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## **Interpretative Memorandum 2011 - 002**

Date: April 22, 2011

To: Cabinet Secretaries, Agency Directors and Human Resources Managers

From: Eugene J. Moser, State Personnel Director

Subject: Reduction in Force Technical Guidelines

### **1. Purpose**

These technical guidelines shall provide agencies with interpretation of State Personnel Board (SPB) Rules and Regulations *1.7.10.9 NMAC* and *1.7.10.10 NMAC* with respect to the planning, implementation and management of a Reduction in Force (RIF).

A RIF, or layoff, as required either by an agency or an executive statewide mandate from the Governor, must be based on the specifics of the particular situation affecting employee(s) in *a career appointment*<sup>1</sup>.

Agencies may only lay off employees for the deletion of positions, shortage of work or funds, or other factors that do not reflect discredit on the services of the employees.<sup>2</sup> It should be noted that specifics of a particular situation could modify the applicability and/or sequence of these guidelines.

### **2. General Information**

Examples that may apply to an agency or Governor mandated statewide RIF may include, but

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<sup>1</sup> NMAC 1.7.2.7, Subsection A

<sup>2</sup> NMAC 1.7.10.9, Subsection A

are not limited to, state legislative action and/or other related actions involving:

- a reduction or elimination of funding, or positions,
- a shortage of work,
- legitimate and/or critical agency business operational needs, and/or
- other reasons not reflecting discredit on the service of employee(s) in *career appointments*.

### 3. **State Personnel Board Rules**

Agencies must work closely with the State Personnel Office (SPO) on applicable SPB Rules and Regulations to include *1.7.10.9 NMAC* and *1.7.10.10 NMAC*. Once advised of a possible RIF plan, an agency's designated SPO Executive Human Resource Manager (EHRM) shall provide assistance throughout the RIF pre-planning and plan development and implementation, as needed.

### 4. **Definitions**

- **Agency hire date**<sup>3</sup> – means the date on which an employee's current continuous employment with the agency or its legal predecessor began or, when an agency or organizational unit of an agency is merged with another agency, the date on which the employee began continuous employment with the original agency.
- **Career appointment** - the employment of a candidate in a position recognized by SPO as permanent.
- **Career status** - an employee in a career appointment attains all of the rights and privileges of a career appointment beginning the day following the end of the probationary period required by *1.7.2.8 NMAC* unless otherwise provided by the SPB Rules and Regulations.
- **Classification** - means a job that is occupationally and quantifiably distinct.
- **Emergency appointment**<sup>4</sup> - means the employment of an apparently qualified applicant when an emergency condition exists and the appropriate employment list contains no available candidates.
- **Job Related Qualification Standards (JRQS)** - include, but are not limited to, job qualifications such as education, experience, licensure and specialized training. These are the recommended full performance qualifications of the position.
- **Organizational unit** - means a unit within the agency that may be recognized on the basis of agency structure, geographic area, function, funding source or other acceptable factors. The organizational unit within the agency also has the classifications defined within the referenced unit.

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<sup>3</sup> NMAC 1.7.10.7, Subsection B

<sup>4</sup> NMAC 1.7.2.7, Subsection D

- **Reduction in force (RIF)** - a process by which an agency may lay off employees in permanent career status only for deletion of positions, shortage of work or funds, or other reasons that do not reflect discredit on the service of the employees.
- **RIF tie-breaker process** – means a process the SPO Director approves for breaking a tie between employees with the same agency hire date.
- **Temporary appointment**<sup>5</sup> - is the employment of a candidate in a position created for a duration of less than one year.
- **Term appointment**<sup>6</sup> - is the employment of a candidate in a position created for a special project or state or federally funded program with a designated duration.

#### 5. **Collective Bargaining Agreement (CBA) Requirements**

- A. An agency that has bargaining unit employees must notify and meet with the Union to discuss the RIF plan affecting bargaining unit positions (and only for AFSCME and FOP, consider alternatives).
- B. Notification to and discussion with the representing Union(s) must occur at least thirty (30) calendar days (only CWA) **prior to submission** of a RIF plan to the SPB for approval.
- C. Under a Governor mandated statewide RIF the provisions established within the Executive Order will apply and agencies with bargaining unit employees must follow CBA notification requirements.

#### 6. **Pre-Planning Requirements for a RIF**

- A. Pre-planning requirements for a RIF include the agency's completion of a series of steps **before submittal** of the written plan to SPB for approval. SPO EHRM's will assist and provide technical assistance to agencies throughout this process.
- B. Pre-planning steps must include an assessment ensuring that no employee in a **career appointment** would be laid off while any term, probationary, emergency, or temporary status employees **in the same organizational unit and the same classification** are still employed.
- C. **Agency RIF Pre-planning steps:**
  - 1) Obtain written documentation confirming and identifying primary reason(s) for RIF (e.g.: could be loss of funding, no further work available and/or subsequent deletion of jobs for employee(s) in career status) and the anticipated effective date.
  - 2) Create spreadsheet(s) on each organizational unit affected identifying the following information:

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<sup>5</sup> NMAC 1.7.2.7, Subsection C

<sup>6</sup> NMAC 1.7.2.7, Subsection B

- a) Position(s) affected by classification title(s);
  - b) Job functions affected;
  - c) Each affected position's job related qualification standards (JRQS) as applicable;
  - d) Position number;
  - e) Pay band;
  - f) Position status;
  - g) Geographic location;
  - h) Bargaining unit covered positions (if any);
  - i) Filled positions to include employee name and employee ID within the affected organizational unit by status (Emergency, Temporary, Term or Permanent) then by agency hire date in ascending order (earliest to latest higher date). Ties will be resolved through the **RIF Tie-Breaker Process** in case of a "tie" on "agency hire date" with affected employees in the same status; and
  - j) Identification of any other pertinent information.
- 3) Notify the Union(s) to discuss the RIF plan (and only for AFSCME and FOP, consider alternatives) according to CBA requirements only if employees in bargaining unit positions are to be part of a RIF plan submitted to the SPB.

**Notification of the applicable union must occur prior to the submission of a RIF plan to the SPB for approval.**

Discussion with the union(s) shall not be interpreted as a negotiation process. The RIF plan and process is non-negotiable.

- 4) After all required RIF pre-planning information has been obtained, confirmed, placed on a spreadsheet(s) and approved by the agency head, the following additional action steps must be completed based on the anticipated effective date of the RIF:
- a) Develop a separation sequence based on status and the agency hire date that may allow an agency to realize sufficient funding reductions that no further separations are needed. Prior to designating any separations SPO EHRM will verify these factors have been considered.
  - b) Separation of employees who are either in an emergency appointment, unauthorized or authorized temporary appointment, a probationary term or a career appointed probationary appointment, said employee must be afforded as much advance notice as possible; however, not less than twenty four (24) hour written notification.
  - c) Employees in career term appointment must be provided at least fourteen (14) calendar day written notice.<sup>7</sup>
  - d) Any employee that is to be separated must be provided applicable accrued leave

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<sup>7</sup> NMAC 1.7.10.9, Subsection F

payout and applicable benefits notifications (COBRA, PERA, life insurance, etc.) as required.

- 5) If time allows before a RIF is initiated, it is appropriate and necessary for an agency to consider those employees in **permanent career appointments** affected by the RIF for jobs. This is to be based on their agency hire date for any vacant authorized FTE position to be filled within the agency for which they meet the established requirements (JRQS) at the same or lower midpoint than the midpoint of the position the employee currently holds, unless there is an actual layoff candidate exercising RIF rights for that position.

#### **7. Submittal of Final Agency RIF Plan to State Personnel Office Director**

- A. An agency must identify organizational units for purposes of a layoff and submit their Agency Head approved written RIF plan as outlined above. The RIF plan shall be addressed to the State Personnel Board through the State Personnel Director requesting approval by the SPB<sup>8</sup>.

#### **B. Agency RIF Plan steps**

- 1) Develop a formal letter from the Agency head to the SPB through the SPO Director. This letter should include:
  - a) The business reasons for the RIF,
  - b) RIF's anticipated effective date, and
  - c) A complete outline of RIF Plan as specified within these guidelines.
- 2) The expected effective date must account for the required fourteen (14) calendar day written notice of layoff **after** the anticipated SPB meeting approved date.
- 3) The RIF plan must include, for each organizational unit affected, the spreadsheet developed in the preplanning process.

#### **8. Upon SPB Approval of RIF Plan**

Once an agency has received SPB approval of the submitted RIF Plan, the agency shall initiate the right of first refusal process within the agency. All documents related to this process must be reviewed by the EHRM and retained by the agency.

Employees in **permanent career appointments** affected by the layoff shall be provided the following rights pursuant to SPB Rules<sup>9</sup>:

- A. After SPB approval of the RIF plan, written notice of the layoff must be given to the affected employees at least a fourteen (14) calendar days prior to implementation<sup>10</sup> and served according to the provisions of ***1.7.1.10 NMAC Method of Serving Notice***.

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<sup>8</sup> NMAC 1.7.10.9, Subsection B

<sup>9</sup> NMAC 1.7.10.9, Subsection C

<sup>10</sup> NMAC 1.7.10.9, Subsection F

- B. Employees affected by the RIF must be provided the right of first refusal of any vacant authorized FTE position to be filled within the agency for which they meet the established requirements (JRQS) **at the same or lower midpoint** than the midpoint of the position the employee currently holds, unless another actual layoff candidate is exercising RIF rights for that position. If the pay band of the position to which the employee is claiming is lower than the employee's current pay band, the provisions of **1.7.4.11 NMAC, Subsection B of Salary Schedules** will apply.
- C. Employees only compete with other employees in the same agency affected by the RIF.
- D. Employees must be provided with eleven (11) calendar days from the date of a job offer to accept the position unless otherwise agreed between the parties.<sup>11</sup>
- E. Employees who do not accept a job offer shall not lose the right of first refusal status to other positions. The right of first refusal under **1.7.10.9 NMAC, Subsection C of Reduction in Force** shall extend until the first effective date of layoff as defined in the plan.
- F. The agency's list of eligible candidates for the open positions will be comprised of those affected employees meeting the established requirements (JRQS) of the position.
- G. Employees not placed into positions prior to the effective date of the SPB approved RIF Plan shall be separated from service on the effective date of the RIF, informed in writing of their reemployment rights and provided applicable accrued leave payout.<sup>12</sup> Any employee separated must be provided applicable benefits notifications (COBRA, PERA, life insurance, etc.) as required.

## 9. **Return from Reduction in Force**

Former employees who were in career status at the time of separation by a RIF have reemployment rights<sup>13</sup> within the classified service for a six (6) month period from the effective date of the layoff under the following provisions:

- A. Former employees will be returned to work in order of highest service date (reverse order of layoff)<sup>14</sup> to any position to be filled within the agency from which the employee was laid off. In accordance with the SPB Rules the position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements (JRQS).<sup>15</sup>

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<sup>11</sup> NMAC 1.7.10.9, Subsection C (4)

<sup>12</sup> NMAC 1.7.7.8, Subsection G

<sup>13</sup> NMAC 1.7.10.10

<sup>14</sup> NMAC 1.7.10.9, Subsection D

<sup>15</sup> NMAC 1.7.10.10, Subsection A (1)

- B. Reemployment to positions and agencies other than the agency from which the former employee was laid off shall be extended when any position is to be filled.<sup>16</sup> The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements (JRQS). If, when an agency intends to fill a position and there is more than one eligible former employee with rights to return to work, the agency may select the former employee who is best qualified in the agency's opinion.<sup>17</sup>
- C. Offers of employment must be made in writing and delivered by a method that provides proof of service or attempted service.
- D. A former employee who is offered and accepts employment after layoff must occupy the position within fourteen (14) calendar days of accepting the offer or forfeit the right to employment.<sup>18</sup>
- E. Any former employee who refuses an offer of employment or fails to respond to an offer of employment within fourteen (14) calendar days of receipt of an offer will be removed from the employment list for the position offered.
- F. Former employees returned to work according to the provisions outlined above will:
  - a) have that period of time they were laid off counted as time in the classified service;
  - b) hold the status of the position in accordance with *1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC*;
  - c) not have to serve a new probationary period if reemployed into a career status position; and
  - d) have their accrued sick leave balance at the time of their layoff restored<sup>19</sup> and other applicable benefits reinstatement to which the process also applies.

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<sup>16</sup> NMAC 1.7.10.10, Subsection A (2)

<sup>17</sup> NMAC 1.7.10.10, Subsection A (2)

<sup>18</sup> NMAC 1.7.10.10, Subsection A (4)

<sup>19</sup> NMAC 1.7.7.10, Subsection G