UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 83

Docket No. PH-4324-08-0574-I-1

David M. Baker,

Appellant,

v.

Department of Homeland Security,

Agency.

May 18, 2009

Scott E. Schermerhorn, Esquire, Scranton, Pennsylvania, for the appellant.

Liza M. Murphy, Esquire, and Mary E. Deluca, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that adjudicated his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115, VACATE the ID, FIND that the Board has jurisdiction over the appeal, and REMAND the case for further processing consistent with this Opinion and Order.

BACKGROUND

¶2 On August 18, 2008, the appellant, a GS-13 Special Agent with the United States Secret Service, filed a USERRA appeal. Initial Appeal File (IAF), Tab 1. He asserted that the agency violated USERRA when it required him to transfer out of the Department of the Navy's Selected or Ready Reserve as a condition of his July 2003 appointment. *Id.*, Tab 1 at 6-7. He attached documents to show that, as a "Key Federal Employee," he was required to change his military status to Standby Reserve. *Id.*, Exs. 1-3. He stated that, after he filed a complaint, the Office of Special Counsel (OSC) "was able to achieve corrective action in the nature of [his] return to his prior military reserve designation." *Id.*, Tab 1 at 7. He further stated, however, that the agency refused to reimburse him for the damages he had incurred, and he asked the Board to order the agency to pay him damages. *Id.* at 8. He requested a hearing. *Id.* at 3.

¶3 The administrative judge (AJ) issued acknowledgment and show-cause orders informing the appellant that, under USERRA, the Board has jurisdiction over appeals of any person alleging discrimination in federal employment on account of prior military service, informing the appellant of the jurisdictional standard, and directing the appellant to address various issues including exhaustion, jurisdiction, and damages. IAF, Tabs 2, 10. She stated that the "record on the issues of jurisdiction and damages will close on November 24, 2008, and no evidence or argument will be accepted into the record after that date." *Id.*, Tab 10 at 2. Both parties filed argument and evidence in response to the orders. *Id.*, Tabs 5-9, 11, 12. The agency asserted that the case should be dismissed "for failure to state a claim and/or lack of jurisdiction." *Id.*, Tab 7 at 4.

¶4 In her ID, the AJ first noted the appellant's allegation that the agency violated USERRA "by requiring him to change his military reserve designation as a condition of hire/employment" and his request for damages incurred due to the violation. She stated that, for the reasons set forth in the ID, "CORRECTIVE ACTION IS NOT ORDERED." ID at 1.

¶5 The AJ then recounted the background of the case as follows: The agency hired the appellant as a Special Agent on July 14, 2003. He was required to sign a Policy Regarding Military/Reserve Status stating that the Special Agent position was a "key" civilian position as defined in Department of Defense (DOD) Directive 1200.7, and the agency would petition the military to change his status to Standby Reserve, or seek other non-active status or discharge. On August 15, 2003, the agency asked the Department of the Navy to remove the appellant from the Ready Reserve. In 2006, the appellant filed his OSC complaint, and OSC advised the appellant that the agency should not have requested his transfer from the Ready Reserve. As a result of discussions, the agency sent a September 21, 2006 letter to the Department of the Navy "acknowledging that the Department of Defense would reinstate the appellant in the Ready Reserve (Select Reserve)" and "that it would not have the appellant removed from the Ready Reserve until the end of the continued mobilization of the military reserves or for a period of three years from the appellant's reinstatement." ID at 2. The Department of the Navy agreed to put the appellant back in the Ready Reserve. OSC notified the appellant that those actions "fully remedied the adverse consequences of the erroneous transfer request at the start of the appellant's employment," and closed its files. *Id.* at 2-3.

¶6 The AJ further recounted as follows: The appellant asked the Board to order the agency to pay him damages incurred due to the agency's USERRA violation as determined by OSC, specifically loss of drill pay from July 2003 to February 2008, loss of the ability to accrue additional military leave time, loss of approximately 4.5 years of accumulated military retirement points, and damages due to attempts by the Defense Finance and Accounting Service to collect approximately $800 in connection with his Montgomery GI Bill. In response, the agency asserted that it had not violated USERRA and that the appellant failed to identify any "benefit of employment" denied by the agency, stating that he identified only lost wages and benefits associated with the Department of the

Navy or the DOD and damages related to a violation of the GI Bill. ID at 3. The AJ stated that the parties "were provided an opportunity to address the jurisdictional issue presented by this appeal." *Id.* at 3.

¶7 The AJ set forth the applicable USERRA law at 38 U.S.C. § 4311(a), which provides as follows:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service or obligation.

ID at 3. She also set forth the standard for establishing Board jurisdiction over a USERRA claim. *Id.* at 3-4. She stated that, "[t]o make out a proper discrimination claim under USERRA, the appellant must show that a benefit of his employment with the Secret Service has been denied as a result of his military status." *Id.* at 4. She found that, in *Thomsen v. Department of the Treasury*, 169 F.3d 1378, 1381 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit "clearly stated that membership in the Ready Reserves, in and of itself, is not a benefit of employment with the Secret Service." ID at 4. Applying that holding, she found that "the appellant's service in the Ready Reserves had no nexus to his employment in the Secret Service. Thus, the appellant's removal from the Ready Reserves was not itself a denial of a benefit of employment under USERRA." *Id.*

¶8 After repeating the appellant's asserted damages and citing *Thomsen*, the AJ found that "[t]he benefit of employment that cannot be lawfully deprived by an employer is one that flows as a result of the person's employment by the employer in question." ID at 4-5. She found that "the appellant has not shown that the damages he seeks in the loss of drill pay, the loss of accrual of additional military leave time and military retirement points, were denials of benefits of employment by the agency as defined under USERRA." *Id.* at 5. Citing *Johnson*

v. Department of Veterans Affairs, 91 M.S.P.R. 405, ¶ 13 (2002), the AJ similarly found that Montgomery GI Bill benefits are not a "benefit of employment" under USERRA. The AJ stated that "[t]herefore, the appellant is not entitled to relief under USERRA." *Id.* at 5.

¶9 The AJ concluded as follows: "Based on the evidence, I find that the appellant's request for relief is DENIED, and his appeal must be dismissed for failure to state a claim upon which relief can be granted." ID at 5.

¶10 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

The appellant has established jurisdiction over his USERRA appeal.

¶11 As described above, it is unclear which of three dispositions the AJ intended in this case. She implied that the appellant did not satisfy the jurisdictional standard, but then both dismissed for failure to state a claim upon which relief may be granted and denied corrective action. In any event, we agree with the appellant that he established jurisdiction over his appeal.

¶12 To establish Board jurisdiction over a USERRA discrimination appeal arising under 38 U.S.C. § 4311(a), the appellant must allege the following: (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 under USERRA should be broadly and liberally construed in determining whether it is non-frivolous. *Lubert v. U.S. Postal Service*, 110 M.S.P.R. 430, ¶ 11 (2009); *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 15 (2008). An allegation that an employer took or failed to take certain actions based on an individual's military status or obligations constitutes a non-frivolous allegation entitling the appellant to Board

consideration of his claim. *Williams v. Department of the Army*, 109 M.S.P.R. 206, ¶ 5 (2008).

¶13 Here, the appellant met the first criterion for establishing jurisdiction because he was a member of the Naval Reserve. 38 U.S.C. § 4303(13), (16); *see, e.g., Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1483 (Fed. Cir. 1998); *Eberhart v. U.S. Postal Service*, 88 M.S.P.R. 398, ¶¶ 5, 14 (2001). To the extent that the AJ found that the appellant failed to establish Board jurisdiction, she apparently found that he did not meet the second and third criteria because of *Thomsen*'s finding that membership in the Department of the Army's Ready Reserve was not a benefit of Mr. Thomsen's employment with the Secret Service. 169 F.3d at 1380-81.

¶14 We find that *Thomsen* does not preclude the appellant from showing that he met the second and third criteria for establishing jurisdiction over his USERRA appeal. First, the court did not find that Mr. Thomsen failed to establish jurisdiction; rather, it simply vacated the Board's holding that membership in the Ready Reserve was a benefit of employment and remanded for further proceedings concerning whether the agency denied the appellant a benefit of employment by preventing him from using his vacation to train with the Ready Reserve.[1] 169 F.3d at 1380, 1382-83. Indeed, it stated that the Board erred in concluding that service in the Ready Reserve was a benefit of employment "sufficient to state a claim under USERRA." *Id.* at 1382. A dismissal for failure to state a claim upon which relief can be granted is a decision on the merits, not a dismissal for lack of jurisdiction. *See Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686-89 (Fed. Cir. 1992); *Lubert*, 110 M.S.P.R. 430, ¶ 12.

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[1] The agency's reliance on the ID issued after remand in *Thomsen*, which dismissed the appeal for lack of jurisdiction, is unpersuasive. IAF, Tab 9, Ex. 2. Initial decisions are not precedential. *See, e.g., Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 13 (2008).

¶15 Second, *Thomsen* specifically stated that "it is not clear on the present record whether the Agency's 'key employee' policy denied Mr. Thomsen a benefit of employment under USERRA." 169 F.3d at 1382. In that regard, we note that *Thomsen* was issued before the post-September 2001 mobilization of the military reserves and before the agency issued its July 6, 2005 memorandum entitled Military Reserve Status of Secret Service Employees. Citing USERRA, the memorandum stated that the Secret Service may not advise applicants or employees to separate from the military reserves. It noted that, under DOD Directive No. 1200.7, the Secret Service is generally required to review annually whether it has employees who are members of the military reserves and occupy "key" civilian positions; that the Secret Service had determined that Special Agents and Uniformed Division members occupy such positions; and that the reserves are generally required to reassign or transfer such members from mobilization status. It noted, however, that this military reserve screening process is suspended during mobilization and that the military reserves have been mobilized since September 2001. It stated that, if an employee is mobilized, only the agency Secretary can request an exemption and such exemption will be requested or granted only in rare circumstances. IAF, Tab 5, subtab 4i.

¶16 Third, Mr. Thomsen apparently had already been employed by the agency for 2 years when it notified the Department of the Army that he was a "key" employee prohibited by agency policy from membership in the Ready Reserve and another 7 years passed before he was transferred to inactive status. *Thomsen*, 169 F.3d at 1380. Here, in contrast, the appellant was required to sign documents before his appointment acknowledging that, if he obtained employment with the agency, the agency would petition the appropriate military command to change his military status. IAF, Tab 5, subtabs 4n, 4n1, 4q, 4q1. As the AJ recognized, ID at 1, the appellant argued that the agency violated USERRA not only by denying him a benefit of employment, but by making separation from the Selected Reserve a condition of his hire and retention, IAF, Tab 1 at 6-7; PFR at

8. To the extent that the agency argued that the appellant was selected for the position before he signed the documents, IAF, Tab 5, subtab 4p, its argument is unpersuasive. The appellant was not actually appointed until the day he signed the second set of documents. *Id.*, subtabs 4m, 4n, 4n1. In any event, denial of retention in employment on the basis of membership in a uniformed service, as well as denial of initial employment, may also constitute discrimination under USERRA. 38 U.S.C. § 4311(a). The record showed that, on August 15, 2003, the agency requested that the appellant be removed from the Ready Reserve. IAF, Tab 5, subtab 4j.

¶17 We thus find that the appellant also met the second and third criteria for establishing jurisdiction over his USERRA appeal.

The appellant is entitled to a hearing.

¶18 We find that the AJ erred to the extent that she dismissed the appeal for failure to state a claim upon which relief may be granted and denied corrective action without granting the appellant his requested hearing.[2] A USERRA claimant who establishes Board jurisdiction is entitled to a hearing on the merits. *Downs*, 110 M.S.P.R. 139, ¶ 18; *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007); *Williams v. Department of the Treasury*, 110 M.S.P.R. 191, ¶ 11 (2008). Thus, we find that the appellant is entitled to a hearing at which he may present testimony to satisfy his burden to show that the agency violated his rights under USERRA and that there is effective relief that the Board can provide. *See, e.g., Williams*, 109 M.S.P.R. 206, ¶ 7.

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[2] As previously noted, a dismissal for failure to state a claim upon which relief can be granted is a decision on the merits. *See Lubert*, 110 M.S.P.R. 430, ¶ 12.

ORDER

¶19 Accordingly, we remand this case to the regional office for adjudication onthe merits, including the appellant's requested hearing, if he still desires one. *See Will v. Department of the Treasury*, 105 M.S.P.R. 283, ¶ 12 (2007).

FOR THE BOARD:

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