



Department of Defense INSTRUCTION

NUMBER 1403.2

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ASD(FM&P)

SUBJECT: Reduction in Force in the Senior Executive Service (SES)

- References:
- (a) Section 3595 of title 5, United States Code, "Reduction in Force in the Senior Executive Service"
 - (b) Title 5, Code of Federal Regulations, Part 359, "Removal from the Senior Executive Service; Guaranteed Placement in Other Personnel Systems"
 - (c) Federal Personnel Manual Supplement 920-1, "Operations Handbook for the Senior Executive Service"
 - (d) Section 8336 of title 5, United States Code, "Immediate Retirement"
 - (e) Section 5384 of title 5, United States Code, "Performance Awards in the Senior Executive Service"
 - (f) through (o), see enclosure 1

1. PURPOSE

This Instruction establishes policy, responsibilities, and procedures in accordance with reference (a), reference (b) and reference (c) for conducting a reduction in force (RIF) in the Department of Defense.

2. APPLICABILITY AND SCOPE

This Instruction:

2.1. Applies to the Office of the Secretary of Defense (OSD); the Military Departments; the Joint Staff; the Unified and Specified Commands; the Office of the Inspector General, Department of Defense (OIG, DoD); the U.S. Court of Military Appeals; the Defense Agencies; and the DoD Field Activities.

2.2. Applies to all career SES appointees, except for reemployed annuitants.

2.3. Does not apply to noncareer or limited SES appointees, or to SES reemployed annuitants, all of whom serve at the pleasure of the appointing authority and may be separated without recourse to RIF procedures.

2.4. Does not apply to employees outside the SES, regardless of grade.

3. DEFINITIONS

Terms used in this Instruction are defined in enclosure 2.

4. POLICY

Due to the size and diversity of the Department of Defense and its major components, and the flexibility with which assignments can be made under the SES, it is DoD policy that a RIF is to be avoided whenever possible.

4.1. When conditions that could culminate in a RIF are observed, the major component shall review current SES vacancies throughout the entire component, with a view toward effecting reassignments that would obviate the RIF.

4.2. If this process does not eliminate the likelihood of a RIF, the component shall explore possible actions through which a RIF might be avoided such as those described as follows:

4.2.1. The affected component shall examine occupied SES positions with a view toward effecting a series of reassignments culminating in the placement of all affected individuals in bona fide SES positions for which they are qualified.

4.2.2. The affected component shall also examine the possible redistribution of duties (reorganization), so as to relieve the conditions that threaten a RIF.

4.2.3. The affected component shall explore the possibility of separating noncareer and limited SES appointees, as well as reemployed annuitants, before pursuing a RIF.

4.2.4. The affected component shall also consider separating SES members under the discontinued service retirement provisions contained in 5 U.S.C. 8336(d)(2)

(reference (d)) before initiating a RIF.

4.3. Before initiating a RIF, the major component shall advise the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) of the circumstances involved and shall certify that the alternatives listed in subsections 4.1. and 4.2., above, have been pursued.

4.4. A component implementing a RIF shall have withdrawn from its allocation the position resources that supported SES positions abolished in the RIF.

4.5. It is DoD policy that retention registers consist of all SES incumbents within the area of competition who are covered by this Instruction. Accordingly, separate competitive levels based on the qualification requirements of individual positions shall not be maintained.

5. RESPONSIBILITIES

5.1. The Assistant Secretary of Defense (Force Management and Personnel) shall administer the policies in this Instruction.

5.2. The Secretaries of the Military Departments, the Director of Administration and Management, and the Inspector General of the Department of Defense shall ensure compliance with this Instruction.

6. PROCEDURES

6.1. Areas of Competition. Areas of competition ordinarily shall be the entire major component and should not be limited to a single locality, installation, or commuting area.

6.2. Retention Register. All covered senior executives in the area of competition affected by a RIF shall be entered on a retention register that has been established in accordance with the provisions outlined in FPM Supplement 920-1, Subchapter 510, section 510-7 (reference (c)).

6.3. Conducting the RIF

6.3.1. When a position is abolished or modified so that it no longer meets statutory SES criteria, its incumbent displaces the lowest-ranking individual on the retention register (i.e., below the individual's own ranking) for whose position the

qualification requirements are met. Qualification requirements are those reflected in the most recent official job opportunity announcement (JOA) under which recruitment was conducted to fill the position. Qualification requirements different from those contained in the JOA may be used if consistent with the position description and approved by the major component. The latter approach shall be used in those instances where there is no JOA on record.

6.3.2. Employees identified for release from the retention register may be eligible for placement elsewhere in the Department of Defense outside the area of competition, or outside the Department of Defense through the auspices of the Office of Personnel Management (OPM), through processes prescribed in 5 U.S.C. 3595(b) (reference (a)).

6.3.3. Release from a retention register does not itself suffice to remove an individual from the SES. Members remain in the SES, in a pay status, until and unless they are expressly removed from the SES.

6.4. Placement within or Removal from the SES

6.4.1. Placement or Removal of Probationers

6.4.1.1. A probationer who is selected by competition for release from the retention register has no statutory right to be considered for SES vacancies. Accordingly, such probationer may be removed from the SES pursuant to procedures specified under 5 CFR 359, subpart D (reference (b)). Placement rights, if any, are treated in subpart G of reference (b) and subsection 6.8., below. Appeals provisions discussed in subsection 6.5., below, should also be consulted.

6.4.1.2. There is no bar against the placement of probationers affected by the RIF in vacant SES positions within the major component in which they were employed in the SES or in a vacant position within the Department of Defense, provided such placement does not deprive a post-probationer of the statutory right to be assigned to an SES vacancy.

6.4.2. Placement of Post-Probationers within the SES

6.4.2.1. A post-probationer who is selected by competition for release from the retention register has a statutory right to be assigned to any vacant SES position in the Department of Defense for which the qualification requirements are met.

6.4.2.1.1. The major component initiating the RIF shall review the

qualifications of all post-probationers released from the retention register against the qualification requirements of all SES positions throughout that component that are either currently vacant or potentially vacant, i.e., for which the incumbent has submitted a specific notice of resignation or retirement. The component shall direct that affected individuals be placed in its vacant SES positions when the qualification requirements are met.

6.4.2.1.2. If there is no SES position in the component to which a displaced post-probationer can be assigned, the ASD(FM&P) shall be notified and provided with a completed Standard Form (SF)-171, "Application for Federal Employment," for the individual. The ASD(FM&P) shall request the other major components to review their SES vacancies and make a determination as to whether or not the individual is qualified for any of them. If qualified, the individual shall be placed in the first available vacancy. If the individual is qualified for two or more existing vacancies, the ASD(FM&P), in consultation with the components having the vacancies, shall decide the position in which the individual will be placed.

6.4.2.1.3. If an individual is placed in another major component within the Department of Defense, the gaining component ordinarily shall be awarded the SES position resource forfeited by the losing component under the terms of subsection 4.4., above.

6.4.2.1.4. If an individual fails to accept a directed reassignment, he or she may be removed from the SES pursuant to 5 CFR 752, subpart F (reference (f)).

6.4.2.2. If the ASD(FM&P) concludes that there is no vacant SES position for which a displaced post-probationer meets the qualification requirements, that individual must be advised in writing.

6.4.2.2.1. The written notification shall be prepared under the auspices of the component in which the individual is employed in the SES. Authority to sign the notice may be delegated within the component, as appropriate.

6.4.2.2.2. The notice must be received by the affected post-probationer on or before the date his or her name is transmitted to OPM for placement assistance, as described under paragraph 6.4.3., below.

6.4.2.2.3. The notice must include the following information:

6.4.2.2.3.1. The nature of the RIF competition, including the appointee's competitive area and standing on the retention register.

6.4.2.2.3.2. The place where the appointee may inspect the regulations and records pertinent to the competition for job retention.

6.4.2.2.3.3. Efforts made to place the employee in a vacant SES position within the Department of Defense.

6.4.2.2.3.4. The date on which the Department of Defense certified (or will certify) the employee to OPM for placement assistance.

6.4.2.2.3.5. Information about OPM's placement assistance program, including what the employee has to do to apply. (See paragraph 6.4.3., below.)

6.4.2.2.3.6. The prospective effective date of removal if the individual cannot be placed elsewhere in the SES during the 45-day OPM placement period. If the specific date is not known, a "not earlier than" date may be used.

6.4.3. Placement Assistance by OPM

6.4.3.1. If there is no vacant SES position in the Department of Defense to which a displaced post-probationer can be assigned (see subparagraph 6.4.2.1., above), OPM must be notified in writing, as follows:

6.4.3.1.1. The letter of notification must be addressed to the Director, OPM, and signed by the Secretary of Defense or the Deputy Secretary of Defense. Signatory authority cannot be delegated, but the letter shall be prepared (and associated staff work accomplished) in the component where the individual is employed in the SES.

6.4.3.1.2. The letter must contain the Secretary or Deputy Secretary of Defense's certification that there is currently no vacant SES position in Department of Defense for which the cited individual is qualified.

6.4.3.1.3. The letter shall also include a copy of the RIF notice given to the displaced employee (see subparagraph 6.4.2.2., above) and a statement describing the internal placement effort conducted on the employee's behalf. (See subparagraph 6.4.2.1., above.)

6.4.3.2. OPM's placement assistance continues for 45 days, from the date of OPM's written acknowledgment of the Agency's notification described in

subparagraph 6.4.3.1.1., above. As noted earlier, the individual remains in the SES, on the rolls of his or her employing component, during this period.

6.4.3.3. To receive placement assistance from OPM, the displaced SES member must specifically request it, in writing.

6.4.3.3.1. The member must furnish OPM a signed SF-171 including a statement of the geographical area in which he or she is available for placement. He or she must also provide a copy of the most recent SES performance evaluation; a one or two page synopsis, suitable for distribution, of his or her technical and managerial experience, addressing the six areas of executive competency in FPM Supplement 920-1, Subchapter 5, Exhibit 5A (reference (c)); and a Privacy Act statement, title 5, U.S.C. 552a (reference (g)), authorizing OPM to distribute this information to other Federal Agencies.

6.4.3.3.2. If this submission is not received, OPM shall conclude that the individual has declined assistance.

6.4.3.3.3. It is the responsibility of the employing component to notify the employee in writing of the necessity to request OPM assistance. (See subparagraph 6.4.2.2.3., above. This responsibility includes ensuring that the employee is cognizant of the six areas of executive competency, cited in subparagraph 6.4.3.3.1., above.

6.4.4. Removal of Post-Probationers from the SES

6.4.4.1. If a displaced post-probationer declines a reasonable offer of placement by OPM, OPM shall notify the Department of Defense in writing. At that point, the component may begin procedures to remove the individual from the SES pursuant to 5 U.S.C. 3595(b)(4) (reference (a)).

6.4.4.2. Despite OPM's placement efforts, if the employee is not appointed to another SES position during the 45-day placement period, OPM shall advise the Department of Defense in writing. At that point, the component may initiate removal procedures pursuant to 5 U.S.C. 3595(b)(5) (reference (a)).

6.4.4.3. The employing component must give the post-probationer a written notice before removal. The notice must include the following information:

6.4.4.3.1. The basis for the removal; i.e., 5 U.S.C. 3595(b)(5) (reference (a)) if the basis is expiration of the 45-day OPM placement period; or 5

U.S.C. 3595(b)(4) (reference(a)) if the basis is declination of a reasonable offer of placement. In the latter case, the notice must identify the position offered and the date on which it was declined.

6.4.4.3.2. The effective date of the removal.

6.4.4.3.3. The appointee's right to appeal the competitive procedures used in the RIF to the Merit Systems Protection Board (MSPB), the time limit for making an appeal, and the MSPB office to which the appeal should be sent. (See subsection 6.5., below.)

6.4.4.3.4. Placement rights outside the SES. (See subsection 6.8., below.)

6.4.4.3.5. When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(d) (reference (d)).

6.5. Appeals

6.5.1. 5 U.S.C. 3595(c) (reference (a)) provides a right of appeal to the MSPB, under 5 U.S.C. 7701 (reference (h)), for career appointees on the competitive procedures taken under a RIF. The right applies to both probationers and post-probationers.

6.5.2. Appeals must be filed with the MSPB within 20 days of the effective date of the adverse action. They are submitted to the MSPB Regional Office with jurisdiction over the locality where the action was effected (5 CFR 1201.21, appendix II (reference (i))).

6.5.3. This information must be given to the affected employee, as provided under subparagraph 6.4.2.2.3., above.

6.6. Moratorium

6.6.1. The 120-day moratorium on removals, cited in 5 U.S.C. 3592 (reference (j)), does not apply.

6.6.2. The 120-day moratorium on involuntary reassignments cited under 5 U.S.C. 3395(e) (reference (k)), does apply except when to do so would result in the violation of another law taking precedence (e.g., an Agency may involuntarily reassign a career appointee during the 120-day moratorium period if funding for an activity has

ceased, all the positions in the activity are being abolished in a RIF, or failure to effect the reassignment would violate the Anti-Deficiency Act.

6.7. Records. All records pertaining to a RIF, particularly retention registers and the basic information used to determine relative standing, must be preserved by the component conducting the RIF for at least 2 years from the effective date of the RIF.

6.8. Guaranteed Placement Outside the SES as a Result of a RIF

6.8.1. The following categories of SES members displaced by RIF are guaranteed placement outside the SES pursuant to 5 U.S.C. 3594 (reference (l)).

6.8.1.1. Probationers who were appointed to the SES from a civil service position held under a career or career-conditional appointment or an appointment of equivalent tenure.

6.8.1.2. Post-Probationers.

6.8.2. An individual covered under paragraph 6.8.1. above, who is removed from the SES because he or she declined an offer of placement in the SES (see subparagraphs 6.4.2.1.4. or 6.4.3.1.), could not be offered an SES position by OPM (see subparagraph 6.4.3.2.), or failed to apply for placement assistance by OPM (see subparagraph 6.4.3.3.2., is entitled to be placed in a continuing civil service position outside the SES, under conditions described in paragraph 6.8.4., below.

6.8.3. The guaranteed placement described under paragraph 6.8.2., above, must be effected by and within the major component that conducted the RIF, unless a transfer is arranged with another component or Federal Agency. (A transfer may not take place without the agreement of both the gaining organization and the affected individual.)

6.8.4. The offer of guaranteed placement required under this section must meet the following conditions:

6.8.4.1. The offer must be to a continuing position; i.e., one that will continue for at least 3 months. Any future RIF action affecting an individual following placement outside the SES would be subject to 5 CFR 351 (reference (m)).

6.8.4.2. The position must be at GS-15 or above, or equivalent. This is true even if the individual entered the SES from a position below the GS-15 level.

6.8.4.3. The employee must meet the qualifications requirements for the position.

6.8.4.4. The tenure of the appointment offered a probationer, or a post-probationer who at, the time of appointment to the SES held a career or career-conditional appointment (or an appointment of equivalent tenure), must be equivalent to the tenure of the appointment held by the employee at the time of entry into the SES.

6.8.4.4.1. If the employee does not have reinstatement rights in the competitive service, and if there is no excepted appointment authority that the component can use, the component may request a special Schedule B authority from OPM to effect the appointment.

6.8.4.4.2. The provision under subparagraph 6.8.4.4.1. does not apply if the Agency does not have a position with an appointment of equivalent tenure or if the appointee is willing to accept a position having different tenure.

6.8.4.5. The placement may not cause the separation or reduction in grade of any other employee. If there is no current vacant position for which the individual qualifies, the Department of Defense must create one.

6.9. Saved Pay

6.9.1. An employee placed in a non-SES position under 5 USC 3594 (reference (1)) is entitled to be paid at the highest of:

6.9.1.1. The rate of basic pay for the non-SES position to which assigned,

6.9.1.2. The current rate of basic pay for the civil service position that the employee held immediately before entry into the SES, or

6.9.1.3. The rate of basic pay held under the SES immediately before removal. (5 U.S.C. 3594(c)(1)(B) (reference (1)))

6.9.2. If placement is in a position in another component or Federal Agency, the employee is still entitled to saved pay.

6.9.3. An employee receiving saved pay under 5 U.S.C. 3594(c) (reference (1)), based on the rate of basic pay held under the SES immediately before removal,

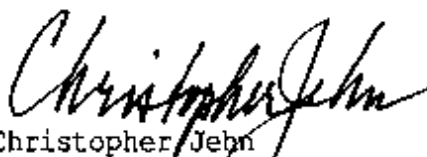
may receive the full pay even if it exceeds the 5 U.S.C. 5308 (reference (n)) pay ceiling of level V of the Executive Schedule that is normally applicable to employees in the General Schedule.

6.9.4. An employee receiving saved pay is to have the basic pay rate increased by 50 percent of each increase in the maximum rate of basic pay for the grade in which placed until the rate is equal to the rate in effect for the position in which placed. (5 U.S.C. 3594(c)(2) (reference (l)))

6.9.5. If as a result of an increase in the scheduled rate(s) of the grade of the employee's position, the employee's saved pay becomes equal to or lower than the maximum rate of that grade, retention ceases and the employee receives the maximum rate. For example, if the saved pay falls between GS-15/8 and GS-15/9, the employee is entitled to the GS-15/10 rate.

7. EFFECTIVE DATE

This Instruction is effective immediately.


Christopher Jehn
Assistant Secretary of Defense
(Force Management and Personnel)

Enclosures - 2

E1. References, continued

E2. Definitions

E1. ENCLOSURE 1

REFERENCES, continued

- (f) Title 5, Code of Federal Regulations, Part 752, "Adverse Actions"
- (g) Section 552a of title 5, United States Code, "Records Maintained on Individuals"
- (h) Section 7701 of title 5, United States Code, "Appellate Procedures"
- (i) Title 5, Code of Federal Regulations, Part 1201, "Practices and Procedures"
- (j) Section 3592 of title 5, United States Code, "Removal from the Senior Executive Service"
- (k) Section 3395 of title 5, United States Code, "Reassignment and Transfer within the Senior Executive Service"
- (l) Section 3594 of title 5, United States Code, "Guaranteed Placement in Other Personnel Systems"
- (m) Title 5, Code of Federal Regulations, Part 351, "Reduction in Force"
- (n) Section 5308 of title 5, United States Code, "Pay Limitation"
- (o) Section 3393 of title 5, United States Code, "Career Appointments"

E2. ENCLOSURE 2

DEFINITIONS

E2.1.1. Area of Competition. Each major component is a competitive area.

E2.1.2. Fourth Estate. For the purpose of this plan only, every organization, collectively, under the purview of the Department of Defense that is not part of the Department of the Army, Department of the Navy, Department of the Air Force, or the Office of the Inspector General of the Department of Defense (OIG, DoD). It does not include the Defense Intelligence Agency (DIA) or the National Security Agency/Central Security Service (NSA/CSS).

E2.1.3. Major Component. The Department of the Army, the Department of the Navy, the Department of the Air Force, the "Fourth Estate," or the OIG, DoD.

E2.1.4. Post-Probationer. An SES career appointee who has completed the 1-year probationary period prescribed under 5 U.S.C. 3393(d) (reference (o)), or who was not required to serve one.

E2.1.5. Probationer. An SES career appointee who has not yet finished serving the 1-year probationary period prescribed under 5 U.S.C. 3393(d) (reference (o)).

E2.1.6. Reduction-in-Force (RIF). The release of a career member of the SES from the SES due to the elimination of an SES position or its modification so that it no longer satisfies statutory criteria for certification to the SES. Such elimination or modification may occur as a result of reorganization, curtailment of work, a determination that a position no longer satisfies SES criteria, lack of funds, or the withdrawal of SES position authorizations by OPM.

E2.1.7. Retention Register. A roster of SES members in an area of competition, ranked on the basis of predominantly performance-related factors.