

Veterans Preference – The Decisions

Veteran Preference Employees have rights to appeal to the Merit System Protection Board certain actions. One action veterans may appeal to the board is involuntary reductions in grade. These actions have occurred regularly during excessing for decades.

Currently the most important decision rendered by the MSPB is Robert F. Burger, ET AL Vs. USPS. Congratulations to Philip Thomas the President of the Omaha, Nebraska Area Local, who handled this appeal at every level.

The employees involved were all LSM Operators whose jobs were abolished and either bid or were assigned to lower level positions. The question was whether these voluntary bids and involuntary assignments constituted a RIF. Originally an Administrative Law Judge dismissed their appeals. The veterans appealed the Administrative Judges' decision to the Merit System Protection Board and the Merit System Protection Board overturned the Administrative Judges' decision. The board stated:

“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 paylevel,” 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”.**

The board was stating these action are RIFs, but our contract at Article 6 prohibits RIFs. This places the postal service at a huge disadvantage. If you are a preference eligible employee who had become unassigned through excessing and then bid or were assigned to a lower level without being notified that you would receive an assignment at the same level you should file an MSPB appeal. Thousands of former LSM operators should meet these criteria.

Management has never notified employees of a RIF much less notified veterans of their appeal rights. If you were never notified of your MSPB appeal rights by management your appeal should still be timely.

In conjunction with the Burger Decision, several Administrative Judges have ruled that as long as Veterans Preference Employees **are told** in advance that if they do nothing they will be placed in a same level position, any bidding they do is voluntary and their rights have not been violated. The Administrative Judges' reasoning included:
Docket Number NY-0351-02-0042-I-1.

In Harants, the U.S. Court of Appeals for the Federal Circuit held that an assignment to a lower-grade position constitutes in 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 was abolished and that he had not been selected for assignment to a position at his former grade. See Harants, 130 F. 3d at 1469. The Board held in Burger that the appellants made nonfrivolous allegations that their bid to and selection for lower-graded positions constituted RIF demotions. There, the appellants were notified that their positions were to be abolished, that they would become unassigned regular employees, and that if they failed to bid for existing vacancies, the agency would place them in residual vacancies at unspecified grade levels. See Burger, 88 M.S.P.R. at 581-82.

Here, however, the appellant conceded that he was advised that if he declined to bid for a lower graded position, he would have been involuntarily assigned to another PS-6 position. See IAF, 18, Conference Tape, Side 1; see also Tab 14, Exhibits A-C. He explained that he did not elect that option because the agency could have assigned him to the night shift. See id, Tab 18.

These Administrative Judges decisions may be appealed to the Merit System Protection Board. The APWU is willing to support a veteran who chooses to appeal this issue to the MSPB to determine the Veterans full rights.

Veterans Preference – The Questions

Can management avoid a RIF by leaving a Veteran Preference Employee in their old position as unassigned and have them perform lower level work? Several Administrative Judges have ruled that if the Veteran Preference Employee is not placed into the lower level position by a Form 50, that there has been no action which is appealable to the Board and/or being unassigned is temporary detail.

The APWU is helping Veteran Preference Employees to pursue these Administrative Judges' decisions to the Merit System Protection Board. When a reorganization totally eliminates a "position" in a competitive area, such as LSM operators or FSM-L6, or PSDS Tech we don't believe it can be considered temporary, (LSMs are not coming back) and we don't believe Veterans Rights can be defeated simply because management refuses to produce an official document such as a Form 50 to properly classify an employee to the position in which they are performing.

Can management stop saved grade for a Veteran's Preference Employee for merely failing to bid or apply for a duty assignment in the employee's former level? This

question may have different answers depending on whether or not the employee had been;

1. involuntarily assigned to a lower level,
2. bid to a lower level without advance notice that without bidding the Veteran Preference Employee would be placed in a same level vacancy.

We believe Veteran's Preference employees have rights to be placed into same level positions. The fact that employees seek duty assignments to improve their hours or days off while they are unassigned before they **are placed** should not end managements legal obligation not to reduce the Veteran's Preference Employees grade. The fact that an employee does not bid does not negate management's obligation to the veteran.

C O P A N O W !!!

The destruction of postal SERVICE and the subsequent excessing directly affects you, your family and your community. We know, as you should, that this a battle which will be fought politically. If we stand together we have the numbers to be a political force. If we stand together!! However, we need COPA dollars now!! Congressional politics is costly. The contribution you send may save your job! Send a COPA Contribution now!

GRIEVANCE BACKLOG

President Burrus, has assigned me the task of reducing our grievance backlog. The backlog is a tremendous problem which is causing us to lose credibility with members, locals and arbitrators. I believe we must accomplish three steps to reduce the backlog:

1. Improve Labor Management relationship. Without dialog there can be no relationship. After two years of contentious negotiations, anthrax differences, and our battle against discounts, there had been a wall built between the parties. I arranged a meeting for the Coordinators, their area counter parts and upper postal management. President Burrus and I also attended. Several agreements were reached to enhance interaction at the area level and to meet regularly at the Washington level. We will be meeting again in mid November.

2. Improve oversight of Direct Appeals to Arbitration. Remember the cornerstone of the grievance procedure is not that we can prove something happened as the grievant stated, but we must prove that the action violated the contract.

Every case that moves through the system, which does not meet the above criteria, results in one of two actions, withdrawal prior to arbitration or a loss in arbitration. This denies and delays arbitration for cases which meet the criteria.

We must get the direct appeal cases reviewed long before they are scheduled for arbitration.

3. Use every arbitration date effectively. We have 30-years experience with most of our contractual violations and many years experience with many of our arbitrators. In a majority of cases we should have a very good idea of what we can win and what we will lose. To lose a majority of cases that we select to arbitrate is untenable. To withdraw cases and lose an arbitration date is unacceptable. We are working on procedures to prevent this from happening.