

Attached, for your information, is a copy of the RIF policy memo signed by the Deputy Assistant Secretary (Civilian Personnel Policy) on June 5, 1998. The memorandum advises the field of Office of Personnel Management government-wide regulations affecting how reduction-in-force (RIF) retention service credit is computed. The OPM final rules were published in the Federal Register at 62 Fed. Reg. 62495 (1997) which can be found on the OPM's web site at http://www.opm.gov/fedregis/html/nov_97.htm (November 24, 1997). The changes affect 5 CFR Parts 351, 430 and 531. The memorandum also issues Army policy on those areas of the new rules on which agencies were given discretion. The following discusses the scope of bargaining over those areas.

Briefly, the OPM changes address four areas. They are: (1) the method for averaging actual ratings received if there are fewer than three during the four year look-back period; (2) the use of "modal" ratings for employees who have no ratings of record during the four year look-back period; (3) the use of performance evaluations given under appraisal systems not covered by 5 CFR Part 430, Subpart B; and (4) the system for assigning retention service credit when there are mixed rating patterns within the same competitive area. The Federal Register and the attached memorandum provide details concerning these areas.

As these changes affect bargaining unit employees' conditions of employment, there is an obligation to notify your union(s) of the changes and provide them an opportunity to request bargaining. As these changes stem from a government-wide regulation, they are generally outside the duty to bargain in accordance with 5 USC ? 7117(a)(1). There are areas of the regulation, though, where management has been given certain discretion. Typically, these areas are open for collective bargaining, but in light of the Authority's decision in U.S. Office of Personnel Management, 51 FLRA 491 (1995) (OPM), this may not be true under the present circumstances. Briefly, in OPM, the Authority held that proposals, which establish conditions of employment for supervisory personnel, are outside the duty to bargain. I will discuss the scope of bargaining in more detail later in this note.

The following provides a description of the labor relations implications stemming from the changes to the CFR.

1. Method for averaging actual ratings. The method described in the Federal Register is non-discretionary and, therefore, proposals that violate the government-wide regulation are nonnegotiable.

2. The use of modal ratings for employees with no ratings of record. The OPM regulations provide that employees with no rating of record in the four year look-back period will receive a "modal" rating. The modal rating is the most frequent performance summary rating level given during the most recent appraisal period. The modal rating can be determined from all ratings within a competitive area, in a larger subdivision of the agency or agency-wide. Army has determined that installations will use the competitive area in which the RIF is being conducted in determining modal ratings. While this decision may be subject to negotiations, we do not believe the unions will object to this determination as it allows the most relevant performance rating for the employee who has not been rated. Additionally, it is the easiest to calculate.

Should a union, nevertheless, attempt to bargain for a larger area in determining the modal rating, we believe such a proposal would be outside the duty to bargain based on the Authority's OPM, decision.

3. The Use of Performance Evaluations Not Given Under 5 CFR Part 430. Again, management has no discretion under this procedure so there is no duty to bargain over proposals that conflict with this requirement.

4. System for Assigning Retention Service Credit When There are Mixed Rating Patterns. While there is some discretion here, such as the number of years credit given for a particular performance rating, Army's decision as to the number of years of retention service to be given for individual performance ratings should be acceptable to the unions. If not, the Authority's decision in OPM, would allow installations to decline to bargain over this matter.

One other area where management has been given discretion is in establishing the effective date of the new regulation (as long as it is implemented by October 1, 1998.) Army has chosen to implement on October 1st. This should give activities sufficient time to notify union(s) of the change and complete any requested bargaining. It also gives the parties sufficient time to become familiar with the new regulations and to have our computer systems capable of complying with the new requirements. Again, I don't foresee any strong union opposition to this determination. Should the union seek an earlier implementation date, the Authority's findings in U.S. Office of Personnel Management, should preclude the duty to bargain over such a proposal.

Let me briefly explain why I believe U.S. Office of Personnel Management, allows the activity to refuse to bargain over union proposals

conflicting with the above determinations. The new regulations must be applied, at a minimum, to everyone in a competitive area as they must be "uniformly and consistently applied in any one reduction in force." (See 5 CFR ? 351.201(c).) Competitive areas "must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined." (5 CFR ? 351.402(b)) This includes bargaining unit employees as well as supervisors.

If a union submits a proposal that directly modifies any of the above determinations, the proposal would have to be applied throughout the competitive area. The proposal would not only apply to bargaining unit members, but would also impact directly on the conditions of employment of supervisory personnel. In U.S. Office of Personnel Management, the Authority found that a union proposal defining the competitive area was outside the duty to bargain as it established conditions of employment for supervisory personnel. (A more detailed discussion of U.S. Office of Personnel Management, can be found in Labor Relations Bulletin No. 390, Negotiability of Competitive Areas.) The Authority subsequently held that bargaining over supervisors' conditions of employment is a permissive matter which management may elect to bargain over, but is not obligated to do so. (See Labor Relations Bulletin No. 399, Negotiating Conditions of Employment of Supervisors and Management Officials.)

So, should a union proposal directly impact the discretionary determinations discussed above, you can argue that the proposal has to be applied throughout the competitive area and the competitive area includes supervisors. The proposal, therefore, directly impacts on the conditions of employment of supervisors and is outside the duty to bargain.

This does not mean that you shouldn't discuss these issues with your unions. Where unions are uncomfortable with management's determinations, explain why these decisions have been made and why they are in the employees' best interests. You should not use the fact that a union proposal may be outside the duty to bargain as a basis for cutting off discussions with your unions too early on in the negotiation process. If forced to, though, you may have to use the argument to avoid mediation and impasse...though I can't imagine it ever getting that far.

Of course, the union may submit other related proposals that do not directly conflict with the above guidance. In those cases, you have to bargain to completion before implementing these new regulations.

Further, in accordance with 5 USC ?7116(a)(7), it is an unfair labor

practice to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. That is, if your agreement conflicts with these new regulations, and your union will not re-open the agreement, you can not implement the changes until they are re-negotiated at the expiration of the current agreement. Once the agreement comes up for renewal, you must then bring it into conformance with the government-wide regulation. If this describes your situation, please let me know as soon as possible.

Should you have any questions concerning the above, or should any questions arise in discussions with your unions over this matter, please contact me at DSN 225-4011 or (703) 695-4011.