

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2014 MSPB 32

Docket No. AT-4324-12-0199-I-1

**James David Johnson, Sr.,
Appellant,**

v.

**United States Postal Service,
Agency.**

May 6, 2014

James David Johnson, Sr., Decatur, Alabama, pro se.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) appeal as barred by the doctrine of laches. For the following reasons, we DENY the petition for review, AFFIRM the portion of the initial decision dismissing the appellant's claim that the agency discriminated against him when it failed to promote him to Postmaster in Huntsville, Alabama, VACATE the initial decision to the extent that the administrative judge found that the appellant's claim regarding a denial of a

lateral reassignment was subsumed in his claim regarding the nonselection for promotion, and DISMISS the lateral reassignment claim for failure to state a claim upon which relief can be granted.

BACKGROUND

¶2 The appellant was an EAS-22 Postmaster in Decatur, Alabama, when he applied for an EAS-24 position as Postmaster of Huntsville, Alabama, in 2002. Initial Appeal File (IAF), Tab 5 at 4, Tab 25 at 13. In or around October 2002, the appellant was temporarily detailed to the Huntsville Postmaster position, in which he remained until he reported to active duty on January 3, 2003, pursuant to military reserve orders. IAF, Tab 5 at 16, 36, Tab 10 at 8. While on military duty, the Manager of Post Office Operations (MPOO) for the Alabama District, J.L., interviewed the appellant by telephone for the Huntsville Postmaster position. IAF, Tab 5 at 6, 40, Tab 10 at 8. Thereafter, the appellant learned that J.L. selected D.S., the Huntsville MPOO, for the Huntsville Postmaster position. IAF, Tab 5 at 7, Tab 10 at 24. On February 26, 2003, the appellant indicated to J.L. that he wished to be considered for a lateral reassignment to the Huntsville MPOO position formerly encumbered by D.S. IAF, Tab 5 at 40, Tab 10 at 24. J.L. acknowledged the appellant's request and informed the appellant that he had forwarded it to the relevant person. IAF, Tab 5 at 40. The appellant was not reassigned to the Huntsville MPOO position. IAF, Tab 5 at 9, Tab 25 at 6-7, 17. After the appellant was released from active duty in July 2003, he returned to his former position as the Postmaster in Decatur. IAF, Tab 5 at 8, Tab 25 at 7, 18. The appellant retired on April 3, 2004. IAF, Tab 25 at 14, 22.

¶3 On December 21, 2011, the appellant filed a USERRA appeal. IAF, Tab 1 at 4-5. He alleged that he first learned of his right to file a USERRA appeal in March 2011, after reading an article about another USERRA case involving a Postal Service employee, and thereafter filed a complaint with the Department of

Labor (DOL).¹ IAF, Tab 5 at 13-14, Tab 67 at 4. He asserted that the agency discriminated against him based on his military service when it declined to promote him to the Huntsville Postmaster position. IAF, Tab 5 at 7-8. The appellant also alleged that the agency discriminated against him when it denied him a lateral reassignment to the Huntsville MPOO position formerly encumbered by D.S. IAF, Tab 5 at 9. He asserted that this denial of a lateral transfer resulted in a loss of training and promotion opportunities because the individual selected for the MPOO position was subsequently promoted to Postmaster of Huntsville. *Id.*; IAF, Tab 25 at 63.

¶4 The agency moved to dismiss the appeal based on the doctrine of laches. IAF, Tab 43. It argued that the 8-year delay between the 2003 selection and the appellant's 2011 complaint to DOL was unreasonable and substantially prejudiced the agency's ability to defend itself. In particular, it argued that it could not locate the 2003 selection file for the Huntsville Postmaster position, which was likely destroyed pursuant to the agency's 5-year retention policy, and that J.L., D.S., and the concurring official for the selection had all retired. *Id.* at 18-19. After ordering the parties to submit argument and evidence on the issue of laches, IAF, Tab 65, the administrative judge found that the agency established that the appellant's 8-year delay was unreasonable and had prejudiced the agency's ability to defend itself, IAF, Tab 71, Initial Decision (ID) at 5. Thus, she dismissed the appeal based on the doctrine of laches. ID at 5-6.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. He argues that the doctrine of laches should not apply because he did not receive any training about his rights under USERRA. *Id.* at 16, 25. He also re-argues that the agency discriminated against him when it denied his request for

¹ The appellant received notice from DOL closing its investigation into his USERRA complaint. IAF, Tab 6 at 3-4.

a lateral reassignment, and he attaches agency regulations concerning noncompetitive reassignment. *Id.* at 17, 19, 24, 30-34. The agency has filed an opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

The appellant's nonselection for promotion claim is dismissed as barred under the doctrine of laches.

¶6 The equitable defense of laches bars an action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. *See Brown v. Department of the Air Force*, [88 M.S.P.R. 22](#), ¶ 5 (2001). The Board has acknowledged that the doctrine of laches may apply as a defense to a USERRA claim. *See Garcia v. Department of State*, [101 M.S.P.R. 172](#), ¶¶ 14-17 (2006).² The party asserting laches must prove both unreasonable delay and prejudice. *Pueschel v. Department of Transportation*, [113 M.S.P.R. 422](#), ¶ 6 (2010).

¶7 The administrative judge found that because the appellant did not indicate that he felt discriminated against, the agency had no obligation to inform him of his USERRA rights and that the appellant did not take any steps between 2003 and 2011 to discover if he had any appeal rights to the Board even though he allegedly believed that he had been discriminated against because of his military service. *Id.* at 4; *see Blaske v. Department of the Navy*, [76 M.S.P.R. 164](#), 167-69 (1997), *aff'd*, 168 F.3d 1322 (Fed. Cir. 1998) (Table). Further, she found that his discovery of appeal rights under USERRA was not due to his own effort to pursue such information but rather by happenstance when he came across an article about USERRA in 2011. *Id.* at 4-5. We discern no error in the administrative judge's findings that the delay was unreasonable. *See Brown*, [88 M.S.P.R. 22](#),

² Federal courts have also applied the doctrine of laches to dismiss USERRA appeals. *See, e.g., Maher v. City of Chicago*, [547 F.3d 817](#), 821-23, 825-26 (7th Cir. 2008).

¶¶ 3, 8-10 (finding a 6-year delay to be unreasonable and applying the doctrine of laches to bar an individual right of action appeal). We find unpersuasive the appellant's argument that laches should not apply because the agency failed to provide training to him. The appellant does not submit evidence or argument that the agency was required to provide such training during his employment and such an argument does not excuse the appellant's responsibility to diligently pursue steps to discover his rights. Further, the appellant served as Postmaster from 1984 to 2004 and, in his role as a manager and supervisor, was positioned to discover any rights he might have had under USERRA. IAF, Tab 25 at 4, 13-14.

¶8 The administrative judge also found that the agency demonstrated that it was prejudiced by the delay. ID at 5. The agency argued that it twice searched for the 2003 selection file for the Huntsville Postmaster position and could not locate it, presumably because it had been destroyed at the expiration of the 5-year retention period per agency policy. IAF, Tab 68 at 4. The agency further argued that the delay would substantially prejudice the agency's ability to defend itself because both the selecting and concurring officials had retired and, even if they did testify, could only testify based on memory alone. *Id.* at 6. The agency submitted a sworn declaration from the Labor Relations Manager for the Alabama District. *Id.* at 8-12. In it, she detailed her efforts to locate the selection records for the 2003 Postmaster position in Huntsville. *Id.* at 10. She contacted several Alabama District employees and learned that the search for documents related to the 2003 selection yielded no results, likely because they were destroyed pursuant to the agency's 5-year retention period. *Id.* She stated that she conducted another search at the request of the agency's attorney to determine whether the records were maintained locally at the Huntsville Postmaster's office or in the MPOO office, as alleged by the appellant; however, no selection records were located in either office. *Id.* at 11. She further declared that documents out of range of retention, unless subjected to a litigation hold notice, were typically destroyed via confidential shredding and disposed of. *Id.* at 12. She stated that

destruction logs were not required or maintained; however, based on the normal course of business, the 2003 selection records would have been destroyed in late 2008 or early 2009. *Id.* She attached several documents from the agency employees involved in searching for the records. *Id.* at 12-30. These documents corroborated her statements concerning the breadth of the search and the agency's inability to locate any documents concerning the 2003 Huntsville Postmaster selection. *Id.*

¶9 Based on the agency's evidence concerning the 2003 selection file, we agree with the administrative judge's conclusion that the agency has demonstrated prejudice in defending itself in this appeal. The agency proved that it could not locate either the selection file or any related records concerning the 2003 Postmaster selection process.³ The absence of relevant documents concerning the selection substantially prejudices the agency's ability to defend itself in this appeal. *See Brown*, [88 M.S.P.R. 22](#), ¶¶ 8-9 (the loss of documents, retirement of witnesses, and faded recollections established that the agency suffered prejudice due to the appellant's 6-year delay). Further, although the retirement of relevant witnesses does not in itself establish prejudice, we find that the potential unavailability of some of the relevant witnesses,⁴ coupled with the loss of documents that could refresh their recollections of the events, establishes prejudice. *Id.*; *see Pueschel*, [113 M.S.P.R. 422](#), ¶ 8 (retirement does not establish unavailability). Thus, we find that the administrative judge properly dismissed as

³ The appellant argues that the agency did not provide proof that the records were destroyed. IAF, Tab 70 at 4, 23-25. Nonetheless, his submissions do not rebut the Labor Relation Manager's declaration concerning her search for the records, irrespective of whether the documents were indeed destroyed according to agency policy.

⁴ The record reflects that J.L. was located and was available to testify. IAF, Tab 65.

barred by the doctrine of laches this USERRA claim concerning the 2003 Huntsville Postmaster position.⁵

The appellant's claim regarding denial of lateral reassignment is dismissed for failure to state a claim upon which relief can be granted.

¶10 With respect to the appellant's claim concerning the agency's denial of his lateral reassignment request, we disagree with the administrative judge that it should be dismissed as barred by the doctrine of laches. The agency did not make any assertions or submit any evidence below that it was prejudiced by the appellant's delay with respect to this claim.⁶ IAF, Tabs 43, 68. Nor did the administrative judge make any finding that the agency was prejudiced in this

⁵ The appellant argues that the administrative judge failed to honor his motion to compel the agency to respond to his interrogatories. PFR File, Tab 1 at 17. The appellant's arguments on review concern his March 18, 2012 motion to compel. *Id.*; IAF, Tab 35. It appears, however, that the administrative judge addressed this motion in her January 22, 2013 Summary of Telephonic Prehearing Conference. IAF, Tab 55. We otherwise find no error in the administrative judge's decision to deny the appellant's January 23, 2013 motion to compel as untimely filed. ID at 6 n.2; IAF, Tab 56. The appellant also asserts that the administrative judge required him to submit sworn affidavits while "agency witnesses were taken at face value." PFR File, Tab 1 at 17, 18, 27. The administrative judge specifically ordered affidavits and other evidence from both parties and properly credited the sworn declaration of the Labor Relations Manager. IAF, Tab 65 at 2; ID at 5; *see Truitt v. Department of the Navy*, [45 M.S.P.R. 344](#), 347 (1990) (it is well settled that sworn statements that are not rebutted are competent evidence of the matters asserted therein). The appellant argues that the agency's offer of \$2,000 to settle his appeal indicated that the agency knew he "had been wronged." PFR File, Tab 1 at 18. An offer of settlement, however, is not an admission of wrongdoing. Finally, we find unpersuasive the appellant's argument that laches should not apply here because his appeal did not involve an adverse action. PFR File, Tab 1 at 28; *see Maher*, 547 F.3d at 819-23 (applying laches in a USERRA case involving a denial of advancement).

⁶ Indeed, although the agency addressed the appellant's USERRA claim concerning the lateral reassignment in its motion to dismiss, it did not argue that this claim should be barred by laches. IAF, Tab 43 at 20-21. Instead, the agency argued that the appellant provided no evidence to substantiate that he was discriminated against because of his military status with regard to his request for a lateral transfer to the MPOO position. *Id.* at 21.

regard. Rather, she found that the appellant's lateral reassignment claim was subsumed in the claim regarding the nonselection for promotion because it was unclear what remedy the appellant could obtain if he prevailed on the lateral reassignment claim alone. ID at 2 n.1. We find that this was tantamount to a dismissal for failure to state a claim upon which relief can be granted. *See Alford v. Department of Defense*, [113 M.S.P.R. 263](#), ¶ 14 (2010) (an appeal that is within the Board's jurisdiction can be dismissed for failure to state a claim upon which relief can be granted if the appellant cannot obtain effective relief before the Board even if his allegations are accepted as true), *aff'd*, 407 F. App'x 458 (Fed. Cir. 2011).

¶11 Although we disagree with the administrative judge's characterization of the disposition for this claim, we agree with her that dismissal is appropriate. The Board's remedial authority under USERRA comes from [38 U.S.C. § 4324\(c\)\(2\)](#), which authorizes the Board to enter an order requiring an agency to comply with the provisions of USERRA and to compensate an appellant for any loss of wages or benefits suffered by reason of such lack of compliance. *See Lee v. Department of Justice*, [99 M.S.P.R. 256](#), ¶ 25 (2005). Because the appellant is now retired, an order for the agency to comply with USERRA would have no effect. ID at 2 n.1; *see Hudson v. Department of Health & Human Services*, [104 M.S.P.R. 223](#), ¶ 8 (2006). Furthermore, we agree with the administrative judge that loss of upward mobility as a result of loss of training opportunities is speculative at best. ID at 2 n.1. The Board's remedial authority under USERRA does not extend to speculative matters, *see West v. Department of the Air Force*, [117 M.S.P.R. 24](#) (2011), so there is no basis for the Board to award lost pay or benefits either. Because the appellant has not identified any effective relief that the Board could award him at this point based on the denial of lateral reassignment, this portion of the claim must be dismissed for failure to state a claim upon which relief can be granted. *See Hudson*, [104 M.S.P.R. 223](#), ¶ 8.

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's Rules of Practice, and Forms 5,
6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.