

# Proposed Rules

Federal Register

Vol. 85, No. 243

Thursday, December 17, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 351 and 430

RIN 3206-AO06

#### Reduction in Force

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a proposed regulation to revise its reduction-in-force (RIF) regulations to set forth the principle that agencies should prioritize performance over length of service when determining which employees will be retained in a RIF following regulations that OPM will issue. In addition, OPM is exercising its authority to modify the order of retention, clarify tenure group definitions, and modify how credit for performance is computed.

**DATES:** Comments must be received on or before January 19, 2021.

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

#### FOR FURTHER INFORMATION CONTACT:

Kimberly A. Holden by email at [employ@opm.gov](mailto:employ@opm.gov) or by fax at (202) 606-4430.

**SUPPLEMENTARY INFORMATION:** The OPM is proposing to revise its regulations governing reduction in force and related

technical changes under statutory authority vested in it by Congress in 5 U.S.C. 1103, 3502, 3596, 4305, and 4315. The regulations will also assist agencies in carrying out certain principles set forth by the President in Executive Order (E.O.) 13839, titled: “Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems and Principles” consistent with law, and update current procedures to make them more efficient and effective. The proposed regulations will change existing regulations regarding RIF procedures to modify the order of retention and enhance the value of performance relative to length of service when determining which employees will be retained in a RIF.

The proposed regulations will assist agencies in better aligning, consistent with law, to certain of the principles articulated by the President to the Executive Branch in E.O. 13839 and update current procedures to make them more efficient and effective.<sup>1</sup> Apart from OPM’s existing authority to promulgate regulations relating to reductions in force, 5 U.S.C. 3502, Section 7 of the E.O. directs OPM to propose revisions to existing regulations, as needed, to effectuate the principles set forth in section 2, including those pertaining to RIFs.

#### Reduction in Force

Section 2(j) of E.O. 13839 calls on agencies to prioritize performance over length of service in determining who will be retained in a RIF. Section 7 of the E.O. directs OPM to examine whether existing regulations effectuate the principles set forth in section 2 of the Order. It directs OPM, “to the extent necessary or appropriate,” to propose for notice and public comment appropriate regulations to effectuate the principles set forth in Section 2.

<sup>1</sup> Some of the provisions of E.O. 13839 were enjoined by the United States District Court for the District of Columbia. *Am. Fed’n of Gov’t Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018). The principles pertaining to RIFs, however, were not among those provisions that were enjoined. *Id.* at 440. The plaintiffs did not seek further judicial review of this decision, so this determination is final. In any event, the decision imposing the injunction against other provisions of the E.O. was subsequently reversed, see *Am. Fed’n of Gov’t Employees, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019), and thus no longer has any effect.

After conducting this examination, OPM, under its statutory authority in 5 U.S.C. 3502, is proposing, in accordance with the procedural requirements under 5 U.S.C. 1103(b) and the Administrative Procedure Act, to amend its regulations at Subpart E of 5 CFR part 351 and to make corresponding changes to Subparts B and Subpart G of 5 CFR part 351 and to Subpart B of 5 CFR part 430 to prioritize performance over length of service in a RIF. In addition, we are modifying the order of retention at 5 CFR 351.501. Specifically, when determining the order in which employees are placed on a RIF retention register, agencies will do so on the basis of tenure first, followed by performance, then veterans’ preference, and finally length of service, as outlined in further detail below. In addition, we are proposing to clarify the definition of tenure groups.

Proposed § 351.501 *Order of retention* establishes that competing employees in a RIF will be classified on a retention register on the basis of (in descending order): (1) Tenure of employment, (2) performance, (3) veterans’ preference, and (4) length of service. This section also clarifies that the order of retention provisions applies to employees in both the competitive and excepted services.

Under current regulations at 5 CFR 351.501, the order of retention for classifying competing employees on a retention register is (in descending order): Tenure of employment, veterans’ preference, length of service, and performance. Length of service is augmented by performance; an employee receives additional retention service credit (*i.e.*, additional years of service) based on the employee’s applicable ratings of record. OPM is proposing to modify the order of retention to be: Tenure of employment, performance, veterans’ preference, and length of service.

Under the current regulations at 5 CFR 351.504, credit for performance is used to supplement an employee’s length of service for purposes of determining an employee’s standing on a retention register (both of these retention factors are expressed in years). An employee receives additional retention service credit based on his or her performance ratings of record and their assigned summary levels. This additional credit is added to the employee’s length of service to

determine that employee’s retention standing within the employee’s appropriate tenure group and veterans’ preference subgroup. An employee receives additional credit for performance (added to his or her length of service) on the following basis: 20 additional years of service for each rating of record with a Level 5 (Outstanding or equivalent) summary level; 16 additional years of service for each rating of record with a Level 4 (Exceeds Fully Successful or equivalent) summary level; and 12 additional years of service for each rating of record with a Level 3 (Fully Successful or equivalent) summary level, in accordance with the summary levels described in 5 CFR 430.208. The additional years of service are added together, divided by 3, and rounded up to a whole number if necessary to determine the number of years that will be used to adjust an employee’s actual service computation date and arrive at an adjusted service computation date for RIF purposes.

OPM is proposing to elevate performance above length of service in the RIF order of retention. We propose to do this by establishing performance as a subgroup within the appropriate tenure group. The proposed order of retention will be: (1) Tenure, (2) performance, (3) veterans’ preference, and (4) length of service. Under this proposal, employees competing in a RIF

will first be sorted into their appropriate tenure group; then within each tenure group employees will be sorted by performance in descending order based on the total of the employee’s three most recent ratings of record; then within each tenure group and performance subgroup, according to their veterans’ preference status or subgroup; then within each tenure group, performance subgroup, and veterans’ preference subgroup, employees will be listed on the retention register in terms of their length of service based on each employee’s actual service computation date. Thus, length of service will be used as a tie-breaker for employees with the same tenure, three-year total of their summary level performance ratings, and veterans’ preference status (*i.e.*, the first three factors being equal, an employee with longer length of service will be listed ahead of an employee(s) with shorter length of service).

We are proposing that an agency determine an employee’s performance standing by adding each employee’s summary level performance rating for the three most recent ratings of record issued under 5 CFR part 430 (or equivalent ratings of record established in accordance with 5 CFR 430.201(c)) prior to the RIF. An agency will place employees on a retention register based on the total of each employee’s summary level rating in descending order, within each tenure group. In most

instances, an employee’s summary level ratings of record for the three most recent ratings of record will be added together. Ratings of record will be assigned a numerical value as follows in conjunction with the patterns of summary level in 5 CFR 430.208(d): 5 for a Level 5 (Outstanding or equivalent) summary level, 4 for a Level 4 (Exceeds Fully Successful or equivalent) summary level, 3 for a Level 3 (Fully Successful or equivalent) summary level, 2 for a Level 2 (Minimally Successful or equivalent) summary level, 1 for a Level 1 (Unacceptable) summary level. Agencies will list competing employees on the retention register in descending order (within the same tenure group) based on the total of their three most recent ratings of record. OPM believes listing employees in descending order (*i.e.*, highest to lowest) based on their total summary level rating for three most recent ratings of record is the most objective methodology for these purposes, and best implements the principle of emphasizing performance over length of service as set forth in E.O. 13839.

The following example illustrates and contrasts the impact of performance ratings of record and their summary levels on a retention register under the current rules and the proposed rules. Consider the following employees in a General Schedule (GS) 201–12 position:

Name	Tenure group	Vets pref subgroup	Rating of record summary levels	Service comp date
Al .....	I	A	3/3/3	01/01/1988
Barb .....	I	A	5/4/5	01/01/2010
Carl .....	I	A	3/4/3	01/01/2000
Dave .....	I	A	4/5/4	01/01/1980
Emma .....	I	A	3/4/4	01/01/2014

Under the current rules, a retention register constructed in 2018 for these employees would look like this, based on retention factors considered in this

order: Tenure | Vets Pref | Adjusted Service Computation Date (ASCD) — *i.e.*, the service computation date (SCD) adjusted for additional service credit

(ASC) based on ratings of record and summary levels:

SCD	ASC	ASCD
Dave: I   A   (01/01/1980 – 18 years $[(16+20+16)/3]$ )	=	I   A   01/01/1962
Al: I   A   (01/01/1988 – 12 years $[(12+12+12)/3]$ )	=	I   A   01/01/1976
Carl: I   A   (01/01/2000 – 14 years $[(12+16+12)/3]$ )	=	I   A   01/01/1986
Barb: I   A   (01/01/2010 – 19 years $[(20+16+20)/3]$ )	=	I   A   01/01/1991
Emma: I   A   (01/01/2014 – 15 years $[(12+16+16)/3]$ )	=	I   A   01/01/1999

Under the proposed rules, the retention register for these same competing employees would look like this, based on considering retention factors in this order: Tenure | Performance based on the total of the employee’s summary levels | Vets Pref | Service Computation Date:

Barb: I | 14 | A | 01/01/2010  
 Dave: I | 13 | A | 01/01/1980  
 Emma: I | 11 | A | 01/01/2014  
 Carl: I | 10 | A | 01/01/2000  
 Al: I | 9 | A | 01/01/1988

The following illustrates how veterans’ preference and length of service will be used under the proposed

rules. Assuming the same group of employees but with two differences: Al and Carl have the same ratings of record, but Carl’s veterans’ preference subgroup is AD, as follows:

Name	Tenure group	Rating of record summary levels	Vets pref subgroup	Service comp date
Al .....	I	3/3/3	A	01/01/1988
Barb .....	I	5/4/5	A	01/01/2010
Carl .....	I	3/3/3	AD	01/01/2000
Dave .....	I	4/5/4	A	01/01/1980
Emma .....	I	3/4/4	A	01/01/2014

Under the proposed rules, the retention register for these employees would look like this, based on considering retention factors in this order (in this example Carl is listed ahead of Al because he is in veterans’ preference subgroup AD despite having less service credit than Al):

Barb: I | 14 | A | 01/01/2010  
 Dave: I | 13 | A | 01/01/1980  
 Emma: I | 11 | A | 01/01/2014  
 Carl: I | 9 | AD | 01/01/2000  
 Al: I | 9 | A | 01/01/1988

OPM is proposing to revamp 5 CFR part 351, sections 501 through 505. We are proposing to renumber current § 351.505 *Records*, and § 351.506 *Effective date of retention standing*, to § 351.506 *Records* and § 351.507 *Effective date of retention standing*, respectively. We are also proposing corresponding changes to § 351.701 *Assignment rights (bump and retreat)*. Lastly, OPM is proposing to modify § 430.208(d) to attune those provisions with the proposed changes in 5 CFR part 351. The proposed changes are as follows:

Proposed § 351.501 *Order of retention* establishes that competing employees in a RIF will be classified on a retention

register on the basis of (in descending order): (1) Tenure of employment, (2) performance, (3) veterans’ preference, and (4) length of service. This section also clarifies that the order of retention provisions applies to employees in both the competitive and excepted services.

Proposed § 351.502 *Tenure of employment* defines tenure groups for competitive service and excepted service employees. Proposed § 351.502(a) defines tenure groups for competitive service employees. The new § 351.502(a) incorporates the provisions currently found in § 351.501(b)(1)–(3) but clarifies that Tenure group I will consist of career employees who are not serving a probationary period. Proposed tenure group II will consist of career-conditional employees and other employees serving a probationary period, as well as the other categories of employees currently described in § 351.501(b)(2). OPM is deleting the reference to “temporary appointments pending establishment of a register” listed in current Tenure group III at § 351.501(b)(3) because these types of appointments, also known as TAPER appointments, were abolished in 2003 (see 68 FR 35265, “Organization of the

Government for Personnel Management, Overseas Employment, Temporary and Term Employment, Recruitment and Selection for Temporary and Term Appointments Outside the Register, Examining System, and Training”). Proposed § 351.502(b) defines tenure groups for excepted service employees. The new § 351.502(b) incorporates the provisions currently found in § 351.502 *Order of retention—excepted service* without change. OPM is proposing to consolidate tenure of employment definitions for both services into one section for the convenience of the reader.

Proposed § 351.503 *Performance* establishes that an agency will list employees on a RIF retention register (within the same tenure group) based on the total of each employee’s summary level ratings for the employee’s three most recent ratings of record for performance. In accordance with 5 CFR 430.208(d) summary level ratings of record for these purposes are as follows:

- (i) 5 for a Level 5 (Outstanding or equivalent) summary level
- (ii) 4 for a Level 4 (Exceeds Fully Successful or equivalent) summary level

- (iii) 3 for a Level 3 (Fully Successful or equivalent) summary level
- (iv) 2 for a Level 2 (Minimally Successful or equivalent) summary level, and
- (v) 1 for a Level 1 (Unacceptable) summary level

This section also explains that an agency lists competing employees on the retention register in descending order (*i.e.*, highest to lowest) based on their totals within the same tenure group.

Section 351.503(b) *Ratings used* explains that an employee's ratings of record are to be used in a manner consistent with the provisions of subpart B of 5 CFR part 430, and provides guidance as to how an agency determines an employee's performance standing for RIF purposes for employees not covered under subpart B of 5 CFR part 430 and in other special circumstances. § 351.503(b) remains largely unchanged from the provisions currently in § 351.504(a)(1)–(3), though we are removing the reference to 'additional retention service credit' currently found in § 351.504(a)(1).

Section 351.503(c) *Consideration of performance* includes language currently in § 351.504(b) but modifies this language by removing the reference to "additional retention service credit" consistent with the aim of E.O. 13839 (*i.e.*, credit for performance will no longer be added to an employee's length of service). Performance will now be a subgroup, within the tenure group, which will be based on the total of each employee's summary level ratings for the employee's three most recent ratings of record for performance consistent with § 351.503(a). Proposed § 351.503(c)(1) removes the reference to 'awarding additional retention service credit' currently found in § 351.504(b)(4).

Section 351.503(d) *How to apply performance ratings* is a new subsection which explains to agencies that they must total the summary levels from an employee's three most recent ratings of record to derive a total summary level value for purposes of placing the employee on a RIF retention register under this part. This new subsection uses the rating of record summary levels described in subpart B of 5 CFR part 430. For example, the employees below are covered under a pattern H five-summary level rating performance appraisal system as described in 5 CFR 430.208(d). Their ratings and totals are:

Employee	Ratings	Total
Alice .....	5/4/4	13
Bill .....	4/3/3	10

Employee	Ratings	Total
Carol .....	4/4/3	11
Fred .....	3/4/5	12

These employees would be listed on the retention register in the following order: Alice, Fred, Carol, then Bill.

New paragraph § 351.503(e) *Single rating pattern* describes how agencies list employees who have been covered under the same rating pattern of summary levels during the 4-year period prior to the date of issuance of the reduction in force notice or the agency-established cutoff date. Subparagraph (e)(ii) proposes that for employees covered under a summary level appraisal system in which the highest summary level is a level "3" rating (*i.e.*, a pattern A ('pass/fail'), or pattern D system) the agency may create a performance subgroup for employees who have documented exceptional performance above the norm. This subparagraph explains that evidence of exceptional performance may include documentation showing an agency: Has awarded an employee the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a special act or service award, a quality step increase, or other performance awards or bonus (*e.g.*, a 'time-off' for demonstrated performance above expectations). OPM is proposing this to effectuate the principle of the E.O. (which is to elevate performance over length of service) and to provide a method by which an agency may make meaningful distinctions among employees in a pattern A or D performance appraisal program (*i.e.*, the highest summary level rating is a "3" or satisfactory) who have documented performance above expectations in these appraisals systems.

In new subparagraph § 351.503(e)(2)(B) OPM is also proposing to allow an agency to give more weight to certain performance-related actions than others for purposes of listing some level "3" employees ahead of other employees on a retention register. For example, an agency could list all employees who received the agency's highest sustained performance award ahead of all employees who received an organizational or component-specific award, and ahead employee who received a time off award (both groups would be listed ahead of the other level "3" employees). An agency that chooses this option must specify and document, in advance of any RIF, how it will prioritize performance awards for these purposes. OPM believes this option is consistent with the E.O. and the principle of

elevating performance over length of service, and it provides an agency with a method for making meaningful distinctions among employees with a fully successful rating when some of these employees were recognized for exceptional performance.

Section 351.503(f) *Multiple rating patterns* addresses situations in which an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as described in 5 CFR 403.208(d). This paragraph explains that an agency shall consider the mix of patterns and proposes that an agency shall provide enhanced performance standing to employees under disparate pattern summary levels under certain circumstances. To do this OPM is proposing that an agency transmute or assign an employee a higher summary level rating than what he or she received under a previous rating system only when there is documented evidence of exceptional or higher level performance consistent with the criteria in proposed § 351.503(e). An agency must transmute the rating of an employee who meets this requirement to the highest summary level of the pattern summary level being used during the RIF (*i.e.*, a level "4" rating if the agency conducting the RIF uses a pattern C or G summary level appraisal system, or a level "5" rating if the agency uses a pattern B, E, F, or H summary level appraisal system). Documented evidence of exceptional or higher level performance for these purposes includes: Award or receipt of the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a quality step increase, or an annual performance appraisal bonus. For example, an employee was covered by a pattern A (pass/fail) appraisal program for two years and a pattern H (5 summary level) appraisal program for the one year prior to a RIF. While covered under the pattern A appraisal program the employee received his agency's highest award for excellent performance in the second year. Under the five-summary level system he received a level "4" rating. Under this proposal the agency must assign the employee a higher rating level; so in this instance the employee's performance ratings for the three year period would be 3/5/4 (his level 3 rating would be transmuted to a level 5) and his ratings of record total for the three year period would be 12 for purposes of 351.503(d). OPM is also proposing that an employee who goes from an appraisal system which uses a higher pattern of summary levels to a lower one (*e.g.*, an employee who goes

from a 5 summary level appraisal program to two level system (*i.e.*, pass/fail system)) with ratings above the highest summary level of the lower pattern system be listed ahead of any employee on the retention register who does not have documented evidence of exceptional performance as described above. Lastly, this proposed section requires an agency to specify the basis on which it will consider exceptional or higher level performance described in § 351.503(e) and transmute or assign an employee a higher rating in accordance with the pattern of summary level used during the RIF, and make this information readily available for review prior to running a reduction in force. OPM is proposing enhanced performance credit or standing to implement the E.O.'s principle that an agency emphasize performance over length of service in a RIF. We believe this method prevents exceptional performers from being disadvantaged because they may be covered under two or more patterns of summary rating levels which may not make meaningful distinctions for performance among employees.

§ 351.503(g) *Missing ratings* describes how an agency should factor performance ratings into the RIF process when an employee does not have three actual ratings of record during the 4-year period prior to the date of issuance of RIF notices, or the 4-year period prior to the agency-established cut-off date. Proposed § 351.503(g) uses the modal rating concept for employees with no ratings during the 4 year period prior to the RIF currently found in § 351.504(c)(1) but modifies the current provisions by removing the reference to "additional retention service credit" consistent with the aim of E.O. 13839 (*i.e.*, credit for performance will no longer be added to an employee's length of service). The term 'modal rating' is currently defined in § 351.203. For employees with at least one rating of record but less than three, this section proposes that an agency total the summary levels, divide by the number of ratings, and use this value for the missing ratings. For example, an employee in five level pattern H summary level appraisal system has summary level rating of "3" fully successful and "4" exceeds fully successful but is missing a third rating. The agency would add 3 + 4, then divide by 2, for a value of 3.5 for the missing rating. The agency then adds the three ratings of record: 3, 4, and 3.5 for a total of 10.5 and enters the employee on the retention register accordingly.

Proposed § 351.504 *Veterans' preference* defines veterans' preference subgroups for employees in both the competitive and excepted services. This proposed section will consist of the provisions currently found in § 351.501(c) and (d) without change.

OPM is proposing to delete current § 351.502 *Order of retention—excepted service* and cover these provisions in proposed § 351.501(a).

OPM is proposing to modify current § 351.705 *Administrative assignment* to be consistent with the proposed changes to §§ 351.501–.505. Specifically, OPM is proposing to update § 351.705(a)(2) to incorporate the new order of retention and the creation of the new subgroup called 'performance'.

#### Performance Management

OPM is proposing to modify current § 430.208(d)(4) to attune this language with the proposed changes in part 351. To do this, we propose removing the current reference to ". . . assigning additional retention service credit under § 351.504."

OPM is proposing to modify current § 430.208(d)(5) by removing the reference to "the number of years of additional retention service credit" and replacing it with a general reference to proposed § 351.503 *Performance*.

#### Regulatory Impact Analysis

OPM has examined the impact of this rulemaking as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. While this proposed rule does not reach the economic effect of \$100 million or more under Executive Order 12866, this proposed rule is still designated as a "significant regulatory action," under Executive Order 12866.

#### Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not an E.O. 13771 regulatory action because this proposed rule is expected to be no more than de minimis costs.

#### Regulatory Flexibility Act

The Office of Personnel Management certifies that this proposed rule will not

have a significant economic impact on a substantial number of small entities.

#### Federalism

We have examined this proposed rule in accordance with Executive Order 13132, Federalism, and have determined that this proposed rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

#### Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

#### Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this proposed rule before its effective date, as required by 5 U.S.C. 801. This proposed rule is not a major rule as defined by the Congressional Review Act (CRA) (5 U.S.C. 804).

#### Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### List of Subjects in 5 CFR Parts 351 and 430

Government employees.  
Office of Personnel Management.  
**Alexys Stanley,**  
*Regulatory Affairs Analyst.*

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 351, and 430 as follows:

#### PART 351—REDUCTION IN FORCE

- 1. Revise the authority citation for part 351 to read as follows:

**Authority:** 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965; E.O. 13839, 83 FR 25343.

### Subpart B—General Provisions

■ 2. In § 351.203, revise the definition of “*Current rating of record*” to read as follows:

#### § 351.203 Definitions.

\* \* \* \* \*

*Current rating of record* is the rating of record for the most recently completed appraisal period as provided in § 351.503(c)(3).

\* \* \* \* \*

### Subpart E—Retention Standing

■ 3. Revise Subpart E to read as follows:

#### Subpart E—Retention Standing

Sec.

351.501	Order of retention.
351.502	Tenure of employment.
351.503	Performance.
351.504	Veterans' preference.
351.505	Length of service.
351.506	Records.
351.507	Effective date of retention standing.

#### § 351.501 Order of retention.

Competing employees in the competitive and excepted services shall be classified on a retention register on the basis of four factors: Tenure of employment, performance, veterans' preference, and length of service as follows:

(a) On the same retention register in descending order by tenure group I, group II, group III, as described in § 351.502;

(b) Within each tenure group by performance based on the sum of the summary levels for the employee's three most recent ratings of record for performance in accordance with § 351.503;

(c) Within each performance subgroup by veterans' preference subgroup AD, subgroup A, subgroup B, as described in § 351.504; and

(d) Within each veterans' preference subgroup by years of service beginning with the earliest service computation date, as computed under § 351.505, when two or more employees have the same summary level total value for the employees' three most recent ratings of record.

#### § 351.502 Tenure of employment.

(a) *Competitive service*. Tenure groups in the competitive service are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this chapter is in group I if the employee is otherwise eligible to

be included in this group.) The following employees are in group I as soon as the employee completes any required probationary period for initial appointment:

(i) An employee for whom substantial evidence exists of eligibility to immediately acquire status and career tenure, and whose case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors);

(ii) An employee who acquires competitive status and satisfies the service requirement for career tenure when the employee's position is brought into the competitive service;

(iii) An administrative law judge;

(iv) An employee appointed under 5 U.S.C. 3104, which provides for the employment of specially-qualified scientific or professional personnel, or a similar authority; and

(v) An employee who acquired status under 5 U.S.C. 3304(c) on transfer to the competitive service from the legislative or judicial branches of the Federal Government.

(2) Group II includes each career-conditional employee, and each employee serving a probationary period under subpart H of part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this chapter is in group II if the employee has not completed a probationary period under subpart H of part 315 of this chapter.) Group II also includes an employee when substantial evidence exists of the employee's eligibility to immediately acquire status and career-conditional tenure, and the employee's case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors).

(3) Group III includes all employees serving under indefinite appointments, status quo appointments, term appointments, and any other non-status non-temporary appointments which meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter.

(b) *Excepted service*. Tenure groups in the excepted service are defined as follows:

(1) Group I includes each permanent employee whose appointment carries no restriction or condition such as conditional, indefinite, specific time limit, or trial period.

(2) Group II includes each employee:

(i) Serving a trial period; or

(ii) Whose tenure is equivalent to a career-conditional appointment in the competitive service in agencies having such excepted appointments.

(3) Group III includes each employee:

(i) Whose tenure is indefinite (*i.e.*, without specific time limit), but not actually or potentially permanent;

(ii) Whose appointment has a specific time limitation of more than 1 year; or

(iii) Who is currently employed under a temporary appointment limited to 1 year or less, but who has completed 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more.

#### § 351.503 Performance.

(a) *Performance subgroup*. Within the tenure groups an agency shall list competing employees in descending order (*i.e.*, highest to lowest) based on the total of the summary levels for each employee's three most recent ratings of record for performance in accordance with part 430 of this Chapter.

(b) *Ratings used*. (1) Except as provided at § 351.503(d)(3), only ratings of record as defined in § 351.203 shall be used as the basis for classifying an employee's performance in a reduction in force.

(2) For employees who received ratings of record while covered by part 430, subpart B, of this chapter, the summary levels assigned for those ratings of record shall be used to establish the employee's performance subgroup in a reduction in force in accordance with 5 CFR 351.501, except as provided in 5 CFR 351.503(d)(3).

(3) For employees who received performance ratings while not covered by the provisions of 5 U.S.C. chapter 43 and subpart B of part 430 of this chapter, those performance ratings shall be considered ratings of record with summary levels for designating an employee's performance subgroup in a reduction in force only when it is determined that those performance ratings are equivalent ratings of record under the provisions of § 430.201(c) of this chapter. The agency conducting the reduction in force shall make that determination.

(c) *Consideration of performance*. (1) An employee's entitlement to performance consideration under this subpart shall be based on the employee's three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, except as otherwise provided in paragraphs (c)(2) and (g) of this section.

(2) To provide adequate time to determine employee performance total values, an agency may provide for a cutoff date, a specified number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used

for purposes of this subpart. When a cutoff date is used, an employee's performance average will be based on the three most recent ratings of record received during the 4-year period prior to the cutoff date.

(3) To be considered for purposes of this subpart, a rating of record and its assigned summary level (including any adjustments to performance consistent with this subpart) must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (*i.e.*, the rating of record is available for use by the office responsible for establishing retention registers).

(4) The use of performance ratings of record and assigned summary levels (including any adjustments to performance) for purposes of this subpart must be uniformly and consistently applied within a competitive area, and must be consistent with any agency's appropriate issuance(s) that implement these policies in part 351. Each agency must specify in its appropriate issuance(s):

(i) The conditions under which a rating of record is considered to have been received for purposes of determining whether it is within the 4-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, as appropriate; and

(ii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart.

(d) *How to apply performance ratings of record.* Agencies determine each competing employee's performance standing (or numerical value) by adding the employee's three most recent summary level ratings of record during the 4-year period prior to the date of issuance of the reduction in force notice or the agency-established cutoff date. An agency lists competing employees on the retention register in descending order (*i.e.*, highest to lowest) based on these totals.

(e) *Single rating pattern.* (1) If all employees in a reduction in force competitive area have received ratings of record under a single pattern of summary levels as set forth in § 430.208(d) of this chapter, agencies must apply the method described in paragraph (d) of this section.

(2) An agency may give additional credit for performance for employees covered under a summary level appraisal system in which the highest summary level is a level "3" rating (*i.e.*,

a pattern A 'pass/fail', or pattern D system), consistent with § 430.208(d) of this chapter. At its discretion an agency may create a subgroup of level "3" employees with demonstrated exceptional performance and list them ahead of other level "3" employees if, within the 4-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, the following condition is met:

(i) The agency has applied performance-related criteria and taken an action that recognizes the employee's exceptional performance; such actions may include but are not limited to awarding an employee: The highest Agency or Departmental award (such as a Secretary's or Chairman's award), a special act or service award, a quality step increase, or other performance awards or bonus (*e.g.*, a 'time-off' for demonstrated performance above expectations), etc.

(ii) An agency may determine on its own whether to give more weight to the performance-related action described in paragraph (e)(2)(i) of this section for purposes of listing some level "3" employees ahead of other on a retention register. For example, an agency could list all employees who received the agency's highest sustained performance award ahead of all employees who received an organizational or component-specific award, and ahead of an employee who received a time off award. An agency which chooses this option must specify and document, in advance of the RIF, how it will prioritize performance awards for these purposes.

(iii) An agency that chooses to give an employee additional credit for performance must specify and document, in advance of the RIF, how it will prioritize performance awards for these purposes and make this criterion readily available for review.

(f) *Multiple rating patterns.* (1) If an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as set forth in § 430.208(d) of this chapter, it shall consider the mix of patterns and provide additional retention credit for performance in accordance with the following:

(i) Transmute or assign an employee a higher summary level rating than what he or she received under their previous appraisal system in accordance with the appraisal system (*i.e.*, pattern of summary level) being applied to the Reduction in Force;

(ii) Transmute or assign an employee a summary level rating only when there is documented evidence of exceptional

or higher level performance as evidenced by an employee who received the highest Agency or Departmental award (such as a Secretary's or Chairman's award), a quality step increase, or appraisal performance awards or bonus (*e.g.*, a "time-off" for demonstrated performance above expectations in lieu of a cash bonus); and

(iii) Each agency must specify and document, in advance of a RIF, the basis on which it will transmute an employee's rating; *i.e.*, the agency needs to describe how it will translate evidence of documented exceptional performance to a higher performance rating under the appraisal system (*i.e.*, pattern of summary level) being applied to the RIF and make this criteria readily available for review.

(iii) An agency must transmute the rating of an employee who meets the requirement in 351.503(f)(1)(B) to the highest summary level of the pattern summary level being applied to the RIF (*i.e.*, a level "4" rating if the agency conducting the RIF uses a pattern C or G summary level appraisal system, or a level "5" rating if the agency uses a pattern B, E, F, or H summary level appraisal system). An agency cannot transmute a rating to a summary level which is not among those in the pattern being applied to the RIF.

(ii) In situations in which the agency running the RIF is using a pattern summary level rating appraisal system with a summary level no higher than a level "3" (*i.e.*, a pass/fail system) but has employees rated previously under a pattern with higher summary levels the agency must place the employees with the higher summary ratings at the performance subgroup at the top of retention register, or ahead of, other summary level "3" employees with no documented evidence of exceptional performance.

(g) *Missing ratings.* (1) Use of performance ratings for employees who do not have three actual ratings of record during the 4-year period prior to the date of issuance of reduction in force notices or the 4-year period prior to the agency-established cutoff date for ratings of record permitted in paragraph (c)(2) of this section shall be determined under paragraph (d) of this section, as appropriate, and as follows:

(2) The performance standing of an employee who has not received any rating of record for any year during the 4-year period shall be based on the modal rating as defined in 5 CFR 351.203 for the summary level pattern that applies to the employee's official position of record at the time of the reduction in force.

(3) The performance standing of an employee who has received at least one but fewer than three previous ratings of record during the 4-year period shall have his or her performance standing determined on the basis of the value of summary levels for the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the summary levels is added together and divided by 2, with the result being either (1) a whole number or (2) a number with .5 decimal value. The agency totals these values and lists the employee in score order in accordance with § 351.204(d). If an employee has received only one actual rating of record during the period, its summary level value determines the employee's performance subgroup for purposes of this part.

#### § 351.504 Veterans' preference.

(a) *Veterans' preference subgroups.* Veterans' preference subgroups for both competitive and excepted service employees are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not included in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(b) A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (b)(1), (2), or (3) of this section, except as limited by paragraph (b)(4) or (b)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee retired at the rank of major or above (or equivalent) is

considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraphs (b)(1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.

#### § 351.505 Length of service.

(a) All civilian service as a Federal employee, as defined in 5 U.S.C. 2105(a), is creditable for purposes of this part. Civilian service performed in employment that does not meet the definition of *Federal employee* set forth in 5 U.S.C. 2105(a) is creditable for purposes of this part only if specifically authorized by statute as creditable for retention purposes.

(b)(1) As authorized by 5 U.S.C. 3502(a)(A), all active duty in a uniformed service, as defined in 5 U.S.C. 2101(3), is creditable for purposes of this part, except as provided in paragraphs (b)(2) and (b)(3) of this section.

(2) As authorized by 5 U.S.C. 3502(a)(B), a retired member of a uniformed service who is covered by § 351.503(b) is entitled to credit under this part only for:

(i) The length of time in active service in the Armed Forces during a war, or in a campaign or expedition for which a campaign or expedition badge has been authorized; or

(ii) The total length of time in active service in the Armed Forces if the employee is considered a preference eligible under 5 U.S.C. 2108 and 5 U.S.C. 3501(a), as implemented in § 351.504(b).

(3) An employee may not receive dual service credit for purposes of this part for service performed on active duty in the Armed Forces that was performed during concurrent civilian employment as a Federal employee, as defined in 5 U.S.C. 2105(a).

(c)(1) The agency is responsible for establishing the service computation date applicable to each employee competing for retention under this part. If applicable, the agency is also responsible for adjusting the service computation date to withhold retention service credit for non-creditable service.

(2) The service computation date includes all actual creditable service

under paragraph (a) and paragraph (b) of this section.

(d) *Service computation date.* The service computation date is computed on the following basis:

(1) The effective date of appointment as a Federal employee under 5 U.S.C. 2105(a) when the employee has no previous creditable service under paragraph (a) or (b) of this section; or if applicable,

(2) The date calculated by subtracting the employee's total previous creditable service under paragraph (a) or (b) of this section from the most recent effective date of appointment as a Federal employee under 5 U.S.C. 2105(a).

#### § 351.506 Records.

(a) The agency is responsible for maintaining correct personnel records that are used to determine the retention standing of its employees competing for retention under this part.

(b) The agency must allow its retention registers and related records to be inspected by:

(1) An employee of the agency who has received a specific reduction in force notice, and/or the employee's representative if the representative is acting on behalf of the individual employee; and

(2) An authorized representative of OPM.

(c) An employee who has received a specific notice of reduction in force under authority of subpart H of this part has the right to review any completed records used by the agency in a reduction in force action that was taken, or will be taken, against the employee, including:

(1) The complete retention register with the released employee's name and other relevant retention information (including the names of all other employees listed on that register, and their individual service computation dates calculated under § 351.505(d)), so that the employee may consider how the agency constructed the competitive level, and how the agency determined the relative retention standing of the competing employees; and

(2) The complete retention registers for other positions that could affect the composition of the employee's competitive level, and/or the determination of the employee's assignment rights (e.g., registers to which the released employee may have potential assignment rights under § 351.701(b) and (c)).

(d) An employee who has not received a specific reduction in force notice has no right to review the agency's retention registers and related records.



(e) The agency is responsible for ensuring that each employee's access to retention records is consistent with both the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a).

(f) The agency must preserve all registers and records relating to a reduction in force for at least 1 year after the date it issues a specific reduction in force notice.

#### § 351.507 Effective date of retention standing.

(a) The retention standing of each employee released from a competitive level in the order prescribed in § 351.601 is determined as of the date the employee is so released.

(b) The retention standing of each employee retained in a competitive level as an exception under § 351.606(b), § 351.607, or § 351.608, is determined as of the date the employee would have been released had the exception not been used. The retention standing of each employee retained under any of these provisions remains fixed until completion of the reduction in force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction-in-force action to accord with the employee's proper retention standing as of the effective date established by this section.

■ 5. Revise § 351.705(a)(2) to read as follows:

#### § 351.705 Administrative assignment.

(a) \* \* \*

(2) Permit an employee in tenure group III, same performance subgroup, veterans' preference subgroup AD to displace an employee in tenure group III, same performance subgroup, veterans' preference subgroup A or B, or permit an employee in tenure group III, same performance subgroup, veterans' preference subgroup A to displace an employee in tenure group III, same performance subgroup, veterans' preference subgroup B consistent with § 351.701 (e.g., an employee in tenure group III, performance summary level ratings of record total of 12, veterans' preference subgroup AD to displace an employee tenure group III, performance summary level ratings of record total of 12, veterans' preference subgroup A or B).

\* \* \* \* \*

## PART 430—PERFORMANCE MANAGEMENT

### Subpart B—Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees

■ 6. Revise § 430.208(d)(4) to read as follows:

#### § 430.208 Rating Performance.

\* \* \* \* \*

(d) \* \* \*

(4) The designation of a summary level and its pattern shall be used to provide consistency in describing ratings of record and as a reference point for applying other related regulations, excluding enhanced performance values under § 351.503(d) and (f) of this chapter.

#### § 430.208 [Amended]

■ 7. In § 430.208, remove paragraph (d)(5).

[FR Doc. 2020-26347 Filed 12-16-20; 8:45 am]

BILLING CODE 6325-39-P

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 26

[Docket Nos. PRM-26-3; NRC-2009-0482, PRM-26-5; NRC-2010-0304]

#### Fitness-for-Duty Program

AGENCY: Nuclear Regulatory Commission.

ACTION: Petitions for rulemaking; denial.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is denying two petitions for rulemaking related to the fitness-for-duty program that were docketed as PRM-26-3, "Professional Reactor Operator Society—Fitness-for-Duty Programs," and PRM-26-5, "Nuclear Energy Institute—Fitness-for-Duty Programs," due to the discontinuation of the associated rulemaking.

**DATES:** As of December 17, 2020, the dockets for PRM-26-3 and PRM-26-5 are closed.

**ADDRESSES:** Please refer to Docket IDs NRC-2009-0482 or NRC-2010-0304 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket IDs NRC-2009-0482 or NRC-2010-0304. Address questions about NRC dockets to Dawn Forder;

telephone: 301-415-3407; email: [Dawn.Forder@nrc.gov](mailto:Dawn.Forder@nrc.gov). For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.

- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov) or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

#### FOR FURTHER INFORMATION CONTACT:

Yanelly Malave, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-1519, email: [Yanelly.Malave-Velez@nrc.gov](mailto:Yanelly.Malave-Velez@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

### I. Background

Title 10 of the *Code of Federal Regulations* (10 CFR) 2.802, "Petition for rulemaking—requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation in 10 CFR chapter I. The NRC received the following petitions for rulemaking (PRMs) regarding 10 CFR part 26, "Fitness for Duty Programs," subpart I, "Managing Fatigue," from the Professional Reactor Operator Society (PROS) and the Nuclear Energy Institute (NEI) after the NRC issued a final rule<sup>1</sup> in 2008 that substantially revised its fitness for duty requirements:

(1) *PRM-26-3 Submitted by Robert N. Meyer on Behalf of PROS*

On October 16, 2009, Mr. Robert N. Meyer, on behalf of PROS, an organization of operations personnel employed at nuclear power plants throughout the United States, submitted a PRM requesting that the NRC amend its fatigue management regulations to

<sup>1</sup> "Fitness for Duty Programs; Final Rule," 73 FR 16966 (March 31, 2008).