U.S. Merit Systems Protection Board

CASE REPORT DATE: November 3, 2008

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BOARD DECISIONS

► **Appellant: Julius L. Phillips**
Agency: Department of the Navy
Decision Number: 2008 MSPB 235
Docket Number: DC-3443-08-0249-I-1
Issuance Date: October 28, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied his request for corrective action under VEOA. The appellant was a GS-6 police officer, who applied under a vacancy announcement for GS-7 and GS-8 police officer vacancies. Following his non-selection under this vacancy announcement, the appellant filed a complaint with the Department of Labor and then filed an appeal with the Board.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, found the agency in violation of VEOA regarding the selection process for a GS-7 police officer position, and remanded the case for further adjudication with respect to the appellant's non-selection for a GS-8 police officer position, and to consider a possible USERRA claim:

1. The agency stated below that it did not consider the appellant for the GS-7 position because he "did not indicate interest in the GS-0083-07-position." The appellant's résumé specifically indicated, however, that he was applying at both the GS-7 and GS-8 levels. The Board concluded that the appellant is entitled to corrective action because the agency's admission that it did not consider his application for the GS-7 position is sufficient to establish that the agency denied him the opportunity to compete for the position as required by 5 U.S.C. § 3304(f)(1).

2. Regarding the GS-8 vacancy, the agency appears to have concluded that the appellant was not qualified solely because of his status as a GS-6 and OPM's

guidance that positions that are GS-6 and above require specialized experience of "1 year equivalent to at least next lower grade level." The agency failed to consider the possibility that the appellant's prior work experience qualified him under this standard. Resolving this matter requires further adjudication on remand.

3. Remand is also required to determine whether the appellant's claim that the agency discriminated against veterans was a component of his VEOA claim or, alternatively, was a separate claim that the agency violated USERRA.

► **Appellant: Marla W. Hunter**
Agency: Department of Justice
Decision Number: 2008 MSPB 236
Docket Number: CB-7121-08-0012-V-1
Issuance Date: October 29, 2008
Appeal Type: Arbitration Appeals/Grievances
Action Type: Arbitration

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitrator's decision that sustained her removal on misconduct charges.

Holdings: The Board granted the request for review, as the appellant established jurisdiction under 5 U.S.C. § 7121(d), but sustained the arbitrator's decision. The appellant failed to show that the arbitrator erred as a matter of law in sustaining the charges and finding that discipline for the sustained misconduct promoted the efficiency of the service, in finding that the appellant failed to establish retaliation for protected EEO activity, or in determining that the removal penalty was reasonable.

► **Appellant: Joseph A. Williams**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 237
Docket Number: SF-4324-08-0284-I-1
Issuance Date: October 29, 2008
Appeal Type: Uniformed Services Employment and Reemployment Rights Act (USERRA)

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his USERRA appeal for lack of jurisdiction without conducting a hearing. The appellant had applied for, but was not selected for various Tax Compliance Officer positions with the Internal Revenue Service. In dismissing the appeal, the AJ found it undisputed that the appellant was a veteran with the requisite uniformed service, but that he failed to make a nonfrivolous allegation that he was discriminated against based on his veteran status.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and remanded the appeal for further adjudication:

1. To establish jurisdiction over a USERRA discrimination appeal, an appellant must allege that (1) he performed duty or has an obligation to perform duty in a uniformed service of the United States, (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment, and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. A claim of discrimination under USERRA should be broadly and liberally construed, particularly where, as here, the appellant is representing himself.

2. The first two elements are undisputed. As to the third, contrary to the AJ's unsupported statement, evidence that the agency hired a non-veteran instead of the appellant does constitute a nonfrivolous allegation of discrimination sufficient to establish USERRA jurisdiction.

3. An appellant who raises a USERRA claim has an unconditional right to a hearing.

► **Appellant: Gaby Markey**
Agency: Department of Transportation
Decision Number: 2008 MSPB 238
Docket Number: NY-1221-05-0076-X-2
Issuance Date: October 30, 2008
Appeal Type: Individual Right of Action (IRA)

Compliance

This case was before the Board on the AJ's Recommendation finding that the agency breached the non-disclosure provision of the parties' settlement agreement. The AJ recommended that the Board grant the appellant's petition for enforcement (PFE), rescind the settlement agreement, and reinstate the appellant's IRA appeal.

Holdings: The Board concurred with the AJ that the agency was in noncompliance with the settlement agreement. When a party to a settlement agreement materially breaches the agreement, the non-breaching party usually has the option of enforcing the agreement, or rescinding the agreement and reinstating the appeal. In some cases, however, such as this one, there is no effective way to enforce the agreement, and the only option available to the non-breaching party is rescission. Here, the appellant has stated that she does not want rescission. In the absence of a viable enforcement remedy, the Board dismissed the appellant's PFE.