that specified in § 351.802. The information concerning consideration for reemployment should be included in or with the specific reduction in force notice; otherwise, a separate supplemental notice covering this information must be given to the employee.

PART 351—REDUCTION IN FORCE

3) Subpart J of Part 351 is revised to read as follows:

Subpart J—Reemployment Priority List

Sec.

351.1001 Establishment and maintenance of the reemployment priority list.

351.1002 Persons covered.

351.1003 Employee eligibility.

351.1004 Duration of eligibility.

351.1005 Operation of the list in Alaska or overseas.

Authority: 5 U.S.C. 1302, 3315.

Subpart J—Reemployment Priority List

§ 351.1001 Establishment and maintenance of the reemployment priority list.

Each agency shall establish and maintain a reemployment priority list for each commuting area in which it separates group I or group II employees from competitive positions under this part.

§ 351.1002 Persons covered.

(a) The name of each group I or group II employee who receives a specific notice of separation from a competitive position (as distinguished from an excepted position) under this part is entered on the reemployment priority list.

(b) This priority extends to all competitive positions in the commuting area for which the employee is qualified and available, except as provided in § 351.1005.

(c) Subpart B of Part 330 of this title covers appointment from the reemployment priority list.

§ 351.1003 Employee eligibility.

(a) A full-time group I or group II employee is entered on the

reemployment priority list unless he or she has declined assignment under Subpart G of this part to a position that:

- (1) Is full-time;
- (2) Is competitive;
- (3) Is nontemporary; and

(4) Has a representative rate no lower than that of the position from which the employee was separated.

(b) An other-than-full-time group I or group II employee is entered on the reemployment priority list unless he or she has declined assignment under Subpart G of this part to an other-than-full-time position that:

(1) Is of the same type work schedule (i.e., part-time, intermittent, or seasonal) as the position from which the employee was separated;

- (2) Is competitive;
- (3) Is nontemporary;

(4) Has a representative rate no lower than that of the position from which the employee was separated; and

(5) Has a regularly scheduled administrative workweek no lower than that of the position from which the employee was separated.

§ 351.1004 Duration of eligibility.

(a) The name of a group I employee remains on the reemployment priority list for 2 years, and a group II employee's name for 1 year, from the date he or she was separated.

(b) An employee's name is deleted from the reemployment priority list when the employee submits a written request to the agency asking that his or her name be deleted.

(c) A full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a non-temporary, full-time, competitive position; or

(2) Declines under this subpart a full-time, nontemporary, competitive position with a representative rate the same as, or higher than, that of the position from which he or she was separated under this part.

(d) An other-than-full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a nontemporary competitive position; or

(2) Declines under this subpart a nontemporary, competitive position with a representative rate, and regularly scheduled administrative workweek, the same as or higher than that of the position from which the employee was separated under this part.

§ 351.1005 Operation of the list in Alaska and overseas.

(a) The name of each group I or group II employee who receives a notice of

separation under this part from a competitive position in Alaska or overseas is entered on the reemployment priority list for the area in which the position from which separated is located, except when:

(1) The employee leaves that area; or
(2) The agency has a general program for rotating employees between overseas areas and the United States and the employee's immediately preceding overseas services or residence, combined with prospective overseas service under available appointments, exceeds the maximum duration of an overseas duty tour in the agency's rotation program.

(b) Upon his or her written request, the name of an employee who leaves the area is entered on the agency's reemployment priority list for:

(1) The commuting area from which he or she was employed for Alaskan or overseas service; or

(2) Another area, except in Alaska or overseas, that is mutually acceptable to the employee and the agency.

(c) In addition to any of the reasons, as appropriate, in § 351.1004(b), (c), or (d), for deleting an employee's name from the reemployment priority list, the name of an employee is deleted from an Alaskan or overseas reemployment priority list when the employee:

(1) Leaves the area covered by that list; or

(2) Becomes disqualified for overseas appointment because of his or her previous service or residence.

(5 U.S.C. 1902, 3315)

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5 CFR Part 536

Grade and Pay Retention

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement the grade and pay retention provisions of the Civil Service Reform Act of 1978.

EFFECTIVE DATE: January 29, 1981.

FOR FURTHER INFORMATION CONTACT: Larry Holman, 202-632-6127, or Jan Karicher, 202-632-4634.

SUPPLEMENTARY INFORMATION: Interim regulations, effective on the first day of the first applicable pay period beginning on or after January 11, 1979, were published in the *Federal Register* on March 2, 1979 (44 FR 117741). OPM proposed final regulations in this area which were published in the *Federal*

Register for a 60-day comment period on June 17, 1980 (45 FR 40990). Based on comments received from Federal agencies, several labor organization representatives and individuals, OPM has made several revisions to the proposed regulations.

Subpart A

With only two exceptions, the intent of the proposed regulations to redelegate authority to agency heads to determine circumstances under which grade or pay retention should be extended was acceptable to the respondents. Those opposed felt the redelegation was too vague and open to inconsistent application. We have clarified the language pertinent to the redelegation. The term, "management-initiated action," has been dropped from § 536.102, 536.103, and 536.206. With regard to grade retention, the language was simplified to show that management's authority is limited to downgrades during reorganizations and reclassifications. The term, "reorganization," has been defined to further identify the bounds of the redelegation. More important, the redelegation still better recognizes the necessity for agency heads to decide what circumstances, outside those prescribed by the law, warrant grade or pay retention in order to promote the efficiency of their operations.

In response to several separate comments, § 536.104 has been extended to include several specific circumstances warranting pay retention. The first calls for pay retention when an employee is downgraded in a reduction in force or reclassification but does not meet the eligibility requirements for grade retention. This extension was included in the interim regulations. The second extends pay retention to an employee whose basic pay is a special rate moved by management to a lesser special rate position or to a non-special rate position. This circumstance was covered in the interim regulations under § 536.212(a)(2). " * * * reassignment to a position in a different pay schedule."

Some concern was expressed with the term "placement" in the extension of pay retention. The concern was that any movement by an employee in the specified circumstances would warrant coverage. In fact, in any potential entitlement to grade or pay retention, the limitations of the exclusions in § 536.105, especially, "is reduced in grade or pay . . . at the employee's request," means that the placement must be caused or influenced by management. This implies that the movement is beyond the employee's control and/or to further the mission of the agency.

Similarly an individual commented that OPM should not extend pay retention to prevailing rate employees who move from a high to lower wage area. This extension, like the others, is generally for an action which is caused or influenced by management and is not strictly "at the employee's request." Furthermore, it recognizes the needs of management to sometimes move employees to promote an efficient organization without adversely affecting employees. The extension is, therefore, still included.

Several changes or additions have been made to § 536.102 other than the addition of "reorganization." "Rate of basic pay" has been amended to show that the night and environmental differentials for prevailing rate employees are not included in basic pay protected by grade or pay retention. "Representative rate" now includes the representative rate for a Senior Executive Service employee. "Rate schedule" has been added here and where appropriate throughout Part 536 for use in situations where the movement is not between pay schedules but between rates within a schedule, e.g., special rate movement.

"Temporary reassignment" in both § 536.102 and 536.105 was questioned by a commenter as unnecessary because reassignment implies no promotion or demotion. While this is generally correct, these reassignments can result in pay adjustments, e.g., reassignment to a special rate position or to a higher or lower wage area. The result could be a pay discrepancy which might raise questions of entitlement and, therefore, create the necessity for its use. A suggestion to define "covered pay system" was not adopted because the term was not used in these regulations.

In § 536.105, the most significant change was the altering of the exclusion of non-appropriated fund employees. The only non-appropriated fund employees now excluded are those covered under § 2105(c) of title 5, United States Code, i.e., those in Department of Defense and Coast Guard nonprevailing rate positions. Non-appropriated fund employees, other than those in DOD and the Coast Guard, are covered for most benefit purposes. It is, therefore, consistent to cover them for grade and pay retention.

Several comments suggested we increase the scope of coverage beyond reorganizations and reclassifications for grade retention and to change eligibility requirements from the position being classified for 1 year to the employee being in the position for 1 year. OPM has not adopted these because our ability to regulate this benefit does not allow us to

change the intent of the law. We have also not included a restatement of the law or of sections 5337 and 5345 of title 5, which were repealed, because we feel the soon to be released Federal Personnel Manual guidance on grade and pay retention will provide the necessary background. This guidance should also provide information on movements between agencies creating grade retention entitlements and further explain the 52-week/1 year eligibility requirements, both of which raised questions.

A significant question was raised regarding potential entitlement to pay retention when an employee waives grade retention or when an employee requests a demotion for ill health or similar circumstances. In the former case, OPM's position is that once an employee waives grade retention, the employee removes management's influence over the particular action against the employee. Any ensuing loss of pay would be as a result of an employee request and no pay retention could be granted even under the agency's authority. In the latter case these demotions are also at the employee's request unless the agency has already informed the employee that action to downgrade will be taken for non-disciplinary reasons of ill health and the agency offers another position. The agency could then grant pay retention under its authority.

Subpart B

Section 536.202(a) of the proposed regulations has been made a separate section, § 536.201. This reflects the fact that this method of comparing grades and rates is necessary not only for determining grade retention entitlement but also whether the 52-week/1 year at a higher grade requirement has been met, whether a demotion has occurred, or whether an employee has declined an offer at, or been placed in, a grade equal to or greater than the retained grade. This change required renumbering the sections of the entire subpart.

Several changes were made to the section on determining the rate of basic pay. The language of the section was clarified to show what rate of basic pay, including a special rate under 5 U.S.C. 5303, is used to determine pay retention entitlement. The language change also reflects the fact that we will issue regulations shortly as Part 532 for setting pay in the Federal Wage System, when grade and pay retention entitlement terminates.

A paragraph has been added to show that any employee on pay retention receives only 50 percent of the annual comparability increase. This paragraph

also demonstrates that this rule only applied to employees on pay retention and only affects increases in the scheduled rates of a position.

Section 536.204(c) of the proposed regulations has been changed as the result of several comments to place an employee who is on pay retention at the maximum rate of the range of the new position when, after receiving only 50 percent of increases in scheduled rates, the employee's pay can be found within the rate range of the new position. This was the rule of the interim regulations. This 50 percent rule is designed only to move the employee into the rate range of the new position and not to adversely affect the employee any more than is necessary.

Several changes have been made to the section describing the criteria for a reasonable offer. The employee must now be informed of his or her right to appeal to OPM the reasonableness of the offer. This provision is similar to other regulations which require an agency to inform employees of their appeal rights. The language has also been changed to show that the offered position must be at least equal in tenure to the position the grade or pay of which is being protected. This change protects the employee who moves during a period of grade or pay retention but is not offered a position whose tenure is equal to or higher than the position which created the entitlement.

OPM has removed the necessity that the employee meets the qualification requirements of the offered position. This is in keeping with regulations regarding reductions in force which allow agencies to waive qualifications in order to place employees. Staffing guidance in the Federal Personnel Manual will reflect the fact that qualifications may be waived when grade or pay retention is involved.

"Commuting area" was not defined because we believe that the current language allows the affected employee the maximum possible protection in an appeal. Designating a specific radius does not fully take into account other transportation circumstances which may affect the reasonableness of an offer.

Several issues were raised concerning the factors for terminating eligibility and/or entitlement to grade and pay retention. Specifically at issue was the extent of the priority placement program provision in grade retention situations. The provision has been extended to include an employee who does not fully comply with written agency requirements of a priority placement program. These requirements can range from formally placing one's name in the program to actively participating in the

program, e.g., filing SF-171's. This ensures maximum effort by the employee to return as quickly as possible to a proper grade or pay level position. This balances management's requirement under § 536.301 to establish placement and classification plans. This prompt return to the proper level recognizes the intent of the law. A similar provision was not added to pay retention situations because of OPM's lack of authority in this area, e.g., restrictions imposed by the statutory construction of section 5363 of title 5, U.S. Code. These restrictions also prevent significant changes in the cessation factors imposed by the law.

These cessation factors for grade retention have also been amended to show that an employee is not declining a reasonable offer when the employee requests a lower graded position than the reduction-in-force position rather than displace another employee. This change avoids harmful and widespread displacement and is in keeping with the intent of the delegation of this authority to agency heads.

Subpart C

The section reserved for grade and pay retention under the merit pay system was determined unnecessary because merit pay employees will be treated the same as General Schedule employees for grade and pay retention purposes. In its place is a section establishing a legal basis for OPM requiring agencies with affected employees to have classification and placement plans. Again, these plans promote the intent of the law, i.e., to return the employee to the proper grade or pay level as quickly as possible.

OPM has adjusted the time period for filing an appeal of the termination of benefits because of the employee's declination of a reasonable offer. It will now be 20 calendar days to conform to the appeal period used by the Merit Systems Protection Board. We decided not to include under this appeal right the termination of benefits due to an employee's failure to fully participate in a priority placement program. These disputes will be based on detailed agency policy and can be better settled within the affected agency through the internal agency grievance procedures or procedures negotiated in labor contracts.

Throughout the regulations several small nonsubstantive changes were made in language to clarify issues and alleviate confusion raised in the comments. Several comments were not accepted for changes in the regulations themselves because we feel the guidance soon to be issued in the

Federal Personnel Manual will take these comments into account and clarify issues in this area.

OPM has determined that these are significant regulations for the purposes of E.O. 12044.

Office of Personnel Management.

JoAnn B. Platter,

Assistant Issuance System Manager.

Accordingly, the Office of Personnel Management is revising Part 536 of Title 5, Code of Federal Regulations, to read as follows:

PART 536—GRADE AND PAY RETENTION

Subpart A—Definitions, Coverage and Applicability

Sec.

- 536.101 General.
- 536.102 Definitions.
- 536.103 Coverage and applicability of grade retention.
- 536.104 Coverage and applicability of pay retention.
- 536.105 Exclusions.

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

- 536.201 Comparison of grades in different pay schedules or pay systems.
- 536.202 Period of grade retention.
- 536.203 Determination of retained grade.
- 536.204 Determination of applicable rate schedule.
- 536.205 Determination of rate of basic pay.
- 536.206 Criteria for a "reasonable offer."
- 536.207 Loss of eligibility for grade retention.
- 536.208 Termination of grade retention.
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- 536.306 Retroactive entitlement.

Authority: 5 U.S.C. 5361-5366, Pub. L. 95-454.

Subpart A—Definitions; Coverage and Applicability

§ 536.101 General.

(a) Title VIII of Pub. L. 95-454 (The Civil Service Reform Act of 1978) provides that an employee who is placed in a lower grade as a result of reduction-in-force procedures, or whose position is reduced in grade as a result of reclassification of the position, is entitled to retain for a period of 2 years the grade held immediately before that placement or reduction. It also provides the authority for granting an employee

indefinite pay retention. In addition to specifying criteria and conditions for the application of the grade and pay retention provisions, the law authorizes the Office of Personnel Management to extend the application of these provisions to other individuals and situations to which they would not otherwise apply.

(b) This part contains the regulations—including extensions, conditions, criteria, and procedures—which the Office of Personnel Management has prescribed for the administration of grade and pay retention. This part supplements and implements the provisions of 5 U.S.C. 5361-5366, and section 801(b) of Pub. L. 95-454, and must be read together with those sections of law.

§ 536.102 Definitions.

For the purposes of this part: "Demotion at an employee's request" means a reduction in grade:

- (1) Which is initiated by the employee for his or her benefit, convenience or personal advantage, including consent to a demotion in lieu of one for personal cause, and
- (2) Which is not caused or influenced by a management action.

"Demotion for personal cause" means a reduction in grade based on the conduct, character, or unacceptable performance of an employee.

"Employee" means an employee as defined in 5 U.S.C. 5361 and also an individual who is moved from a position which is not under a covered pay schedule to a position which is under a covered pay schedule provided that the individual's employment immediately prior to the move was on other than a temporary or term basis.

"Employment on a temporary or term basis" means employment under an appointment having a definite time limitation or designated as temporary or term.

"Rate of basic pay" means, for any pay system, the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay or any kind such as night or environmental differentials in the case of a prevailing rate employee.

"Rate schedule" means a specific set of rates within a pay schedule.

"Reorganization" means the planned elimination, addition or redistribution of functions or duties either wholly within an agency or between agencies.

"Representative rate" means:

- (1) The fourth rate of the grade in the case of a position under the General Schedule including the fourth rate of the corresponding grade of the General

Schedule in the case of a position under the merit pay system established by chapter 54 of title 5, United States Code, the single rate of GS-18; or the individual's rate under the Senior Executive Service;

(2) The second rate of the grade of a position under a regular prevailing rate schedule established under subchapter IV of chapter 53 of title 5, United States Code, or in the case of a position with a single rate, the single rate of that position; or

(3) The rate designated as representative of the position by the agency responsible for establishing and adjusting the schedule in the case of a position under a schedule different from those covered in paragraph (1) or (2) of this section.

"Temporary promotion" means a promotion with a definite time limitation, and one which the individual is informed in advance is temporary and would normally require that the individual return to his or her permanent position at the expiration of that promotion.

"Temporary reassignment" means a reassignment with a definite time limitation, and one which the individual is informed in advance is temporary and would normally require that the individual return to his or her permanent position at the expiration of that reassignment.

§ 536.103 Coverage and applicability of grade retention.

(a) Grade retention shall apply to an employee who moves to a position in a covered pay schedule which is lower graded than the position held immediately prior to the demotion in the following circumstances:

(1) As a result of reduction-in-force procedures; or

(2) As a result of a reclassification process.

(b) Except as otherwise covered in paragraph (a) of this section, the head of the agency may offer grade retention to eligible employees who are or might be reduced in grade as the result of a reorganization or reclassification decision announced by management in writing. When an employee is offered a position with grade retention in anticipation of a reduction in grade, the agency shall inform the employee in writing that acceptance of the position is not required and that declination of the offer has no effect on the employee's entitlement to grade retention under paragraph (a) of this section if he or she is actually moved to a lower graded position.

(c)(1) An employee who, immediately prior to being placed in a lower graded

position as a result of reduction-in-force procedures, is in a position under a covered pay schedule, is eligible for grade retention only if the employee has served for 52 consecutive weeks or more in position(s) under a covered pay schedule at a grade(s) higher than the position in which the employee is placed.

(2) An employee is eligible for grade retention when his or her position has been reclassified at a lower grade only if the position which is being reduced had been classified at a higher grade(s) for a continuous period of at least 1 year immediately before the reduction.

(3) In situations other than those covered in paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more provided that the service was in an agency as defined in 5 U.S.C. 5102 at a grade(s) higher than the position in which the employee is placed.

§ 536.104 Coverage and applicability of pay retention.

(a) Pay retention shall apply to any employee whose rate of basic pay would otherwise be reduced:

(1) As the result of the expiration of the 2-year period of grade retention; or

(2) As a result of reduction-in-force or reclassification when the employee does not meet the eligibility requirement for grade retention; or

(3) As a result of the reduction or elimination of scheduled rates, except those reflecting a decrease in the level of prevailing rates as determined by a wage survey, or as a result of the reduction or elimination of special schedules or special rates; or

(4) As a result of the placement of an employee into a non-special rate position or into a lower special rate position from a special rate position; or

(5) As a result of the placement of an employee in a position in a lower wage area or in a position in a different pay schedule; or

(6) As a result of the placement of the employee in a formal employee development program generally utilized Governmentwide: Upward Mobility, Apprenticeship, and Career Intern Programs.

(b) Except as otherwise covered in paragraph (a) of this section, the head of the agency may provide pay retention to eligible employees whose rates of basic pay would otherwise be reduced as the result of a management action.

§ 536.105 Exclusions

(a) Grade and pay retention shall not apply to an employee who:

(1) Moves from a position which is not in an agency as defined in 5 U.S.C. 5102; or

(2) Is identified under 5 U.S.C. 2105(c) except prevailing rate employees included under 5 U.S.C. 5361; or

(3) Is reduced in grade or pay for personal cause or at the employee's request; or

(4) Does not satisfactorily complete the probationary period prescribed by 5 U.S.C. 3321(a)(2), and, as a result, is removed from a supervisory or managerial position.

(b) An employee's entitlement to grade or pay retention is not affected by a temporary promotion or temporary reassignment. However, an employee serving under a temporary promotion or temporary reassignment may not retain a grade or rate of basic pay held during the temporary promotion or temporary reassignment.

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

§ 536.201 Comparison of grades in different pay schedules or pay systems.

For the purpose of determining whether the grade of a position is equal to, higher than, or lower than the grade of another position in movements between pay schedules or pay systems, the representative rates of the positions will be compared.

§ 536.202 Period of grade retention.

(a) An employee entitled to grade retention is entitled to retain that grade for 2 years beginning on the date the employee is placed in the lower graded position.

(b) If, during a 2-year period of grade retention, an employee is further reduced in grade under circumstances also entitling the employee to grade retention, the employee shall continue to retain the previous retained grade for the remainder of the previous 2-year retention period. At the end of that period, the employee shall be entitled to retain the grade of the position from which the further reduction in grade was made, until 2 years have passed from the date of the further reduction in grade.

§ 536.203 Determination of retained graded.

(a) An employee who is in a position under a covered pay schedule immediately prior to the action which gives entitlement to grade retention shall retain the grade held immediately prior to the action.

(b) An employee who is in a position not under a covered pay schedule immediately prior to the action which gives entitlement to grade retention shall retain:

(1) The lowest grade of the covered pay schedule in which placed which has a representative rate equal to or higher than the representative rate of the grade held immediately prior to that placement; or

(2) The highest grade of the covered pay schedule in which placed, if there is no grade in the covered pay schedule with a representative rate equal to or higher than the representative rate held immediately prior to that placement.

§ 536.204 Determination of applicable rate schedule.

(a) When an employee entitled to grade retention is placed in a position in a different geographical area, the rate schedule which applies to the employee is the rate schedule in the new geographical area.

(b) When an employee entitled to grade retention is placed in a position in, or his or her position is changed to, a different occupational series, the rate schedule which applies to the individual is the rate schedule for the new occupational series.

§ 536.205 Determination of rate of basic pay.

(a) When an employee becomes entitled to grade retention, or moves to another position during a period of grade retention under conditions which permit continuation of the grade retention entitlement, the employee is entitled to the greatest of:

(1) His or her rate of basic pay before the movement, or

(2) The rate of basic pay from the applicable rate schedule for the grade and step (or relative position within a range of rates under the merit pay system) held by the employee before the movement, or

(3) The lowest rate of basic pay from the applicable rate schedule for the retained grade which equals or exceeds the employee's rate of basic pay before the movement.

(b)(1) When an employee becomes entitled to pay retention, or moves to another position while receiving pay retention, the employee's rate of basic pay immediately prior to eligibility or movement shall be compared with the range of rates of basic pay for the position to be occupied by the employee upon this eligibility or movement.

(2) The employee is entitled to the lowest rate of basic pay in the position to be occupied upon the eligibility or movement which equals or exceeds his

or her rate of basic pay immediately prior to the eligibility or movement. If the rate of basic pay can be accommodated in the rate range of the latter position, pay retention does not apply.

(3) If the employee's rate of basic pay immediately prior to the pay retention exceeds the maximum rate of the position to be occupied when he or she becomes entitled to pay retention, the employee is entitled to the lower of:

(i) The rate of basic pay payable to the employee immediately before the reduction in pay; or

(ii) 150 percent of the maximum rate of basic pay payable for the new grade.

(c) When an increase in the scheduled rates of the grade of the employee's position occurs while the employee is under pay retention, the employee is entitled to 50 percent of the amount of the increase in the maximum rate of basic pay payable for the grade of the employee's current position.

(d) When, as a result of an increase in the scheduled rate(s) of the grade of the employee's position, an employee's retained rate of basic pay becomes equal to or lower than the maximum rate of that grade, the employee is entitled to the maximum rate of that grade and pay retention ceases.

(e) An employee who is serving on a temporary promotion at the time he or she becomes eligible for pay retention is entitled to retain the rate of basic pay which he or she would have been receiving at that time had the temporary promotion not occurred.

(f) When an employee's entitlement to grade or pay retention terminates, the employee's rate of basic pay shall be set in accordance with the provisions of Parts 531 and 532 of this title unless:

(1) Grade retention is being terminated as a result of the expiration of the 2-year retention period; or

(2) The employee is moved to a grade equal to or greater than the retained grade; or

(3) The employee is entitled to a higher rate of basic pay under paragraphs (b) or (d) of this section.

§ 536.206 Criteria for a "reasonable offer".

For the purposes of this part, an offer of a position, in order to be considered a reasonable one, must fulfill the following conditions:

(1) The offer must be in writing, and must include an official position description of the offered position; and

(2) The offer must inform the employee that an entitlement to grade or pay retention will be terminated if the offer is declined and that the employee may appeal the reasonableness of the offer as provided in § 536.302; and

(3) The offered position must be of tenure equal to or greater than that of the position creating the grade or pay retention entitlement; and

(4) The offered position must be in an agency, as defined in 5 U.S.C. 5102, although not necessarily in the same agency in which the employee is serving at the time of the offer; and

(5) The offered position must be full-time, unless the employee's position immediately before the change creating entitlement to grade or pay retention was less than full-time, in which case the offered position must have a work schedule of no less time than that of the position held before the change; and

(6) The offered position must be in the same commuting area as the employee's position immediately before the offer, unless the employee is subject to a mobility agreement or a published agency policy which requires employee mobility.

§ 536.207 Loss of eligibility for grade retention.

(a) Eligibility for grade retention as a result of entitlement under § 536.103(a) of this part ceases if any of the following conditions occurs at any time after the employee receives written notice of the reduction in grade action, but before the commencement of the 2-year period of grade retention:

(1) The employee has a break in service of 1 workday or more; or

(2) The employee is demoted for personal cause or at the employee's request; or

(3) The employee is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher than the retained grade; or

(4) The employee elects in writing to terminate the benefits of grade retention.

(b) Eligibility for grade retention as a result of entitlement under § 536.103(b) of this part ceases if any of the following conditions occurs at any time after the employee is informed by management of an impending reorganization or reclassification which will or could result in reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) Any of the conditions listed in paragraph (a) of this section except that an employee's request for placement in a lower graded position, in lieu of displacing an employee at his or her grade under reduction-in-force procedures, is not a declination of a reasonable offer for grade retention purposes; or

(2) The employee fails to enroll in, or to comply with reasonable written requirements established to assure full

consideration under, a program providing priority consideration for placement.

§ 536.208 Termination of grade retention.

(a) Grade retention terminates if any of the conditions listed in § 536.207(a) occurs after commencement of the 2-year period of grade retention.

(b) Grade retention as provided by § 536.103(b) also terminates if any of the conditions listed in § 536.207(b) occur after the commencement of the 2-year period of grade retention.

(c) The effective date of termination of grade retention benefits is:

(1) The day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of the last day of the pay period which the employee:

(i) Declines a reasonable offer; or
(ii) Elects to waive grade retention benefits; or

(iii) Fails to enroll in, or comply with reasonable written requirements established to assure full consideration under, a program providing priority consideration for placement.

§ 536.209 Loss of eligibility for, or termination of, pay retention.

(a) Eligibility for pay retention, or actual retention of pay, ceases if any of the following conditions occurs at any time after the employee had received written notification that his or her pay is to be reduced:

(1) The employee has a break in service of 1 workday or more; or

(2) The employee is entitled to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under pay retention; or

(3) The employee is demoted for personal cause or at the employee's request.

(b) The effective date of termination of pay retention benefits is:

(1) The day before placement if the termination is the result of the employee's placement in another position; or

(2) The end of the last day of the pay period in which the employee declines a reasonable offer.

Subpart C—Miscellaneous Provisions

§ 536.301 Placement and classification plans.

(a) Agencies which employ individuals subject to this part are required to establish in writing placement and classification plans.

(b) The placement and classification plans must commit the agency to:

(1) Identify and correct classification errors; and

(2) Correct position management problems; and

(3) Carry out specific planned efforts to place employees subject to this part; and

(4) Pursue placement efforts that do not adversely affect affirmative action goals.

§ 536.302 Appeal of termination of benefits because of reasonable offer.

(a) Except as provided for in paragraph (e) of this section, an employee whose grade or pay retention benefits are terminated on the grounds the employee declined a reasonable offer of a position the grade or pay of which is equal to or greater than his or her retained grade or pay may appeal the termination to the Office of Personnel Management.

(b) An employee who appeals under this section shall file the appeal in writing with the Office of Personnel Management not later than 20 calendar days after being notified that his or her grade or pay retention benefits have been terminated, and shall state in the appeal the reasons why the employee believes the offer of a position was not a reasonable offer.

(c) The Office of Personnel Management may conduct any investigation or hearing it determines necessary to ascertain the facts of the case.

(d) If a decision by the Office of Personnel Management on an appeal under this section requires corrective action by an agency, including the retroactive or prospective restoration of grade or pay retention benefits, the agency shall take that corrective action.

(e) Termination of benefits based on a declination of a reasonable offer by an employee in an exclusively recognized bargaining unit may be reviewed under negotiated grievance and arbitration procedures in accordance with chapter 71 of title 5, United States Code, and the terms of any applicable collective bargaining agreement. An employee in an exclusively recognized bargaining unit may not appeal a termination of benefits to the Office of Personnel Management if the grievance procedure of the agreement by which he or she is covered provides for this review.

(f) Decisions issued by the Office of Personnel Management shall be considered final decisions. OPM may, at its discretion, reconsider an original appellate decision when new and material information is presented, in writing, by the employee or the agency,

which establishes a reasonable doubt as to the appropriateness of the original decision. The request must show that the information was not readily available when the decision was issued. A request for reconsideration of an original appeal decision must be submitted to OPM within 30 calendar days of the date of the original decision.

§ 536.303 Documentation.

The application of the provisions of this part shall be documented in writing as a permanent part of the employee's Official Personnel Folder. As a minimum this documentation will include a copy of the letter described in § 536.304.

§ 536.304 Issuance of employee letters.

When an employee is entitled to grade and/or pay retention, the employing agency shall give to the employee, with a copy of the Notification of Personnel Action (SF-50) documenting entitlement to grade and/or pay retention, a letter describing the circumstances warranting grade and/or pay retention, and the nature of that entitlement.

§ 536.305 Effect of grade retention on quota spaces.

To determine the number of positions at GS-16, -17 and -18, or the equivalent, including positions in the Senior Executive Service, authorized by an Act of Congress, the grades (or SES levels) of the positions occupied, rather than the retained grades, are to be used.

§ 536.306 Retroactive entitlement.

Employees who are eligible for grade retention as provided by § 536.103(a) except that the reduction in grade took place on or after January 1, 1977, and before the first day of the first pay period beginning on or after January 11, 1979, shall be entitled to pay and benefits as provided in section 801(b) of the Civil Service Reform Act of 1978 under procedures and instructions issued by the Office of Personnel Management.

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5 CFR Part 551

Federal Pay Administration Under the Fair Labor Standards Act

AGENCY: Office of Personnel Management.

ACTION: Final rule

SUMMARY: The Fair Labor Standards Act was amended by the Fair Labor Standards Amendments of 1974 to include Federal employees under its coverage effective May 1, 1974. The