§ 13.02 Reductions in Force

Reduction in force (RIF) procedures enjoy a long, if undistinguished, history. Reductions in force, or executive reorganizations, have for many years been favorite techniques for removing troublesome or unwanted employees. One of the first United States Civil Service Commissioners lost his state job when it was abolished because of his opposition to patronage appointments.[1] During the Wilson administration, black clerks in the post office were transferred from the central branch of the post office to branch offices previously marked for abolition. The jobs of the transferred blacks ended automatically upon the closing of these branches.[2] More recently, the well-known whistleblower, Ernest Fitzgerald, lost his job in a one-person reduction in force, after he testified before Congress concerning cost overruns on a major defense project.[3]

Yet, the authority of the government to separate employees for economic reasons is widely accepted. The necessity of this authority becomes apparent when government confronts financial or organizational difficulties. The detailed regulations controlling agency practice and review by the Merit Systems Protection Board are intended to reduce the likelihood of abuse. Also, the extensive regulations recognize that reductions in force affect employees who have served well for many years and thus, RIFs threaten the job security of all employees who have performed satisfactorily. In no other area of appeals before the Board is it more important for employees to understand their substantive and procedural rights and to monitor the agency's application of the policies and standards.

[1]—Summary of Process

A brief summary of the reduction in force process, described in the relevant regulations, should aid in understanding the specific procedures discussed in the opinions of the Board.[4] An agency may make a reduction in force only for certain specified reasons. Once the agency has determined to conduct a reduction in force, the agency must give notice to employees who will be affected. The implementation of a

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[1] United States Civil Service Commission, *Fifty United States Commissioners* 38-39 (1971) (biographical Sketch of John Robert Proctor).

[2] Hayes, *The Negro Federal Government Worker* 21 (1941).

[3] See generally, Hearings on S. 1210 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975).

[4] 5 C.F.R. Ch. 351.

reduction in force involves determining first, which positions are to be abolished, and then, which employees will be removed or reduced in grade as the result of the elimination of positions. These determinations require selecting which employees will compete with others, and on what basis. Agencies establish competitive areas, which are geographical, and competitive levels, which concern job categories, within an agency to determine which positions will be included in the competition. Specific regulations limit the discretion of an agency in determining these competitive areas and competitive levels. A retention register is drawn up to determine the order in which employees will be released. The specified factors are used in determining an employee's standing on the retention register. When the agency selects an employee for release, it may furlough him or her or, in certain conditions, must offer him or her the best possible position in another competitive level in the employee's competitive area. Board decisions address nearly every aspect of a reduction in force.

[2]—Coverage

Section 7701 gives the Board jurisdiction to hear appeals provided by law or by regulation. Congress mandates the Office of Personnel Management to promulgate regulations relating to reductions in force, and these regulations specifically provide for appeal to the Board.[5] An employee covered under a negotiated grievance procedure may have the option of using the negotiated grievance procedure, rather than a Board appeal, to challenge a reduction in force.[6]

Reduction in force regulations protect a broader range of employees than do Chapters 43 and 75. The regulations cover all civilian employees within the executive branch except those whose appointment must be confirmed by the advice and consent of the Senate (other than a postmaster), certain positions outside the executive branch, and the civil service of the District of Columbia.[7]

OPM regulations control the scope of reduction in force protections. For example, OPM regulations do not provide any appeal to nonpreference eligibles in the U.S. Postal Service.[8] Even preference

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[5] 5 C.F.F. § 351.901.

[6] 5 C.F.R. § 1201.3(c). See Chapter 10 *supra*. A negotiated procedure may make a grievance under it the exclusive remedy. Sirkin v. Department of Labor, 16 M.S.P.R. 432. See Chapter 10 *supra*.

[7] 5 C.F.R. § 351.202(2).

[8] Raymond v. U.S. Postal Service, 45 M.S.P.R. 16, 18 (1990). In addition, seasonal employees who are placed in a nonduty status in accordance with the terms of

eligibles in the Postal Service may not appeal in all circumstances.[9] OPM regulations also do not apply to the release of National Guard technicians[10] or to employees of the Senior Executive Service.[11]

Reduction in force procedures may apply when a job is lost in a transfer of function. A function is transferred when the performance of a continuing function is moved from one competitive area to one or more other competitive areas.[12] A transfer of function also occurs when a function is moved from one competitive area to another.[13] Regulations control the selection of jobs to be transferred with the function,[14] and reduction in force procedures apply to the removal of persons from their competitive level in a transfer of function.

In determining whether a transfer of function has occurred, the Board has stated that a function involves a clearly identifiable activity of the agency, authorized by law, which can be measured in quantitative or qualitative terms.[15] An agency's legislation, organizational manuals, and delegations of authority are the most significant indices of the discrete functions of the agency. In comparing functions at agencies, the performance of activities is crucial in determining whether or not a function has been transferred.[16] In some instances, Congressional intent to establish a new function at an agency, rather than transfer an existing function from another agency, is significant.[17]

The Board has held that there is no right to appeal from a transfer of function unless the transfer of function results in a reduction in force or disciplinary action.[18] When an employee refuses to transfer with a function, the agency may either remove the employee under disciplinary provisions, or it may apply reduction in force proce-

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employment do not have reduction in force appeal rights. Strickland v. MSPB, 748 F.2d 681, 684 (Fed. Cir. 1984). The Board has also so held with respect to on call employees (i.e., employees serving only intermittently, upon call by the agency).

[9] *e.g.*, in case of a change of an employee from regular to substitute in the same pay level in the Postal field service. 5 C.F.R. § 351.202(4).

[10] 5 C.F.R. § 351.202(5).

[11] 5 C.F.R. § 351.202(b)(1).

[12] 5 C.F.R. § 351.203. See § 13.02[4] *infra* for a discussion of competitive areas.

[13] 5 C.F.R. § 351.203.

[14] 5 C.F.R. § 351.302.

[15] Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984) (some quantitative basis must exist to trace the functions from one agency to another).

[16] *Ibid.* The Board concluded that when the legal duties and responsibilities of two agencies require substantially different performance no transfer of function has occurred.

[17] *Id.*

[18] Jackson v. National Transportation Safety Board, 18 M.S.P.R. 626 (1984); Brown v. Department of the Air Force, 4 M.S.P.B. 298, 4 M.S.P.R. 221 (1980).

dures.[19] The employee may adjudicate before the Board the claim that the agency has improperly identified the employee for transfer with the function in only two circumstances: (1) where the employee accepts the transfer of function and then undergoes a reduction in force, or (2) refuses either to transfer with the function or to accept another position, and is subject to a disciplinary action.[20] Reduction in force procedures will not allow an employee to raise previous transfers of function in which the employee was not affected, but which placed the employee in a position that subsequently was the subject of a reduction in force.[21] Likewise, an employee may not raise in a reduction in force appeal the propriety of the original classification of the position of which the employee is an incumbent.[22] The Federal Circuit has emphasized that examination of the classifications of positions that employees held would make the determination of retention rights "impossible"[23] "Reductions in force deal with actual and not theoretical or possible situations."[24] An employee, however, may raise in a reduction in force appeal the allegation that his position should not be subject to reduction in force procedures because the position was, in fact, transferred to another competitive area rather than having been eliminated.[25]

In an appeal of a reduction in force or of a disciplinary action, an employee may also assert that he or she should not have been identified to transfer with the function. For example, the employee identified must be qualified for the position to which he or she is to be transferred[26] and an agency must use permissible methods of identify-

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[19] Brown v. Department of the Air Force, 4 M.S.P.B. 298, 4 M.S.P.R. 221 (1980).

[20] *Id.*, 4 M.S.P.B. at 299.

When the transfer of function occurs during a reduction in force in the losing area, the agency may remove employees who decline to move with their function through RIF procedures and in this circumstance need not use adverse action procedures. Smith v. Department of Commerce, 19 M.S.P.R. 589 (1984).

[21] Bollo v. Department of the Navy, 7 M.S.P.B. 181, 7 M.S.P.R. 286 (1981). Also, an employee may not compel reassignment of his position to an activity not subject to a RIF. Cooper v. TVA, 723 F.2d 1560 (Fed. Cir. 1983).

[22] Davis v. TVA, 10 M.S.P.R. 300 (1982). There is no obligation on an agency to properly classify a position before a reduction in force and the Board will review classification matters only if it is necessary in order to determine whether the reduction in force action is in good faith. Estrin v. Social Security Administration, 24 M.S.P.R. 303 (1984).

[23] Menoken v. Department of Health and Human Services, 784 F.2d 365, 369 (Fed. Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 273, 93 L.Ed.2d 249 (1986).

[24] *Id.*

[25] Prince v. Department of Transportation, 11 M.S.P.R. 584 (1982).

[26] Jackson v. National Transportation Safety Board, 18 M.S.P.R. 395 (1984). See 5 U.S.C. § 3503.

ing employees for transfer.[27] The obligation is on the agency to ensure that the process of identification is proper.[28]

No right exists to appeal to the Board in certain circumstances where an employee was downgraded but retained pay; the employee may appeal neither the reduction in force nor the adverse action.[29]

[3]—Reduction in Force for Impermissible Purposes

An agency may conduct a reduction in force for certain reasons only.[30] These reasons include "lack of work, shortage of funds, reorganization, reclassification due to a change in duties or the exercise of reemployment rights or restoration rights."[31]

When an employee appeals a reduction in force action to the Board, the agency has the burden of persuasion by a preponderance of the evidence.[32] The agency's burden of persuasion extends to establishing that the reduction in force regulations have been properly invoked, as well as properly applied to the individual employee.

In *Losure v. Interstate Commerce Commission*[33] the Board articulated the burdens upon the agency and the employee in an appeal alleging that reduction in force procedures were improperly invoked. The agency may establish a *prima facie* case that the reduction in force procedures have been properly invoked, by presenting evidence showing that the agency undertook the reduction in force for one of

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[27] Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984).

[28] *Ibid.*

[29] See § 12.02 *supra.*

[30] 5 C.F.R. § 351.201(a); *cf.* Mead v. MSPB, 687 F.2d 285 (9th Cir. 1982).

[31] 5 C.F.R. § 351.201(a).

An agency notice need not cite the terms of the regulation if the agency subsequently establishes, by a preponderance of the evidence, that the reduction in force was taken for a permissible reason. Bacon v. Department of Housing and Urban Development, 757 F.2d 265 (Fed. Cir. 1985) (agency gave us reason "workload and skills imbalances," but established that the reduction in force was taken as part of a reorganization). When the reduction in force is taken as a result of a reclassification of the position to a lower grade because of an erosion of duties, the incumbent of the position need not ever have performed the eroded duties. Moraglia v. EPA, 20 M.S.P.R. 265 (1984). A shortage of funds may include management discretion in abolishing a researcher's position which no longer has outside funding. Sinha v. Veterans Administration, 768 F.2d 330 (Fed. Cir. 1985).

The Federal Circuit has found that the change of a position from one shared by two part-time employees to one requiring a full-time employee was not a reorganization and that the agency abused its discretion by invoking reduction in force regulations. Cobb v. Department of Labor, 774 F.2d 475, 477-478 (Fed. Cir. 1985).

[32] Losure v. ICC, 2 M.S.P.B. 361, 2 M.S.P.R. 195 (1980).

[33] *Id.*

the permissible reasons.[34] If the employee presents no rebuttal evidence to challenge the good faith of the agency's action, the evidence establishing the agency's *prima facie* case will normally be enough to carry the agency's burden of persuasion.

If the agency presents a *prima facie* case that it conducted the reduction in force for a permissible reason, the employee must introduce evidence that indicates the agency conducted the reduction force for some improper reason. In these circumstances, the agency may need to introduce additional evidence, because the burden of persuasion remains with the agency. The Board also cautions that the agency may wish to introduce additional evidence, even when the employee introduces none, if its own evidence casts doubt on the agency's good faith.[35]

Several decisions of the Board suggest the circumstances allowing the inference of improper agency use of reduction in force procedures and the types of evidence supporting such circumstances. The Board has stated that an agency may not use reduction in force procedures to circumvent an employee's procedural rights under Chapter 75.[36] Likewise, an agency may not conduct a reduction in force for any other prohibited purpose or reason. In *Losure,* the Board held that the desires to shed the stigma of former officials or to create a credible congressional relations program were not permissible reasons to separate an employee under reduction in force procedures and constituted reasons personal to the employee.

In another case, the Board specifically upheld a single person reduction in force, noting that the reduction resulted from a "planned management action" and that the reason given for the action "clearly meets the regulatory definition of a reorganization even though only one person was affected thereby."[37] The Board has affirmed that the

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[34] *Id.*, 2 M.S.P.B. at 366, 2 M.S.P.R. at 201-202.

[35] *Id.* For example, the testimony of agency witnesses might permit an inference of bad faith.

Relying on *Losure*, supra n. 32, the Federal Circuit has found impermissible a reduction in force that was taken for reasons personal to the employee. Washington v. Garrett, 10 F.3d 1421, 1429-1431 (Fed. Cir. 1993) (all credible evidence supported conclusion that RIF was taken for reasons personal to employee and Board "disregarded well-established law" in upholding RIF despite evidence of the personal nature of the action). A dissenting opinion argued that the Board's conclusion that the RIF was taken for proper reasons was supported by substantial evidence. *Id.* at 1438-1439.

[36] *Id.*, 2 M.S.P.B. at 363, 2 M.S.P.R. at 199, citing Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

[37] Copeland v. Department of the Army, 9 M.S.P.R. 348 (1982)

impact of reorganization on a single position does not make the reorganization invalid.[38] The troubling aspect of the Board's holdings is the treatment of a one person reduction in force as irrelevant as long as the reorganization meets the regulatory definition. The recognized history of reductions in force for improper purposes should, at the very least, make the use of a single person reduction in force related to a reorganization relevant evidence to be balanced in determining whether the agency has met its burden of persuasion. In most agencies, the use of a single person reduction in force does raise an inference of impropriety which should be weighed along with other rebuttal evidence. Of course, in some circumstances, the inference may be less easily drawn because the agency has little motivation to subvert other procedural rights. For example, the Board has noted that, since an employee was not entitled to protection under Chapter 75, "the agency had nothing to gain by following appealable [reduction in force] procedures instead of simply removing appellant."[39] The Federal Circuit has stated that an employee enjoys no right to competition[40] and, therefore, an agency may establish a one person competitive area, which could be overturned only if it were arbitrary or irrational.[41]

The employee should raise any alleged impropriety with some specificity. The Board indicates that an administrative judge has authority to direct the employee to identify the alleged impropriety in use of reduction in force procedures, so as to allow the agency to address the issue in its evidence.[42]

The Board has also held that once the Board determines that the agency has conducted the reduction in force for legitimate reasons, the

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[38] Farmer v. Department of Transportation, 13 M.S.P.R. 384 (1982); Killingsworth v. Department of Health and Human Services, 11 M.S.P.R. 273 (1982).

[39] Killingsworth v. Department of Health and Human Services, 11 M.S.P.R. 273, 276 (1982) (citations omitted).

[40] Ginnodo v. OPM, 753 F.2d 1061 (Fed. Cir. 1985). See § 33.02[4] *infra* for a discussion of competition.

[41] *Ibid.* The dissent argued that since the agency enjoyed flexibility to construct a larger competitive area, the agency should not be permitted to behave contrary to the official procedures governing reductions in force and to consciously place the employee in the "absurd" position of having only himself to compete with.

[42] Losure v. ICC, 2 M.S.P.B. 361, 366, 6, 2 M.S.P.R. 195, 202, n.6 (1980).

The employee must challenge the *bona fide* character of a reduction in force. The administrative judge may not on his or her own raise the similarity of function in pre- and post- RIF positions. Case v. Department of the Army, 27 M.S.P.R. 196 (1985).

Board has no authority "to review the management considerations which underlie that exercise of agency discretion."[43] For example, an employee could argue that the reduction in force was improper because the agency lacked authority to contract out the work previously performed by those employees in the abolished positions since the underlying cost evaluation was faulty. According to the Board, however, the cost evaluation which permits contracting out, as well as the judgment whether to contract out a function, rests within the discretion of the agency.

[4]—Procedural Requirements

[a]—Scope of Competition. Although an agency enjoys discretion in determining whether to conduct a reduction in force, regulations restrict the manner in which a reduction in force is actually conducted.[44] Regulations govern how an agency may set the scope of competition in both the competitive area and the competitive level.

The competitive area is defined in terms of the agency's organizational units and geographic location.[45] In the departmental service or headquarters of an agency, a competitive area is one that covers a pri-

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[43] Griffin v. Department of Agriculture, 2 M.S.P.B. 335, 337, 2 M.S.P.R. 168 (1980).

The Federal Circuit has taken a similar approach. See: Sinha v. Veterans Administration, 768 F.2d 330, 332-334 (Fed. Cir. 1985) (emphasizing management discretion); Bacon v. Department of Housing and Urban Development, 757 F.2d 265, 269-270 (Fed. Cir. 1985) (emphasizing that court could not look behind a valid stated reason for the reduction in force and therefore could not inquire into the mental processes of agency officials); Masden v. Veterans Administration, 754 F.2d 343 (Fed. Cir. 1985) (agency has wide discretion in determining the need for, and possible alternative to, a reduction in force).

[44] In some circumstances, even though an agency has not followed the governing procedures, the Board need not invalidate the entire reduction in force and may structure a remedy designed to protect the particular rights of specific employees. Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978, 985 (Fed. Cir. 1985) (reduction in force involving over 900 employees "[t]he Board's handling of this case constituted a reasonable method of dealing with perhaps a unique and certainly most unusual situation."). Any procedural error in the conduct of a reduction in force must be shown to be harmful. For example, when an employee would have been the only employee within the competitive area, an error in failing to establish the competitive area is not harmful. Mayo v. Hodel, 741 F.2d 441 (D.C. Cir. 1984).

After an employee establishes an error in RIF procedures, the agency must, to avoid reversal, establish by a preponderance of the evidence that the error did not affect the employee's substantive entitlements. Jones v. Department of the Army, 42 M.S.P.R. 680, 685-686 (1990), discussing Hill v. Department of Commerce, 25 M.S.P.R. 205 (1984) and Phelps v. Department of Labor, 25 M.S.P.R. 30 (1984).

[45] 5 C.F.R. § 351.402.

mary subdivision of the agency within a local commuting area. A local commuting area is one geographic area constituting a single area for employment purposes.[46] In the field service, a competitive area is one which covers a field installation in the local commuting area.[47] The regulations also address the development of both larger and smaller competitive areas and the combination of such areas.[48]

Within each competitive area, the agency establishes competitive levels for both the career and excepted services.[49] A competitive level consists of all positions in the same grade or occupational level sufficiently alike in qualifications, duties, responsibilities, pay schedules, and working conditions, to allow an employee to move from one position to another without significant training or undue interruption of the work program.[50] Separate competitive levels are required for positions that are: (1) under different pay schedules, (2) filled on a full time basis, (3) filled on a seasonal basis, (4) filled on a part-time basis, (5) filled on an intermittent basis, or (6) filled by a supervisor or management official.[51]

From the employee's point of view, the determination of the appropriate scope of competition is particularly important because it affects the likelihood of the employee's release from a position within that competitive level. Therefore, employees often challenge the agency's determination of both the competitive area and level.

The agency has the burden of persuasion to establish the propriety of every element of its decision in a reduction in force.[52] This burden of persuasion extends to proving that the competitive area and competitive levels were properly established.[53] In one case, the agency had contended that the employee's position in a field office was a position in another competitive area because the incumbent of the position reported to a different and independent administrative authority than other employees within the agency's subdivision. The Board, however, held that the agency introduced insufficient evidence to establish this separate and independent authority.

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46 5 C.F.R. § 351.203(d).
47 5 C.F.R. § 351.402(b).
48 5 C.F.R. § 351.402.
49 5 C.F.R. § 351.403(b)(2).
50 5 C.F.R. § 351.403(a).
51 5 C.F.R. § 351.403(b).
52 Compton v. Department of Energy, 3 M.S.P.B. 522, 3 M.S.P.R. 452 (1980).
Since an employee has a right to a hearing, an administrative judge may not make a finding about the appropriate competitive area or level without a hearing. Crispin v. Department of Commerce, 732 F.2d 919 (Fed. Cir. 1984).
53 *Id.*

The determination of the competitive area is within the discretion of agency[54] and, in some circumstances, a nationwide competitive area may be appropriate.[55] The agency, however, may abuse its discretion if it establishes a competitive area that cannot be supported by reason.[56]

Likewise, the agency must establish that competitive levels have been properly drawn. In determining the appropriate competitive level, the agency must exercise "sound discretion" and careful judgment, and cannot rely on previous and out-of-date classification of the appropriate competitive level.[57] In *Foster*, agency officials testified that there were other positions that could have been included in the competitive level. The reliance on the competitive level drawn years before, at the time of the classification of the employee's position, left her in a competitive level of one person. The Board found that inadequate proof existed to carry the agency's burden of establishing an appropriate competitive level.

The determination of the competitive level where an employee's position is placed rests not upon the qualifications of the employee, but rather, upon the official position description (PD).[58] Because competitive levels are drawn on the basis of the similarity of positions, the incumbent's qualifications are irrelevant. (Assignment rights, however, do relate to an individual's own qualifications.) While the position description would normally control the Board's review of the appropriate competitive level, the employee may introduce evidence to show that the position description did not reflect adequately the functions of the job.[59] Likewise, the agency may show that two similar positions involve substantially different experience and skills and are not sufficiently alike to belong in the same competitive level.[60]

[b]—Retention Register. Crucial to the employee's status during

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[54] Grier v. Department of Health and Human Services, 450 F.2d 944 (Fed. Cir. 1985) (agency need not expand competitive area to insure actual competition).

[55] Rosenstiel v. Bureau of Alcohol, Tobacco and Firearms, 19 M.S.P.R. 478 (1984).

[56] Beardmore v. Department of Agriculture, 761 F.2d 677 (Fed. Cir. 1985) (competitive area excluded adjacent community which was part of the area for administrative purposes and closer to duty station than the city from which employee commuted).

[57] Foster v. Department of Transportation, 7 M.S.P.B. 707, 8 M.S.P.R. 240 (1981).

[58] Holliday v. Department of the Army, 12 M.S.P.R. 358 (1982).

[59] See Burbridge v. Government of the District of Columbia, 13 M.S.P.R. 360 (1982) (employee failed to demonstrate similarities of duties in two positions).

[60] Shultz v. Department of the Interior, 11 M.S.P.R. 394 (1982).

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[46] 5 C.F.R. § 351.203(d).
[47] 5 C.F.R. § 351.402(b).
[48] 5 C.F.R. § 351.402.
[49] 5 C.F.R. § 351.403(b)(2).
[50] 5 C.F.R. § 351.403(a).
[51] 5 C.F.R. § 351.403(b).
[52] Compton v. Department of Energy, 3 M.S.P.B. 522, 3 M.S.P.R. 452 (1980).
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[53] *Id.*

a reduction in force is the employee's retention standing. The retention register is to be established prior to the commencement of the reduction force. Historically, the standards of retention have varied considerably. Originally, the selection of employees to be released was based on an individual's length of service and performance ratings. In 1929, when a substantial reduction in federal spending reduced the number of federal jobs, special privileges were granted to individuals with permanent appointments; the order of release was first temporary, then probationary, and finally permanent employees. After World War II, veterans and certain other persons linked to veterans or deceased veterans received preference in retention.

The existing regulations combine these historical elements. An employee's performance rating is an important factor affecting the employee's retention standing. Employees receiving unsatisfactory ratings under certain agency systems and employees who have received written notice of demotion or removal under an agency's performance appraisal system are more likely to be the separated.

Employees are divided into three major tenure groups: Group I—career employees not serving a probationary period;[61] Group II—career probationary employees and career conditional employees;[62] and Group III—indefinite employees, term, non-status, non-temporary employees and employees with temporary appointments, employees under temporary appointments pending the establishment of a register for appointment to the position.[63]

Within each of these three major tenure groups are three subgroups based on military experience: Subgroup A-D—preference eligible employees with a service connected disability of thirty percent or more; Subgroup A—all other preference eligible employees; and Subgroup B—non-preference eligible employees. Under present regulations, within each subgroup employees are ranked by length of service, with retired members of the armed forces able to credit all or a portion of military service. The Board's decisions have discussed the definition of creditable service and generally exclude service only in the national guard.[64]

OPM regulations now give much greater weight to performance appraisals than they previously did in determining an employee's place on the retention register. The average of an employee's three most re-

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[61] 5 C.F.R. § 351.501(b).
[62] 5 C.F.R. § 351.501(c).
[63] 5 C.F.R. § 351.501(d).
[64] Jacaruso v. Department of the Army, 1 M.S.P.B. 360 (1980).

cent annual performance ratings become the basis for a performance based adjustment to the employee's length of service.[65] An employee receives twenty additional years of service for each performance rating of outstanding or equivalent, sixteen additional years of service for each performance rating of exceeding fully successful or equivalent, and twelve additional years of service for each performance rating of fully successful or equivalent.[66] Employees who lack three actual performance ratings are entitled to a presumption of fully successful ratings for the lacked ratings.[67] After length of service is adjusted for performance, employees are arranged within the appropriate groups and subgroups.

In reviewing performance ratings during a reduction in force appeal, the Board will not adjudicate an appeal based upon contested performance ratings unless the award of service credit was inconsistent with the agency's performance appraisal system.[68] Therefore, the agency need only show that is award of additional service was consistent with its performance appraisal system. The agency's burden of persuasion could, in most circumstances, be easily satisfied unless the employee presented rebuttal evidence. To prevail, an employee must show that the agency improperly granted or denied performance-based service credit and that the agency's action affected the employee's retention rights.

[c]—Record Keeping. The agency must keep copies of the retention register and of the records upon which the retention register is based. The agency must allow an employee to inspect the records and the retention register to the extent that these materials have a bearing on the employee's case.[69] Proper maintenance of these agency materi-

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[65] 5 C.F.R. § 351.504(b). In American Federation of Government Employees v. OPM, 821 F.2d 761, 764, 765 (D.C. Cir. 1987), the court decided that OPM enjoyed broad authority to determine the weight to be placed on the relevant retention factors and that the regulations reflected a legitimate policy decision by OPM.

[66] C.F.R. § 351.504(d).

[67] 5 C.F.R. § 351.504(c).

[68] Haataja v. Department of Labor, 25 M.S.P.R. 594 (1985).

[69] 5 C.F.R. § 351.505.

The employee should carefully examine the retention register for it will aid an employee in determining whether the agency has proceeded properly and whether to appeal to the Board. In normal circumstances the burden will be on the employee to examine the documentation. However, the employee may be justified in relying on the representations of agency officials that dissuaded the employee from examining the register. Cohen v. Department of Labor, 20 M.S.P.R. 232 (1984) (employee alleged three employees in personnel office and two supervisors advised the employee that there were no positions in the agency to which the employee could be assigned).

als is extremely important both to the employee and to the agency. These materials allow the employee to determine whether his or her own retention standing and that of others have been properly calculated, and whether the agency has released employees in the proper order. Moreover, these retention records allow an employee to evaluate the setting of competitive area and competitive levels.

For the agency, the materials are important because they may be crucial to the agency's ability to carry the burden of persuasion when the conduct of the reduction in force is challenged. The Board has commented unfavorably on an agency's failure to provide the employee with the retention register despite repeated requests.[70] In another case the Board concluded that "the action must fail because the agency, for whatever reason, failed to keep *and consult* the records which RIF regulations require. . . ."[71]

The Federal Circuit has approved the use, in some circumstances, of a master list rather than a retention register.[72]

[d]—The Substantive Right of the Proper Order of Release. After a retention register is established, the agency determines whom to release within the competitive level. This determination requires the agency to release employees in the same competitive area and level in inverse order of their standing on the retention register, employees with the lowest retention standing being released first.[73] Employees generally may not be released while the agency retains an employee from a lower subgroup, for example, an employee with a temporary appointment or

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[70] Foster v. Department of Transportation, 7 M.S.P.B. 707, 709, 7 M.S.P.R. 240, 244-245 (1981).

[71] Sahni v. Government of the District of Columbia, 4 M.S.P.B. 252, 257, 4 M.S.P.R. 170, 175-176 (1980) (emphasis in original). A different approach has been taken as to personnel records that contian errors or omissions if the records were created prior to a reduction in force. As to such records, relevant regulations suggest only a general policy that agencies maintain accurate personnel records; the regulations set not standards or provide any remedy for an agency's failure to satisfy the policy. Therefore, errors in such records are not actionable before the Board. Schroeder v. Department of Transportation, 60 M.S.P.R. 566, 574 (1994) (employees sought advantage of erroneous indication on SF-50 that they were preference) (*dicta*).

[72] Menoken v. Department of Health and Human Services, 784 F.2d 365, 369-370 (Fed. Cir.), *cert. denied* 107 S.Ct. 273 (1986), (approved use of a master list rather than a retention register in unusual circumstances). A master list is a less formal list of all positions and employees involved in the reduction in forces. Accord, Ahlborg v. Department of Health and Human Services, 804 F.2d 1238, 1245-1246 (Fed. Cir. 1986). (in course of actions involving reduction in force of personnel at community Services Administration, the use of master retention lists was not limited to exceptional circumstances). Master lists were necessary in these cases because the Community Services Administration had not maintained adequate personnel records to allow construction of retention registers. See also, Hayes v. Department of Health and Human Services, 829 F.2d 1092 (Fed. Cir. 1987).

[73] 5 C.F.R. § 351.601.

position or performance appraisal of less than satisfactory.[74] However, the regulations provide some exceptions to the order of release requirements[75] and allow, in a few limited instances, an employee with a lower retention standing to be retained for ninety days after the release of a higher ranking employee.[76] Special regulations concern abolishment of all positions in a competitive area within three months.[77] Also, the agency may not assign a lower ranking employee to a new position substantially identical to the abolished position of a higher ranking employee.[78] The agency has more flexibility in filling an existing vacant position.[79] The Board has stressed that the employee's right to be released in the proper order is a substantive right and not a procedural one subject to the harmful error rule.[80]

[e]—Notice. The agency must give each employee chosen for release from his or her competitive level, sixty days' notice prior to the effective date of the release.[81] When the agency includes information in the notice which is not required by regulations, but which is relevant to the employee's decision regarding reassignment rights, the agency will be responsible if the employee relies on incorrect information to his or her detriment.[82]

A notice of a reduction in force can mislead an employee regarding appeal rights without specifically misstating them.[83] In these circumstances, the time limits for appeal of a reduction in force should be waived for good cause.[84] The notice must state the action to be taken and its effective date, the employee's competitive area, competitive level, retention subgroup and service date, and where the employee

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74 5 C.F.R. § 351.602.

75 5 C.F.R. § 351.606.

76 5 C.F.R. § 351.607.

77 5 C.F.R. § 351.605.

78 Wright v. Department of Commerce, 9 M.S.P.R. 472 (1982).

79 Scott v. National Transportation Safety Board, 21 M.S.P.R. 211 (1984) (agency may choose among employees in the same subgroup regardless of standing on retention register).

80 Ray v. Department of the Air Force, 3 M.S.P.B. 516, 3 M.S.P.R. 445 (1980). See § 14.02 *infra* for a discussion of the harmful error rule. For example, when the agency fails to properly conduct the retention register, the employee is entitled to reinstatement regardless of whether he would have been retained if the register was properly constructed. Wright v. Department of Commerce, 20 M.S.P.R. 36 (1984).

81 5 C.F.R. § 351.801(a). (Some employees of the Department of Defense are entitled to 120 days notice.)

82 Reed v. Department of Commerce, 18 M.S.P.R. 697 (1984) (agency included erroneous figure of the severance pay to which the employee would be entitled, misleading the employee into accepting separation rather than reassignment).

83 Yuni v. MSPB, 784 F.2d 381, 384-386 (Fed. Cir. 1986) (agency characterized action as a classification decision appealable to OPM, told the employee there were no time limits in which he must appeal, and provided no additional information when employee stated that the downgrading was an adverse action).

84 *Id.*

85 5 C.F.R. § 351.802.

may inspect the relevant records.[85] The notice must also state, where appropriate, why a lower standing employee is to be retained. The notice must specifically state the employee's right to appeal to the Board. When the agency cannot determine all the specific actions at the beginning of the notice period, it may use general notices supplemented by specific ones.[86] General notices are notices to all employees who might be affected. A new notice of at least sixty days is required when the agency decides to take an action more severe than the one first specified.[87]

When possible, the agency is to retain the employee in an active duty status during the notice period.[88] The Board has interpreted the regulation concerning status during the notice period to allow the agency to place an employee on involuntary annual leave, leave without pay, or non-pay status during the notice period, only when the agency lacks work or funds for all or part of the notice period.[89]

An agency generally has no obligation to give notice of a RIF to an employee if no RIF action has been taken against him.[89.1] For example, an employee who retires under the mistaken assumption that his termination in the absence of retirement would not be a RIF, is not entitled to notice of a right to appeal unless the employee has put the agency on notice that he sees the retirement as involuntary based on his assumptions about his rights absent the retirement.[89.2]

[f]—Assignment Rights. When an agency decides to release an employee from his or her competitive level, the agency must offer the employee a position lasting at least three months for which the employee is qualified, a furlough, or separation.[90]

In some instances, an agency must first offer an employee another such position rather than separation or furlough.[91] Employees in Groups I or II in the competitive service are entitled to a reasonable offer of assignment to certain positions in another competitive level which they can take by bumping or retreating. Bumping involves

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[86] 5 C.F.R. § 351.803.

[87] 5 C.F.R. § 351.805.

[88] 5 C.F.R. § 351.806.

[89] Lerner v. Department of the Interior, 7 M.S.P.B. 365, 7 M.S.P.R. 511 (1981).

[89.1] Krizman v. MSPB, 77 F.3d 434, 437-438 (Fed. Cir. 1996).

[89.2] *Id.*, 77 F.3d at 437; Mueller v. U.S. Postal Service, 76 F.3d 1198, 1201 (Fed. Cir. 1996). *Krizman* and *Mueller* stand for that proposition that where "an employee requests and agrees to accept early retirement under the special incentive program before any appealable action has been taken by the agency no appeal rights accrue." Torain v. U.S. Postal Service, 83 F.3d 1420, 1423 (Fed. Cir. 1996) (Postal Service had not indicated to the employee that the employee would be placed in any position other than one at the employee's present grade level).

[90] 5 C.F.R. § 351.603.

[91] 5 C.F.R. § 351.704.

moving into a position held by a person in a lower subgroup, while retreating involves moving into a position that is essentially identical to the one held by the employee and which is held by a person in the same subgroup but having a lower retention standing.[92]

However, only employees in the competitive service has assignment rights.[93]

Assignment rights are limited. Assignment involving displacement of another employee does not "(1) Authorize or permit an agency to assign an employee to a position having a higher representative rate; (2) Authorize or permit an agency to displace a full-time employee by an other-than-full-time employee, or to satisfy an other-than-full-time employee's right to assignment by assigning the employee to a vacant full-time position; (3) Authorize or permit an agency to displace an other-than-full-time employee by a full-time employee, or to satisfy a full-time employee's right to assignment by assigning the employee to a vacant other-than-full-time position; (4) Authorize or permit an agency to assign a competing employee to a temporary position (i.e., a position under an appointment not to exceed 1 year), except as an offer of assignment in lieu of separation by reduction in force under this part when the employee has no right to a position under Sec. 351.701 or Sec. 351.704 (a) (1) of this part. This option does not preclude an agency from, as an alternative, also using a temporary position to reemploy a competing employee following separation by reduction in force under this part; (5) Authorize or permit an agency to displace an employee or to satisfy a competing employee's right to assignment by assigning the employee to a position with a different type of work schedule (e.g., full-time, part-time, intermittent, or seasonal) than the position from which the employee is released." An agency may, however, "at its discretion, choose to offer a vacant other-than-full-time position to a full-

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92 5 C.F.R. § 351.701. An employee released from his or her competitive level may retreat to a position that: (1) is held by an employee with a lower retention standard in the same tenure of subgroup; (2) is not more than three grades (or appropriate grade intervals or equivalent) below the position from with the employee was released; and (3) is the same position, or an essentially identical one, previously held by the released employee in a federal agency. 5 C.F.R. § 351.701(c), relied upon in Clark v. Department of the Navy, 64 M.S.P.R. 487, 489 (1994).

93 5 C.F.R. § 351.202. See Dodd v. TVA, 770 F.2d 1038 (Fed. Cir. 1985) (TVA employee not in the competitive service and not entitled to assignment rights).

An agency must, consistent with the Veterans Preference Act, offer a preference eligible any assignment rights to a permanent position, even at a lower grade, before offering the preference eligible a temporary position. Jones v. Department of the Army, 42 M.S.P.R. 680, 687-689 (1990).

time employee in lieu of separation by reduction in force."[95] An employee, however, has no right to bump into a position filled by a temporary employee.[96] The regulations also provide that the agency need not, but may, fill a vacancy during a reduction in force.[97] The Board has found that these regulations are unaffected by the Civil Service Reform Act of 1978 and are thus still valid.[98] However, if the agency chooses to fill a vacancy with an employee who would otherwise be released from his or her competitive level, the agency must follow reduction in force procedures.[99] This requirement prevents the agency from using the vacant position to subvert the assignment rights of other employees. Similarly, an agency cannot offer the position to some but not all employees in a competitive level and then abolish it. Allowing the agency to abolish the position after it was declined by a competing employee without offering it to a similarly situated employee would constitute an action personal to an employee and would "undercut" merit principles.[100] According to the court, once the agency chooses to offer a vacant position to an employee who would be released in a reduction in force, it must follow reduction in force procedures and offer the position to other qualified employees.[101]

If the agency offers the employee another position, he or she must meet OPM qualifications (listed in Federal Personnel Manual X-118) for the position, be physically qualified, meet any special conditions

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[94] 5 C.F.R. § 351.704.

[95] *Id.*

[96] Starling v. Department of Housing and Urban Development, 757 F.2d 271 (Fed. Cir. 1985) (temporary employees were not competing employees and, therefore, their positions were not open to bumping; temporary employees lost their positions other than through reductions in force).

[97] 5 C.F.R. § 351.201(b).

[98] Summers v. Department of the Treasury, 4 M.S.P.B. 95, 4 M.S.P.R. 1 (1980).

[99] Wilburn v. Department of Transportation, 757 F.2d 260 (1985).

(Text continued on page 13-19)

for the position, and have the capability, competency and special skills needed to perform without undue interruption.[102] In some instances, an agency may assign an employee to a position without regard to OPM qualifications, if the employee meets the minimum educational requirements and has the capacity, competency, and special skills necessary to perform the duty.[103] As other regulations suggest, the assignment rights of an employee rest not on the description of the employee's abolished position, but on the employee's individual qualifications.[104]

Often when an employee is offered a position in satisfaction of the assignment rights, the employee alleges that he or she should have been offered another, usually higher rated, position. When an employee challenges the agency's offer of assignment, the administrative judge may appropriately require the employee to identify the position for which the employee believed he or she was qualified.[105] The agency retains the burden of persuasion in showing that the employee was not qualified for service in the position. One of the grounds the agency may use is lack of the ability to perform the duties of the position without undue interruption.[106] The Board has interpreted this language, relying on the Federal Personnel Manual (FPM) which states that "the ordinary work program probably will not be unduly interrupted if optimal quality and quantity of work were not [sic] regained within 90 days of the reduction in force. Lower priority programs might tolerate even longer interruptions. . . ."[107] The Board has

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[102] 5 C.F. R. § 351.701(a). An acceptance of a position solely for the purpose of receiving back pay does not make the acceptance improper. Okonski v. Department of Health and Human Services, 31 M.S.P.R. 489 (1986).

[103] 5 C.F.R. § 351.702. The employee who bumps into a position need not be better qualified than the incumbent if the bumping employee meets the minimum qualifications. Masden v. Veterans Administration, 754 F.2d 343 (Fed. Cir. 1985) (Board lacks jurisdiction to review correctness of the classification of a bumping employee).

[104] The employee should insure that information regarding the employee's individual qualifications are contained in the individual personnel folder. Although there may be no duty to check the contents of the folder, information regarding personal qualifications may be important in the event of a reduction in force. Coleman v. Department of the Army, 19 M.S.P.R. 358 (1984) (agency misfiled information regarding personal qualifications submitted by the employee two years before the reduction in force; agency held not justified in denying employee his assignment rights).

[105] Aronson v. Department of the Navy, 4 M.S.P.B. 379, 4 M.S.P.R. 310 (1980).

[106] 5 C.F.R. § 351.701(a)(4).

[107] Porter v. Department of Commerce, 13 M.S.P.R. 177, 179–180 (1982). Therefore, the employee ordinarily has at least 90 days to attain optimal quality and quantity of work.

specifically held that this guidance applies to the meaning of undue interruption in assignment rights as well as in the formation of competitive levels.[108]

An employee who rejects an offer of a proper position loses further rights to reassignment.[109] An employee may also waive a right to a position by stating that he or she will not accept it.[110] An employee is not entitled to assignment at a higher grade through a transfer of function or reduction in force.[111]

[g]—Reemployment. The agency must establish a reemployment priority list for all Group I and Group II employees who receive a specific notice of separation from the competitive service.[112] The priority generally extends to all competitive positions in the commuting area for which the employee is qualified.[113] Full-time employees are eligible unless they have declined a full-time, competitive, non-temporary position of the rate of pay no lower than that of the position from which the employee was separated.[114] A Group I employee remains on the list for two years from the date of separation, a Group II employee for one year.[115] A full time employee's name is deleted if the employee accepts a non-temporary full-time competitive position or declines an offer of a non-temporary full-time competitive position at the same or higher rate of pay than the position from which the employee was separated.[116]

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[108] *Id.*, 13 M.S.P.R. at 180.

[109] Pettis v. Department of Health and Human Services, 803 F.2d 1176 (Fed. Cir. 1986).

[110] Acerno v. Department of Health and Human Services, 815 F.2d 680, 684 (Fed. Cir. 1987) (employees stated on personal qualifications statement that they would not accept temporary positions or positions below GS-8).

[111] Menoken v. Department of Health and Human Services, 784 F.2d 365, 368 (Fed. Cir.) *cert. denied* 107 S.Ct. 273 (1986).

[112] 5 C.F.R. §§ 803, 330.203.

[113] 5 C.F.R. § 330.203; certain exceptions are set forth in 5 C.F.R. § 330.205. The agency's obligation extends not only to permanent positions but to temporary ones as well. Ziegeldorf v. ACTION, 18 M.S.P.R. 700 (1984). The agency is not required, however, to select a specific employee from the reemployment list but only to choose among qualified employees available at the time. *ibid.* Therefore, the agency enjoys greater discretion in selecting employees regardless of served credit than it would in the conduct of the reduction in force.

[114] 5 C.F.R. § 330.203(c).

[115] 5 C.F.R. § 330.203(c).

[116] *Id.* Reemployment priority extends to an appointment to temporary positions coming open after an employee's separation. Ziegeldorf v. ACTION, 18 M.S.P.R. 700 (1984). General allegations of deficiencies in an agency's administration programs for displaced employees are inadequate under the regulations to give the Board jurisdiction. The employee must allege discernible injury to the employee. Carey v. MSPR, 768 F.2d 1338 (Fed. Cir. 1985).

The Federal Circuit has held that the Board lacks jurisdiction over a claim by a preference eligible in the excepted service that his or her reemployment priority rights have been violated.[117] Regulations permitting appeals regarding reemployment rights apply to the competitive and not the excepted service.[118] Therefore, no law, rule or regulation authorized an appeal to the Board.[119] A dissenting opinion argued that the Veterans Preference Act and the Civil Service Reform Act together provided the authorization for Board review.[120]

However, where an agency had listed an employee, who had been separated from a GS-12 position, only for reemployment rights above the GS-11 level, the employee's refusal of a GS-11 position before being separated in the reduction in force was held not to be a proper basis for adversely limiting reemployment rights.[121]

An agency can appoint a person not on the reemployment priority list if hiring the person on the reemployment priority list could not be accomplished "without undue interruption" of the agency.[122]

In interpreting these regulations, the Federal Circuit rejected an argument that the "without undue interruption" provision did not apply to vacant positions.[123] This argument relied on Board decisions holding that similar language in the reduction in force regulations did not apply to vacant positions.[124] The court, however, believed that the reemployment priority regulations provision must apply to vacant positions because these regulations are "used *exclusively* for filling vacant

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117 Noble v. TVA, 892 F.2d 1013, 1015 (Fed. Cir. 1989) (*en banc*).

118 *Id.*, 892 F.2d at 1015. The court distinguished cases permitting appeal by preference eligibles in the excepted service of denial of retention rights because regulations provide for such an appeal. 892 F.2d at 1015 n.1.

119 *Id.*, 892 F.2d at 1015. The court emphasized that neither Congress nor OPM had authorized an appeal.

120 *Id.*, 892 F.2d at 1015. The dissent emphasized the broad scope of veterans' preference rights embodied in a wide range of regulations and the comprehensive character of the Civil Service Reform Act. 892 F.2d at 1015-1019. It characterized the result of the court's opinion as "hypertechnical, whimsical, bizarre. . . ." 892 F.2d at 1018.

121 Freeman v. Department of Agriculture, 2 M.S.P.B. 388, 389, 2 M.S.P.R. 224 (1980).

122 5 C.F.R. § 330.207(d).

123 Chudson v. EOA, 17 F.3d 380, 383-384 (Fed. Cir. 1994). Although Chudson had been placed on the reemployment priority list as the result of a confidential settlement agreement, the regulation interpreted by the court applies to persons separated in a reduction in force who had not been placed in another position during the reduction in force. The regulation also applies to employees placed on the reemployment priority list for other reasons. See § 13.04[3] *infra*.

124 *Id.*, 17 F.3d at 383, relying on Jamison v. Department of Transportation, 20 M.S.P.R. 513, 516-517 (1984), Lewellyn v. Department of Air Force, 25 M.S.P.R. 525, 527 (1985), and Mazzola v. Department of Labor, 25 M.S.P.R. 682, 686 (1985).

positions."[125] "There would be no reason to include the undue interruption exception in the [reemployment priority list] regulations if the exception could never apply."[126] The court did not believe that use of language in the reemployment priority list regulations similar to that in the reduction in force regulations required the terms to be similarly defined.[127]

Reduction in force procedures provide important protections for employees. The Court of Appeals for the District of Columbia Circuit has emphasized that the Board may not sustain an agency action that did not follow reduction in force procedures on the ground that the agency could have achieved the same result if it had followed the procedures.[128]

Successful appeal of a reduction in force requires an employee or his or her representative to understand reduction in force procedures. While the burden of persuasion rests on the agency, Board practice relies on the employee to specify the alleged defects in the agency's application of the procedures.

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[125] *Id.*, 17 F.3d at 383-384 (emphasis in original).

[126] *Id.*, 17 F.3d at 384.

[127] *Id.* A newly created position may have important activities assigned to it, the performance of which could be delayed because of "deficiencies in the skills of [a reemployment priority list] candidate as compared to a more qualified candidate not on the list."

[128] Horne v. MSPB, 684 F.2d 155 (D.C. Cir. 1982).