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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FEDERAL PERSONNEL AND
COMPENSATION DIVISION

B-200170 MARCH 18, 1982

The Honorable John D. Dingell
Chairman, Subcommittee on
Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Subject: Department of Energy's Fiscal Year 1981 Reductions in Force (FPCD-82-33)

On September 10, 1981, our staff met with a representative of your office to discuss your concerns on the fiscal year 1981 reductions in force (RIFs) at the Department of Energy (DOE) in which 654 employees were separated from Federal employment. At that meeting, we were asked to determine whether the RIFs involving the Office of the Assistant Secretary for Conservation and Renewable Energy and the Office of the Assistant Secretary for Congressional, Intergovernmental, and Public Affairs were conducted in accordance with RIF laws and regulations. We were also asked to determine the legality of DOE's conducting a RIF without waiting for final fiscal year 1982 congressional budget action and to determine if severance payments accruing in fiscal year 1982 from fiscal year 1981 RIFs could be paid from 1982 appropriations.

On October 23, 1981, we briefed Subcommittee staff on the results of our work and subsequently testified before your Subcommittee on October 29, 1981. We concluded that DOE did not violate any RIF laws or regulations in the two offices we reviewed. We also concluded that it was legal for DOE to carry out a RIF without waiting for final fiscal year 1982 congressional budget action and that the fiscal year 1982 DOE appropriations made in an unrestricted lump-sum form can be used to pay severance costs for employees separated as a result of a RIF in fiscal year 1981.

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In addition, in a separate examination, the Office of Personnel Management found that DOE did not violate any regulatory requirements in its RIF planning activities for the Department's September 25, 1981, work force reductions. This examination was conducted at the request of the National Treasury Employees Union.

The details on the results of our work, as requested by your office, are summarized in enclosure I. Enclosure I also contains detailed explanations of the objectives, scope, and methodology followed in conducting the review. Enclosure II explains the RIF process and terminology.

At your request, we did not obtain written comments on this report. Also, as arranged with your office, unless you publicly announce its contents earlier, we will not distribute this report until 30 days after its issue date. At that time, we will send copies to other interested persons.

Sincerely yours,

Clifford I. Gould
Director

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DEPARTMENT OF ENERGY'S FISCAL YEAR 1981 REDUCTIONS IN FORCE

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of this review were to determine (1) whether the fiscal year 1981 headquarter's Department of Energy (DOE) reductions in force (RIFs) involving the Office of the Assistant Secretary for Conservation and Renewable Energy and the Office of the Assistant Secretary for Congressional, Intergovernmental, and Public Affairs were conducted in accordance with RIF laws, regulations, and Office of Personnel Management (OPM) policies, (2) the legality of DOE's conducting a RIF without waiting for final fiscal year 1982 congressional budget action, and (3) if severance payments accruing in fiscal year 1982 from fiscal year 1981 RIFs could be paid from 1982 appropriations. Our review covered the period September 16 to October 29, 1981.

To address whether the RIFs were conducted in accordance with RIF laws, regulations, and policies, we examined sections of chapter 35, Title V, United States Code, dealing with RIF requirements; reviewed the OPM regulations and policies on RIF; and examined DOE's RIF planning documents, retention registers, competitive level listings, position descriptions, and related memorandums and documents that were used to support the decision to reduce the staff.

We interviewed headquarter's DOE Personnel Office officials and managers in the two offices included in our review to discuss the reasons for the work force reductions. We also discussed the RIFs with OPM and National Treasury Employees Union (NTEU) officials to obtain their opinion on the conduct of the RIFs. In addition, we reviewed OPM's September 25, 1981, response to NTEU on the legality and appropriateness of DOE's RIF planning activities.

To address the appropriation and budget issues, we reviewed the Supplemental Appropriations and Recission Act of 1981, the Omnibus Budget Reconciliation Act of 1981, the House and Senate fiscal year 1981 and 1982 appropriations bills for DOE, the Impoundment Control Act of 1974, applicable committee and conference reports, and relevant Comptroller General decisions.

The review was performed in accordance with our "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

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BACKGROUND

The President's Economic Recovery Program includes cutting Government expenditures, which also reduces considerably the number of employees within executive Federal agencies. As part of this program, the Office of Management and Budget (OMB) cut the fiscal year 1981 personnel ceilings for DOE from 21,500 to 20,300--a total of 1,200 positions. To meet the reduced ceiling, a number of DOE offices conducted RIFs. Plans for the reductions began in early June 1981, with effective RIF dates on or before September 30, 1981.

DOE separated 654 employees during the RIFs. Of these, 119 were in the Office of the Assistant Secretary for Conservation and Renewable Energy, and 26 were in the Office of the Assistant Secretary for Congressional, Intergovernmental, and Public Affairs. It also downgraded 479 employees. For these two offices, the number of employees downgraded was 171 and 17, respectively.

OVERVIEW OF OPM REGULATIONS FOR CONDUCTING A RIF

Chapter 35, Title 5, United States Code, requires OPM to prescribe regulations for releasing employees during a RIF. Requirements and procedures for conducting a RIF are found in the Code of Federal Regulations (5 CFR 351) and must be followed by Federal agencies when separating employees because of shortage of funds, lack of work, reorganization, reclassification due to change of duties, or the need to place a returning person with reemployment rights.

When an agency determines a RIF is necessary, it must (1) decide the positions to be abolished, (2) determine which employees will lose or change jobs, (3) determine whether employees who lose their jobs have rights to other positions, (4) issue notices to the affected employees at least 30 days before the reduction is scheduled to take place, and (5) assist career and career-conditional employees to find other jobs.

In deciding which employees lose or change jobs, an agency must establish competitive areas, competitive levels, and retention registers. Competitive areas are geographical and/or organizational limits within which employees compete for retention. Competitive levels are groups of positions by occupation or grade within each competitive area.

After assigning employees to the appropriate competitive levels, retention registers are established for each competitive level affected by the RIF. The retention standing of employees on the register is determined by tenure of employment (such as career, probational, career conditional, indefinite or other), veterans preference, length of service, and current performance rating. Affected employees are ranked in three groups according to type of appointment.

Group I -- Career employees not serving probationary period

Group II -- Career employees serving probation and career-conditional employees

Group III -- Indefinite, term, status quo, and some temporary employees

Each of the above groups are divided into three subgroups--AD for veterans with 30 percent or more disability, A for other veterans, and B for nonveterans. Within each subgroup, employees are ranked by "service computation dates" which reflect total Federal service, including creditable military service.

In addition, a performance rating of either "outstanding" or a rating between "satisfactory" and "outstanding" entitles the employee to additional service credit for retention purposes of 4 or 2 years, respectively. (See enc. II for additional information on the RIF process.)

OPM's RIF regulations allow agency managers wide discretion in determining which positions will be eliminated and which employees will lose or change their jobs. For example, agency decisions to abolish one kind of job instead of another are entirely discretionary and are not subject to OPM's review. Similarly, regulations on how to establish RIF competitive areas and competitive levels also allow agency management considerable discretion.

DOE COMPETITIVE AREAS WERE PROPERLY ESTABLISHED

OPM regulations state that:

"The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the

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departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area."

An agency can also, according to regulation, make the competitive area larger than this standard without approval, or smaller, with OPM approval. Further, OPM policy guidance adds that a competitive area should be large enough to permit adequate competition among employees and limited enough to be administratively manageable.

The competitive areas at DOE are defined in DOE Order 3351.1, Reduction in Force, dated May 23, 1980. According to the order, each first-tier organization level in headquarters (one reporting to the Secretary through the Deputy or an Under Secretary) is a separate competitive area. NTEU reviewed and approved the competitive area definitions before DOE printed the final order.

The competitive areas set by DOE meet the regulatory requirement of "all or that part of an agency in which employees are assigned under a single administrative authority." Moreover, we found that the competitive position for some employees in the two offices actually improved because the competitive areas of these offices were made larger as a result of a February 1981 DOE reorganization by the newly appointed Secretary. By combining offices that were originally included in smaller competitive areas, the number of employees and size of the first-tier organizations increased.

To illustrate, the Office of the Assistant Secretary for Congressional, Intergovernmental, and Public Affairs was established to consolidate certain DOE functions. The following organizations or functions, some of which were previously separate competitive areas, were transferred to this new first-tier organization level.

--The Office of Legislative Affairs.

--The Office of Public Affairs, with the exception of publications management functions.

--The Office of Intergovernmental Affairs.

--The functions of the Office of Consumer Affairs with the exception of the educational programs and the advisory committee management function.

--The Office of Competition.

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--The Office of Minority Economic Impact

Similarly, the Office of the Assistant Secretary for Conservation and Solar Energy was retitled the Office of the Assistant Secretary for Conservation and Renewable Energy. Transfers made to this new office were the Office of Renewable Resources, Electric Energy Systems, Power Marketing Coordination, and Alcohol Fuels. These larger competitive areas were the ones on which the September 25, 1981, RIFs were conducted.

DOE management officials also stated that the competitive areas could have been made smaller during the fiscal year 1981 RIFs. DOE was authorized, under OPM's delegation of personnel authorities, in October 1980, to establish areas smaller than the areas described in 5 CFR 351.402(b):

> "when it has been determined that the smaller area will eliminate a severe administrative hardship or other similar factors."

Despite this authority, DOE decided not to use it for the 1981 reductions.

COMPETITIVE LEVELS WERE ESTABLISHED WITHIN REGULATORY FRAMEWORK

RIF regulations allow agency managers wide discretion in establishing competitive levels. They require that each agency establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike so that an agency can assign the incumbent of any one position to any of the other positions without unduly interrupting the work.

OPM policy guidance to agencies adds that the agency, in determining the composition of competitive levels, should be concerned with the qualifications required by the duties and responsibilities of the position as stated in the official position description. It also states that:

> "separate levels may be indicated because the knowledge, technique and know-how acquired on the job may be distinctive enough to keep the agency from readily moving employees from one job to another."

In DOE, the competitive levels were established by position classifiers in the Personnel Office and then reviewed and approved by managers in the respective offices.

About 64 and 73 percent of the competitive levels in the Office of the Assistant Secretary for Congressional, Intergovernmental, and Public Affairs and in the Office of Conservation and Renewable Energy, respectively, consisted of one person. However, DOE management officials interviewed were not surprised at the large number of single competitive levels. They pointed out that many DOE jobs were of a technical nature and were not readily interchangeable with other jobs. Consequently, it would be the exception rather than the rule for such positions to be assigned to the same competitive level. For example, chemical engineers doing primarily liquification work were placed in a different competitive level from those doing primarily gasification work. Similarly, jobs requiring full supervision were not necessarily readily interchangeable with those jobs requiring limited or no supervision, even though they were in the same occupational series and grade.

We analyzed DOE's structuring of the competitive levels and found that DOE complied with existing regulations and OPM guidance in establishing them.

PERFORMANCE APPRAISAL REQUIREMENTS WERE FOLLOWED

OPM regulations prescribe how performance appraisals are to be used in a RIF. Under 5 CFR 351.504(a), an employee's performance rating of record on the date the agency issues specific RIF notices determines the employee's entitlement to additional service credit for retention purposes. An "outstanding" performance rating entitles the employee to 4 years' additional credit and a rating between "satisfactory" and "outstanding" to 2 years' additional credit. This service credit can affect an employee's potential for displacement through the exercise of bump and retreat rights. (Enc. II describes the bump and retreat process.)

DOE's performance appraisal system was established in accordance with Civil Service Reform Act of 1978 requirements. According to this act, agencies were required to develop and implement performance appraisal systems for all employees no later than October 1, 1981. Since merit pay employees (managers and supervisors in grades GS-13 to 15 whose pay increases are based on individual performance and organizational accomplishment) were to receive their

pay increases by the October 1 date, most plans called for rating merit pay employees before nonmerit pay employees.

DOE Order 3430.3 established performance appraisal systems which were approved by OPM on September 26, 1980. According to the plan approved by OPM, DOE's merit pay employees were to receive their appraisals on July 1, 1981 (before the RIFs). Appraisals for nonmerit pay employees, however, were not scheduled to be completed until October 1, 1981 (after the RIFs). As a result, when RIF actions were taken, merit pay employees were eligible for additional service credits of up to 4 years, but nonmerit pay employees were not.

DOE asked OPM on April 23, 1981, if it could disregard merit pay employees' performance appraisals for the purpose of the RIF so that all employees would be treated alike. OPM responded that the regulations require that official appraisals of record must be used during a RIF and that DOE must give the additional service credit where appropriate; otherwise, the agency would be in conflict with 5 CFR 351.504(a) and (c). DOE complied. Nonmerit pay employees, because they had not received ratings before the RIF action started, were given presumptive ratings of "satisfactory" which did not entitle them to any additional years of service credit.

To determine whether there was adverse impact on nonmerit pay employees in the Office of the Assistant Secretary for Congressional Intergovermental, and Public Affairs, we followed the bump and retreat process for each employee, noting first whether the individual was a merit pay or nonmerit pay employee. Our analysis showed that 39 out of a total of about 165 employees were merit pay employees. Of these, 16 received 4 years' additional service credit, 10 received 2 years' credit, and, 13 received no credit. We did not find any cases where the additional service credit given to these employees adversely affected a nonmerit pay employee. In most cases, merit pay employees had greater length of service than nonmerit employees even before performance appraisals were considered.

Similarly, in the Office of the Assistant Secretary for Conservation and Renewable Energy, 152 out of a total work force of about 600 were merit pay employes. Of these, 52 received 4 years' additional service credit, 69 received 2 years' credit, and 31 received no credit. Because of time constraints, we did not determine whether service credit given to these employees adversely affected any nonmerit pay

employees. However, DOE management officials pointed out that merit pay and nonmerit pay employees would not ordinarily compete for the same positions.

USE OF POSITION DESCRIPTIONS MET REGULATORY REQUIREMENTS

OPM policy requires that employees be assigned to competitive levels based on their official position descriptions, not on employee qualifications. Individual qualifications become important once the employee is released from his/her competitive level. (Enc. II explains what is meant by the release of an employee from his/her competitive level and describes the displacement process.) More specifically, OPM policy provides that when an employee released from his or her competitive level has high enough retention standing to displace another employee, the agency determines whether he/she is qualified. In this determination, the agency is required to review the employee's education, training, and experience. For example, employees may engage in qualifications enhancing activities apart from any duty or responsibility appropriate to a position description. In these instances, employees are responsible for updating their personnel folders.

Our investigation of position descriptions and employee qualification determinations in the two offices did not disclose any violation of RIF laws, regulations, or policy. We reviewed 53 position descriptions. Of these, 26 percent were dated in 1978; 47 percent, in 1979; 23 percent, in 1980; and the remaining 4 percent, in 1981. All of these descriptions seemed to reflect the employee's most recent duties. Another case, however, not included in our sample is under appeal to the Merit Systems Protection Board (MSPB).

We also found that employees were given an opportunity to update their personnel folders for DOE use in determining qualifications for other positions.

MSPB DENIED APPEAL OF ALLEGED VIOLATION OF OPM POLICY

In addition to having regulations published in the Code of Federal Regulations, OPM has issued policy guidance to agencies in the Federal Personnel Manual (FPM). The FPM provides that when an employee's duties remain the same, but it is necessary to downgrade the employee because of classification error, the RIF regulations shall not be used. Specifically, FPM 351.1-2(d) 5 states:

> "Reclassification: The agency is neither required nor permitted to apply reduction-in-force regulations to the incumbent of a position that is reduced in grade because of (a) the correction of classification error or (b) the application of new classification standards when, in either event, there is no change in the duties of the position."

The intent of this policy is to limit any adverse impact of the corrective action, such as downgrading, to only those employees directly affected by the classification error.

An employee in the Office of Power Marketing Coordination, a part of the Office of the Assistant Secretary for Conservation and Renewable Energy, alleged that DOE violated this OPM policy and appealed the action to MSPB. According to a supporting affidavit filed by the suboffice Director, DOE simultaneously reclassified positions in the Office of Power Marketing Coordination and conducted a RIF. The Director contended that if it was not possible to exclude the Office of Power Marketing Coordination from the RIF, it was essential to exclude it from the reclassification. Otherwise, he said the policy was violated, particularly since there was no change in the duties of any of the positions.

The result of the reclassification action was that 9 of the 15 positions (involving 6 employees) in the office were downgraded. In addition, some of the downgraded employees were also assigned or transferred to positions outside of the Office of Power Marketing Coordination. The reassignments and transfers were the result of the RIF. Only three individuals were left in their existing assignments.

In an initial decision, MSPB denied this appeal on February 16, 1982.

DOE COMPLIED WITH RIF REGULATIONS

In addition to prescribing regulations for conducting a RIF, OPM may examine an agency's preparations for a RIF at any stage. If OPM finds that an agency's preparations are contrary to regulations or that the actions would result in violation of employees' rights, OPM can require the agency to take appropriate corrective action.

On August 20, 1981, NTEU requested OPM to examine DOE's RIF plans and procedures because it believed that the RIF was planned and was being implemented in violation of OPM's regulations.

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Specifically, NTEU alleged that:

--The competitive areas established by DOE did not allow adequate competition for affected employees although this is required by the FPM.

--The competitive levels established by DOE did not allow affected employees an adequate opportunity to exercise their rights.

--Procedures for using performance appraisals to determine retention standings were not followed.

--Position descriptions of record adversely affected competitive level determinations.

OPM responded on September 25, 1981, that based on NTEU information and subsequent discussions with DOE officials, DOE did not violate any regulatory requirements in its RIF planning activities.

OPM officials also pointed out that an employee who has been affected by a RIF and who believes that RIF procedures were not properly applied may appeal the action to MSPB or through the negotiated grievance procedure, as appropriate.

DOE RIF ACTIONS WERE LEGAL

Your office also asked us to determine the legality of DOE's conducting a RIF without waiting for final fiscal year 1982 congressional budget action and to determine if severance payments accruing in fiscal year 1982 from fiscal year 1981 RIFs could be paid from 1982 appropriations.

We believe it was legal for DOE to carry out a RIF without waiting for final fiscal year 1982 congressional budget action. Decrease in work because of a change in program considerations is one of the five permissible justifications for a RIF, as set forth in 5 USC 1302 and 3501 to 3504 (1976 and Supps.), and OPM's implementing regulation, contained in 5 CFR, part 351 (1981). This is the justification given by DOE in materials submitted to your Subcommittee and is not dependent on the availability of any particular level of funding.

Futhermore, the House and the Senate passed bills for 1982 appropriations for the Department of the Interior and related agencies which include appropriations for DOE. Both bills contained funds for certain programs at levels

considerably higher than the budget recommendations, including sufficient funds for many of the programs scheduled for termination by the Reagan Administration. 1/ The House, in the report accompanying its bill, included a specific instruction to the effect that DOE "should not undertake a reduction in force in the compliance and enforcement program in fiscal year 1982." (H. Rept. 97-163, 97th Cong., 1st Sess., 74). It also directed DOE to continue these programs with sufficient staff and resources to vigorously administer them.

However, the directives and restrictions which are found only in committee reports, including conference reports, have no binding legal effect on the authority of an agency. (LTV Aerospace Corporation, 55 Comp. Gen. 307. (1975).) So long as the legislative enactments are in an unrestricted lump-sum form, the monies appropriated may be used for any authorized purpose--or not used at all, if the requirements of the Impoundment Control Act of 1974 are followed.

This means that, in fiscal year 1982, the appropriations made in an unrestricted lump-sum form can be used to pay severance costs for the employees separated during a RIF in fiscal year 1981. Any balance left over could also be used to obviate the need for a supplemental appropriation later in the year for increased salary cost or other unanticipated expenses. Therefore, the fiscal year 1981 RIF action would not necessarily result in an impoundment. So long as the terminations do not preclude the obligation or expenditure of the appropriated funds and they remain available for authorized purposes, there has been no impoundment which necessitates a deferral or recission message to the Congress.

1/On December 23, 1981, Public Law 97-100 was enacted making fiscal year 1982 appropriations for the Department of the Interior and related agencies. The affected DOE programs were funded at levels higher than the budget recommendations.

DETAILS ON RIF REGULATIONS AND TERMINOLOGY

During a RIF in the Federal civil service, employees are not selected directly for removal; rather, certain positions are selected for abolishment. The effect is that employees are removed from the rolls, although not necessarily those employees whose positions were abolished. An employee whose position is abolished may be entitled to displace another employee in an identical position at the same grade, in a similar position at the same or a lower grade, or in a dissimilar position at the same or a lower grade.

An employee's entitlement to another position depends on the person's personal qualifications as determined by the employing agency, in addition to various factors established by law.

COMPETITION FOR REMAINING POSITIONS

OPM regulations provide three rounds of competition for conducting a RIF. After the agency has selected the positions to be abolished in a competitive level, the first-round competition occurs, and those employees within a competitive level compete only among themselves for the remaining positions within that competitive level. The employees ranking lowest in tenure, veterans' preference, and length of service are generally the first to be selected for release from the competitive level. Upon completion of the first-round competition, the number of employees remaining in the competitive level should equal the number of remaining available positions.

The second-round competition involves those employees released during the first-round competition. Each such employee competes for positions in other competitive levels and is entitled to be assigned to the highest paying occupied position in another competitive level at a rate of pay not in excess of that of his/her abolished position, provided that he/she is personally qualified for the position and that the position is held by an employee of lesser retention standing based on tenure and veterans' preference. The employee displaced by this means, known as bumping, may have similar bumping rights to other positions outside his/her competitive level.

Under OPM regulations, an essential difference between first- and second-round competition is that, in first-round competition, an employee's length of service must be considered whereas, in second-round competition, it need not be.

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In first-round competition (actions within the same competitive level), an employee having a given tenure and veterans' preference will displace another having the same tenure and veterans' preference provided he/she has a greater length of service. OPM regulations, however, state that, in second-round competition (actions between competitive levels in which displacement is on the basis of subgroup superiority), an employee having given tenure and veterans' preference can displace another having the same tenure and veterans' preference if the former has a greater length of service and if the agency chooses to consider length of service in second-round competition. In the fiscal year 1981 RIFs, DOE chose to consider length of service during second-round competition.

A decision not to consider length of service during second-round competition lessens the agency's administrative burden by reducing the number of positions for which an employee must be considered. At the same time, it restricts an employee's ability to bump. For example, a career employee having veterans' preference cannot bump another career employee having veterans' preference even though the former may have greater length of service. Similarly a career employee without veterans' preference cannot bump another employee in the same category even though he/she has greater length of service.

OPM regulations also provide for third-round competition, called retreating, in which tenure, veterans' preference, and length of service are considered. In retreating, an employee may have rights to available positions which are either identical to, or substantially the same as, positions from or through which he/she has been promoted. In such instances, the employee has rights similar to those provided in first-round competition, that is, he/she may displace an employee having equal tenure and veterans' preference if he/she has greater length of service. Displacement during retreating is on the basis of higher standing in the same subgroup.