

## Hiring During a Reduction in Force

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Unfortunately, Reductions in Force (RIF) have been an all too familiar experience within the Department of Defense over the last few years. Fortunately, however, many of our employees are ready to retire, or are willing to take a buyout and move on to greener pastures. Often times, our organizations must down size because the mission of the organization has changed. Certain skills that were once required are required no longer and new skills—and positions—are needed. In many cases, employees who are to be separated under a RIF do not have the qualifications necessary to be placed into the new positions and management is unwilling to waive qualifications because the positions are critical to the success of the new organization and success is needed quickly. Not surprisingly, employees facing separation believe they are entitled to vacant positions in the new organization, even if they are not qualified. What is particularly hard to swallow for employees facing separation is when their organization competitively fills positions with personnel from outside of the organization. The fact of the matter is that hiring during a RIF is legal.

“Each agency is responsible for determining the categories within which positions are to be required, where they are to be located, and when they are to be filled, abolished, or vacated.” 5 CFR § 351.201(a)(1). That decision is for management alone. Griffin v. Dept. of Agriculture, 2 M.S.P.B. 335, 337 (1980). In a RIF appeal to the Merit Systems Protection Board (MSPB), once an agency has proved by preponderant evidence that the reorganization was bona fide and based on good faith with appropriate management consideration, the MSPB will defer to the agency’s decision. There is no regulatory requirement for an agency to fill vacancies during a RIF. Klegman v. DHHS, 16 MSPR 455, 457 (1983). However, once an agency determines to fill vacancies during a RIF the agency must fill those positions based on employee retention standing and their respective assignment rights through the use of “bumping” and “retreating”. The situation is different when an agency decides to fill its vacant positions competitively. If during a RIF an agency decides to fill positions competitively, RIF regulations do not apply to the selection procedures. Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*, Dewey Publications, Inc. (1999), p. 1985; Dante v. National Science Foundation, 16 MSPR 314 (1983). The MSPB has no jurisdiction over RIF appeals based upon a claim of non-selection for vacant positions filled competitively.

Fortunately for our employees, existing collective bargaining agreements, or mid-contract bargaining agreements reached in anticipation of a RIF, may guarantee employees the right to vacant positions in the new organization even if they do not possess the requisite qualifications. In a recent RIF conducted by a tenant DOD organization on the Rock Island Arsenal, the organization agreed to reserve certain entry-level positions in the new organization for those employees facing involuntary separation. The positions were not considered in the RIF, but rather were filled competitively. The organization determined that it would waive qualifications for the positions, in return for a lower entry-level grade. As a result, several employees were placed who would otherwise have been separated. Many other positions were also filled competitively with people from outside of the organization (though many of the placements were made off of the priority placement list). Unfortunately, several other employees, who failed to be selected for the reserved positions, were separated. In their RIF appeals they learned that in fact the government can hire during a RIF and that vacant positions do not necessarily have to be filled through the use of traditional placement rights.