UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT F. BURGER, ET AL.,[1]
Appellants,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DE-0351-00-0167-I-1

DATE: JUN 22 2001

Philip D. Thomas, Omaha, Nebraska, for the appellants.

Joseph F. Doyle, Esquire, St. Louis, Missouri, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

This case is before the Board on the appellants' petitions for review (PFR) of the initial decisions (ID) that dismissed their appeals for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellants' PFRs, REVERSES the IDs, and REMANDS the appeals for further adjudication.

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[1] This is the lead case of twelve cases that have been consolidated on petition for review because they contain identical issues. 5 C.F.R. § 1201.36. The names of the remaining eleven appellants and the docket numbers assigned to their individual cases are included in the attached appendix.

BACKGROUND

¶2 Eleven of the appellants, all except Thelen, were Level 6 Clerks when, in July 1993, the agency began to eliminate the operation with which their positions were associated. At that time, those eleven appellants were notified that their positions were to be abolished and that they would become unassigned regulars, and further that, if they failed to bid to existing vacancies, they would be placed in residual vacancies. At different times, the eleven appellants bid to, and/or were placed in, Level 5 positions. In 1998, Thelen was a Level 6 Review Clerk. When the agency began to eliminate Review Clerk positions, Thelen bid to a Level 5 position. Initial Appeal File (IAF), Tab 11, Subtab 4A.

¶3 The appellants filed individual, but identical, appeals wherein they alleged that the agency's actions constituted reduction-in-force (RIF) demotions taken without RIF procedures. *Id.* at Tab 1. They specifically alleged that their demotions were involuntary. Claiming to be preference eligibles, they argued that they were denied their rights as such because, while their own positions were abolished and they were demoted to Level 5 positions, nonveterans were allowed to retain their Level 6 positions. They contended that their demotions violated the Veterans Preference Act of 1944 and the RIF regulations at 5 C.F.R. §§ 351.502 and 351.601. *Id.* These regulations generally give preference to preference eligible employees in a RIF. In addition, they claimed that the agency's actions were discriminatory based on their race and sex. And, they requested hearings, *id.*, but later agreed to have their cases adjudicated on the written record, *id.* at Tab 11, Subtab 4A.

After reviewing the parties' submissions, *id.* at Tabs 3, 11, 13-14, 16-17, the administrative judge (AJ) issued twelve separate, but identical, IDs in which he found that the appellants were not furloughed for more than 30 days, separated, demoted, or affected by reassignment involving displacement. ID at 3. He found that: (1) There was nothing in the record to indicate that the appellants' Level 6 positions were ever in jeopardy; (2) they voluntarily took action to bid to

the lower-graded positions; and (3) their eventual demotions to Level 5 positions were not RIF demotions. *Id.* at 3-4. The AJ therefore dismissed the appeals for lack of jurisdiction, finding no basis upon which to consider the appellants' allegations of discrimination and no need to address the apparent untimeliness of the appeals. *Id.* at 4.

¶5 In their PFRs, the appellants challenge generally the AJ's dismissal of their appeals. Petition for Review File, Tab 1. The agency has responded in opposition to the appellants' PFRs. *Id.* at Tab 3.

ANALYSIS

¶6 Key to the AJ's dismissal of these appeals for lack of jurisdiction was his finding that the appellants could have remained indefinitely in their Level 6 positions, but chose, apparently for personal reasons, to bid to Level 5 positions. That finding, however, is not supported by the record. Nothing in the parties' stipulations or in the notices the appellants received indicated that they would, or could, remain indefinitely in their Level 6 positions. IAF, Tab 11, Subtabs 4A and 4B. The notices stated that, if the appellants "declined to bid or [were] unsuccessful in obtaining bid position[s], [they would] become ... unassigned regulars and subject to assignment to ... residual vacanc[ies]" in accordance with the collective bargaining agreement. *Id.* at Subtab 4B. While it is true that the appellants stipulated to being told that, upon abolishment of their Level 6 positions, they would become unassigned regular employees at the "PS Level 6 pay level," *id.* at Subtab 4A (emphasis added), neither the notices nor the stipulations indicated the grade level of the residual vacancies in which the appellants would be placed, if they failed to bid. In other words, the appellants were never notified that they would or could be placed into Level 6 positions.

Moreover, the records of four of the appellants, Burger, Christian, Markowitz, and Holloway, directly contradict the AJ's finding that they voluntarily bid to the Level 5 positions and could therefore have remained

indefinitely at the grade 6 level. A listing of the positions to which these four appellants bid during their careers does not show any bid for a Level 5 position at or near the time they were placed in the Level 5 positions. *Id.* at Tab 9, Subtab 4C. Thus, the records for these four appellants support their contention that they were involuntarily demoted to Level 5 positions. *Id.* at Tab 1.

¶8 The records of the remaining eight appellants, Blackman, Reall, Schrage, Schmidt, Thelen, Haskett, Chism, and Dodd, arguably show that they bid to positions at or near the time they were placed in Level 5 positions. However, even if they did, and even if all of the appellants bid to the lower-graded positions to which they were demoted, the applicable case law nevertheless supports a finding that they made nonfrivolous allegations that their assignments to those positions were involuntary RIF demotions. In *Hanson v. U.S. Postal Service*, 58 M.S.P.R. 413, 417 (1993), the Board held that the appellant's change to a lower-graded position was not voluntary, despite his application for it, because he did not seek assignment to that position until after his organization had been restructured, after he had been informed that he had not been selected for assignment at his former grade level, and after he was placed in the agency's "national pool for unplaced preference eligibles." And, in *Harants v. U.S. Postal Service*, 130 F.3d 1466, 1469 (Fed. Cir. 1997), the court held that an assignment to a lower-graded position constitutes a RIF demotion even when the employee voluntarily applies for or is offered an assignment to that position, as long as the assignment was made after the agency had informed the employee that his original position had been abolished and that he had not been selected for assignment to a position at his former grade level.

Here, although the agency's notices informing the appellants that their positions would be abolished did not explicitly state that there were no positions available for them at their current grade levels, it did inform them that their rights to any future positions were governed by the parties' collective bargaining

agreement.[2] *See, e.g., Burger* IAF, Tab 11, Subtab 4B. Under Article 37.3.F.10 of the agreement, *id.* at Subtab 4D, 152-53, the agency was obligated to offer the appellants vacancies at the "same or higher salary level," but if this were not possible, it could offer them lower-level vacancies with "rate protection." *Id.* at 153-54. Thus, even if the appellants bid to lower-level positions, they did so under circumstances clearly indicating that there were no positions at their current grade levels to which they were entitled under the collective bargaining agreement. In other words, the agency's demoting the appellants to lower-graded positions was the functional equivalent of confirming that there were no positions at their former grade levels to which they were entitled. Applying the test in *Hanson* and *Harants*, we find that the appellants made nonfrivolous allegations that they were subjected to RIF demotions, we reverse the AJ's contrary finding, and we remand these appeals for further proceedings.

We find further that the records in seven of these twelve appeals clearly support the conclusion that the appellants made nonfrivolous allegations that they were subjected to adverse actions without being afforded any of the required statutory procedures. Specifically, the files of appellants Reall, Schmidt, Christian, Haskett, Chism, Holloway, and Dodd show that they suffered reductions in their grades and basic pay. IAF, Tab 11, Subtab 4C. These actions qualify as adverse actions under 5 U.S.C. §§ 7511(a)(3)-(4), 7512; *Fair v. Department of Transportation*, 4 M.S.P.R. 493, 496 (1981). The agency's notices neither advised the appellants that they would be reduced in grade or pay, nor provided any of the other procedures required by 5 U.S.C. § 7513(b). *See, e.g., Reall* IAF, Tab 11, Subtab 4B. All of these seven appellants invoked 5 U.S.C. Chapter 75 as a basis for the Board's jurisdiction. IAF, Tab 1, Item 38.

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[2] Preference-eligible employees of the Postal Service have the same rights as competitive service employees under title 5, U.S. Code, and these rights "shall not be modified by ...any collective bargaining agreement...," 39 U.S.C. § 1005(a)(2).

Accordingly, these seven appeals must be remanded for further proceedings to adjudicate these appellants' rights under 5 U.S.C. Chapter 75.

¶11 We acknowledge that, under the parties' stipulations, the agency reserved its right to contest the appellants' claims that they are preference eligibles. *Id.* at Tab 11, Subtab 4A. *See Imdahl v. U.S. Postal Service*, 72 M.S.P.R. 453, 455-56 (1996) (Postal Service employee who was not a preference eligible was not entitled to appeal a RIF demotion); *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996) (to appeal an adverse action under Chapter 75, a postal employee must be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, and must have completed 1 year of current continuous service in the same or similar positions). Therefore, the matter of the appellants' preference eligibility remains an open and dispositive jurisdictional issue in each appeal.

¶12 The appellants' contention that the agency violated their rights as preference eligibles may raise a claim under the Veterans Employment Opportunities Act of 1998 (VEOA), codified at 5 U.S.C. § 3330a, although they have not specifically cited that statute. In general, the VEOA provides an appeal to the Board by a preference eligible who alleges a violation of any statute or regulation relating to veterans preference concerning a matter that occurred on or after October 31, 1998, after the individual has exhausted the complaint procedure administered by the Department of Labor. *See Smyth v. U.S. Postal Service*, 85 M.S.P.R. 549, 550 (2000). Although it appears that many of the demotions that are at issue here occurred before October 31, 1998, appellant Thelen alleges that he was involuntarily demoted in June 1999. Thelen IAF, Tab 1. On remand, the AJ shall determine if any of the appellants is raising a VEOA claim and, if so, shall advise those appellants of the jurisdictional requirements of such a claim and provide them with an opportunity to respond.

ORDER

¶13 Accordingly, all eleven of these appeals are hereby remanded to adjudicate the appellants' nonfrivolous allegations that they were affected by RIF demotions. The appeals of appellants Reall, Schmidt, Christian, Haskett, Chism, Holloway, and Dodd are also remanded to adjudicate their nonfrivolous allegations that they were subjected to adverse actions under 5 U.S.C. Chapter 75. On remand, the AJ shall also: (1) determine if any of the appellants is raising a VEOA claim and adjudicate any such claim if it is within the Board's jurisdiction; (2) resolve the issue of the appellants' preference eligibility as well as the timeliness of their appeals, and (3) consider their allegations of discrimination, if appropriate.[3]

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

[3] We note the appellants' claim on PFR that they believed there would be a hearing in their cases. The record reflects that, during processing, the parties agreed that the appeals would be submitted along with their arguments to the AJ for decision without a hearing. IAF, Tab 11, Subtab 4A. Because they agreed to forego a hearing, they may not now be heard to complain. *Cf. Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988) (the appellant's failure to timely object to rulings on witnesses precludes his doing so on petition for review). However, if the appellants renew their request for a hearing on remand, the AJ, at his discretion, may grant them a hearing.

APPENDIX

Robert L. Thelen	DE-0351-00-0168-I-1
Richard C. Schmidt	DE-0351-00-0174-I-1
Gary R. Reall	DE-0351-00-0175-I-1
Stanley F. Markowitz	DE-0351-00-0176-I-1
Timothy L. Schrage	DE-0351-00-0177-I-1
Alberta G. Christian	DE-0351-00-0178-I-1
Harold W. Blackman	DE-0351-00-0183-I-1
Susan J. Haskett	DE-0351-00-0192-I-1
Edward S. Chism	DE-0351-00-0193-I-1
James R. Holloway	DE-0351-00-0197-I-1
Timothy Z. Dodd	DE-0351-00-0218-I-1