UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 189

Docket No. DC-4324-08-0776-I-1

Michael J. Silva,

Appellant,

v.

Department of Homeland Security,

Agency.

September 23, 2009

Patrick H. Boulay, Esquire, and Joseph M. Scaturo, Esquire, Washington, D.C., for the appellant.

Marc Weinberger, and Lucille Olsavsky, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision (ID) that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) for lack of jurisdiction. For the reasons set forth below, we GRANT the petition, REVERSE the ID, and REMAND the case to the Washington Regional Office for further development of the record and issuance of a new ID.

BACKGROUND

¶2 The appellant, an Army reservist, performed services for the Department of Homeland Security, Customs and Border Protection (DHS or the agency), from June 30, 2005, through May 13, 2006, under a contract between DHS and SPS Consulting, LLC. Initial Appeal File (IAF), Tab 8, Subtabs 2b, 2c, 2f. Under the contract, SPS Consulting provided DHS with financial support services through two positions, one of which was titled Financial Manager. *Id*. SPS Consulting placed the appellant in the Financial Manager position, but pursuant to the contract, DHS retained the right to approve or disapprove any substitutions of the person serving as Financial Manager. *Id*. In May 2006, the appellant was called to active duty with the U.S. Army in Iraq and SPS Consulting placed another person, Ellen Pfeifer, in the Financial Manager position. *Id*. The appellant was released from active duty with an honorable discharge on August 27, 2007. IAF, Tab 8, Subtab 2c; Tab 17 at 3. The appellant notified SPS Consulting that his deployment had ended and requested to return to work effective October 1, 2007. IAF, Tab 8, Subtab 2c. The appellant alleges that SPS Consulting, after first contacting DHS, informed him that it would not reinstate him because DHS had disapproved his reemployment. *Id*.; *see also* IAF, Tab 1 at 4; Tab 17 at 3-4.

¶3 The appellant then filed a complaint with the Department of Labor (DoL), alleging that SPS Consulting had violated USERRA by failing to reemploy him. IAF, Tab 8, Subtab 2c. DoL notified SPS Consulting of the appellant's reemployment rights under USERRA and suggested that DHS might also be considered the appellant's "employer" under USERRA. *Id*. By email, SPS Consulting informed DHS of the notice that it had received from DoL regarding the appellant's USERRA reemployment rights. *Id*. The agency replied through its Contracts Administration and Management Team Lead, Carol Payne, who stated that DHS did not have the responsibility for reemploying the appellant and that such responsibility belonged to SPS Consulting. *Id*. DoL then referred the appellant's complaint to OSC for investigation pursuant to the Veterans Benefits

Improvement Act of 2004, which established a Demonstration Project under which USERRA complaints filed against federal executive agencies by claimants whose Social Security numbers end in odd digits were investigated by OSC. IAF, Tab 1, Exhibit A. After OSC investigated the complaint, it became "reasonably satisfied"[1] that the appellant was entitled to the rights or benefits that he sought from DHS, and initiated this appeal on the appellant's behalf. The appeal alleged that, under the circumstances here, DHS was the appellant's "employer" for purposes of USERRA. *Id*.

¶4 The administrative judge (AJ) dismissed the appeal for lack of jurisdiction. IAF, Tab 21 (Initial Decision (ID)). The AJ held that the appellant lacks standing to file a USERRA appeal because he did not hold an appointment in the civil service at the time he was called up for active military duty, and thus, he was not an "employee" under Title 5 of the U.S. Code. The AJ additionally held that the Board's USERRA jurisdiction is limited to disputes between individuals and executive agencies, and that here, the appellant's dispute is with a private party.

¶5 The appellant has filed a petition for review in which he argues that an individual may bring a USERRA claim before the Board even if he was never appointed in the federal civil service and otherwise does not meet the definition of "employee" under Title 5 of the U.S. Code. He further argues that under the facts of this case, DHS should be deemed his "employer" for purposes of determining his reemployment rights. Petition for Review File (RF), Tab 1. The agency has responded in opposition to the petition. RF, Tab 3.

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[1] USERRA provides that, if OSC is reasonably satisfied that the complainant is entitled to the rights or benefits sought, OSC may initiate an action regarding the complaint before the Board and appear on behalf of, and act as attorney for, the complainant. 38 U.S.C. § 4324(a)(2)(A).

ANALYSIS

¶6 In many cases the Board's inquiry into USERRA jurisdiction focuses on whether the appellant has made a non-frivolous allegation that his rights under USERRA have been violated in some way. In other words, the jurisdictional analysis often turns on whether the appellant has made a cognizable claim within the Board's subject matter jurisdiction under USERRA. *See, e.g., Williams v. Department of the Treasury*, 110 M.S.P.R. 191 (2008); *Gaston v. Peace Corps*, 100 M.S.P.R. 411 (2005); *Tindall v. Department of the Army*, 84 M.S.P.R. 230 (1999). This case, however, requires us to address two additional jurisdictional elements. The first element is standing, that is, whether the appellant falls within the category of individuals who may bring a USERRA claim before the Board. The second element involves the category of parties against whom a USERRA appeal may be pursued before the Board.[2]

Standing

¶7 With an exception that does not apply in this case,[3] USERRA's standing requirement is straightforward. USERRA provides, in relevant part, that "*a person* may submit a complaint against a Federal executive agency or the Office

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[2] The second element is closely related to the concept of personal jurisdiction. Nevertheless, we will not discuss the issue in those terms because the notion of "personal jurisdiction" carries with it a host of additional technical concepts, including but not limited to the adequacy of service of process by the party bringing a claim, the territorial limits of a tribunal, and the due process rights of a party named as a defendant by a complaining party. *See generally Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). These additional technical concepts seldom if ever have application in Board proceedings.

[3] An individual who was separated from the armed forces under other than honorable conditions lacks standing to bring a USERRA appeal. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶ 16 (2008) (applying 38 U.S.C. § 4304(2), which excludes from the entitlements provided in USERRA individuals separated from "uniformed service under other than honorable conditions"). Here, there is no dispute that the appellant received an honorable discharge at the conclusion of his military service in 2007. IAF, Tab 17 at 3.

of Personnel Management under this subchapter directly to the Merit Systems Protection Board" if "*that person*" has chosen not to seek the assistance of DoL, has sought assistance from DoL and exhausted that process, has chosen not to be represented before the Board by OSC, or OSC has chosen not to represent the person before the Board. 38 U.S.C. § 4324(b) (emphasis supplied). Additionally, USERRA provides that OSC "may appear on behalf of, and act as attorney for, *the person*" complaining of a violation of his rights under USERRA and may "initiate an action regarding such complaint before the Merit Systems Protection Board." 38 U.S.C. § 4324(a)(2)(A) (emphasis supplied). The decisions cited by the AJ in finding that an individual must be appointed in the civil service or meet the Title 5 definition of "employee," *see* 5 U.S.C. § 2105(a), in order to bring a USERRA claim before the Board are either distinguishable or support a finding that the appellant herein has standing to bring a USERRA appeal.[4] Where, as here, there is specific statutory language delineating who may file a Board appeal under USERRA, we will not look to more general language in other statutes to determine USERRA's standing requirements. *Cf. Lee v. Department of Justice*,

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[4] In *Thompson v. Merit Systems Protection Board*, 421 F.3d 1336 (Fed. Cir. 2005), the court held that a former employee of a government contractor was not an "applicant for employment" within the meaning of 5 U.S.C. § 7701(a). The decisions in *Bevans v. Office of Personnel Management*, 900 F.2d 1558, 1561 (Fed. Cir. 1990), *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1580-81 (Fed. Cir. 1987), and *Horner v. Acosta*, 803 F.2d 687, 693 (Fed. Cir. 1986), pre-dated the passage of USERRA and involved eligibility for benefits or service credit under the Civil Service Retirement System, 5 U.S.C. ch. 83. In *Welshans v. U.S. Postal Service*, 107 M.S.P.R. 110 (2007), *aff'd*, 550 F.3d 1100 (Fed. Cir. 2008), a USERRA appeal, the Board held that postal workers do not meet the general definition of "employee" under Title 5 of the U.S. Code, and that as a result they are not covered by the Title 5 military leave provision, 5 U.S.C. § 6323. Finally, in *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367, 368-69 (1997), and *Petersen v. Department of the Interior*, 71 M.S.P.R. 227, 230 (1996), both USERRA appeals, the Board mentioned that the appellants had been appointed in the civil service, but it did not state or imply that such an appointment was a jurisdictional prerequisite. Indeed, in *Jasper*, the Board held that even though the appellant was a probationer who lacked adverse action appeal rights under 5 U.S.C. §§ 7511(a) & 7512, he was a "person" entitled to file a USERRA appeal. *See* 73 M.S.P.R. at 369.

99 M.S.P.R. 256, ¶¶ 20-25 (2005) (the remedy for a USERRA violation is controlled by the specific language of USERRA governing remedies, 38 U.S.C. § 4324(c); the general language of the Back Pay Act that is directed toward relief for unspecified "unjustified or unwarranted" personnel actions, 5 U.S.C. § 5596(b)(1), does not control the remedy in a USERRA case).

¶8 We conclude that the appellant is "a person" who may bring a USERRA appeal before the Board, or in this instance, may have OSC file and prosecute an appeal on his behalf. The initial decision, which found that the appellant lacks standing to appeal, is REVERSED.

Parties against whom a USERRA appeal may be pursued before the Board

¶9 As noted above, USERRA provides that a person may submit a complaint to the Board "against a Federal executive agency or the Office of Personnel Management." 38 U.S.C. § 4324(b). In a similar vein, USERRA provides:

> If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

38 U.S.C. § 4324(c)(2).

¶10 These provisions state in plain terms that the Board is empowered to adjudicate a USERRA appeal brought against "a Federal executive agency or the Office of Personnel Management," and likewise, that the Board is empowered to order relief against "a Federal executive agency or the Office of Personnel Management." Moreover, USERRA provides for a right of action in federal court against "a private employer" for violation of a person's rights under USERRA. 38 U.S.C. § 4323(a), (b). These latter provisions also set forth the remedies in such an action that a court may award against a "private employer." 38 U.S.C. § 4323(d), (e). Based on the plain language of 38 U.S.C. § 4324, as well as the parallel private-sector enforcement mechanism set forth in section 4323, we

conclude that the Board lacks authority to adjudicate a claim against a private employer for violation of an individual's rights under USERRA or to order any relief against a private employer for a USERRA violation. Thus, SPS Consulting is not a party to this appeal and the appellant cannot obtain relief against SPS Consulting in this proceeding.

Subject matter

¶11 Notwithstanding the foregoing, we hold, as detailed below, that the appellant is entitled to pursue his claim that DHS should be considered his "employer" for purposes of determining his right to reemployment following his active military duty.

¶12 USERRA provides that an "employee" whose absence from a "position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits" provided by USERRA if he has given advance notice of such service to his employer, the cumulative absence does not exceed 5 years, and he either reports for employment (in the case of an absence of fewer than 31 days) or requests reemployment after completion of uniformed service. *See* 38 U.S.C. § 4312(a), (e). USERRA defines "employee" as "any person employed by an employer." 38 U.S.C. § 4303(3). USERRA defines "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including -- . . . (ii) the Federal Government." 38 U.S.C. § 4303(4)(A). The appellant argues that although his nominal employer was SPS Consulting, the agency should also be considered his "employer" under USERRA because of the degree of control that it exercised over his personal employment opportunities.

¶13 We agree with the appellant that a federal agency *could* be considered an individual's "employer" under USERRA, even when the individual was not appointed in the civil service but instead was formally employed by a government contractor. In so concluding we are mindful of the principle that USERRA

should be broadly construed, and any "interpretive doubt" should be "resolved in the veteran's favor." *Kirkendall v. Department of the Army*, 479 F.3d 830, 846 (Fed. Cir.), *cert. denied*, 128 S. Ct. 375 (2007); *see also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n.9 (1991) (USERRA's predecessor, the Veterans' Reemployment Rights Act, was broadly interpreted because "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). If, as the appellant alleges, DHS exercised direct control over SPS Consulting to such an extent that DHS effectively prevented his reemployment, then DHS should be considered to be the appellant's "employer" under USERRA.

¶14 Our analysis is consistent with a DoL regulation governing USERRA rights in the private sector. The regulation provides:

> Can one employee be employed in one job by more than one employer?
>
> Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.

20 C.F.R. § 1002.37. The federal-sector USERRA regulations issued by the Office of Personnel Management at 5 C.F.R. Part 353 do not contain a similar provision, but neither do they preclude a conclusion that under some

circumstances, a federal executive agency could be treated as the "employer" of an individual who is formally employed by a government contractor. Further, the DoL regulation quoted above is based on the same statutory provision that the appellant relies on herein, 38 U.S.C. § 4303(4), and is consistent with the statutory language.

¶15 We emphasize that the government will not automatically be deemed to be the "employer" of all contractor personnel under 38 U.S.C. § 4303(4). An executive agency's decision to award or terminate a contract certainly can *affect* employment opportunities for contractor personnel, but such actions, when taken for budgetary, programmatic, or other reasons having nothing to do with any individual employee of the contractor, would not represent government *control* of employment opportunities for any particular "person" seeking to vindicate rights before the Board under USERRA. USERRA speaks in terms of "control" over employment opportunities. 38 U.S.C. § 4303(4).

¶16 Turning to the facts of this case, the undisputed evidence shows that the appellant gave SPS Consulting advance notice of his impending deployment to active military duty with the U.S. Army Reserve in Iraq. After receiving such notice, SPS Consulting, on the appellant's behalf, notified the agency of the appellant's deployment. The appellant entered active duty on May 13, 2006, served honorably, and was released from active duty on August 27, 2007, more than 180 days but fewer than 5 years later. Within 90 days of his release from active duty, *see* 38 U.S.C. § 4312(e)(1)(D), the appellant informed SPS Consulting of his intention to return to work and applied for reemployment with SPS Consulting both verbally and in writing, indicating that he would be available to work as of October 1, 2007. IAF, Tab 15, Ex. B. Further, within 90 days of the appellant's return from active military duty, SPS Consulting gave the agency notice that the appellant had sought reemployment.

¶17 What happened after that is less clear. The contract between SPS Consulting and DHS provides that:

> Prior to changing [the Financial Manager] to other programs for whatever reason, the contractor shall notify the contracting officer reasonably in advance . . . and shall submit a detailed explanation of the circumstances necessitating the proposed substitution . . . . The contracting officer shall evaluate such requests and promptly notify the contractor whether the proposed substitution has been approved or disapproved. No diversion shall be made by the contractor without the written consent of the contracting officer.

IAF, Tab 8, Subtab 2f. The record shows that, when SPS Consulting notified Payne, the Contracts Administration and Team Lead, that SPS Consulting wanted to return the appellant to the Financial Manager position pursuant to the appellant's reemployment rights under USERRA, Payne responded via email, dated October 10, 2007, that DHS did not have the responsibility to reemploy the appellant. IAF, Tab 8, Subtab 2a, Exhibit C. Payne's email stated further, however, that Phillip Davis, the agency manager of the program area in which the appellant had worked prior to his deployment, was "very satisfied" with the performance of Pfeifer, the person who replaced the appellant, and did not want a change of personnel in the Financial Manager position. *Id*. Payne's email stated further, "if there is a change, [Davis] would cancel the contract." *Id*.

¶18 In conflict with Payne's email is an email dated December 12, 2007, from Davis to Payne. In that message, Davis stated that he found "it totally unacceptable that [Payne] would say that [he] said anything to the effect that [he] would 'cancel the contract'" for removing Pfeifer from the Financial Manager position. IAF, Tab 14, Tab 2h. Davis stated further that he told Payne that DHS could not "direct [its] contractors when comes [sic] to personnel." *Id*. He stated that it was SPS Consulting's "call" who would serve under the contract in the Financial Manager position. *Id*. By letter dated February 5, 2008, Diane E. Cafferty, the Director of Compliance for SPS Consulting, notified DHS of its

intent to reemploy the appellant as Financial Manager under its contract with the agency. IAF, Tab 1.[5]

¶19 Based on the foregoing, we find that the appellant has made a non-frivolous allegation that DHS exercised control over his reemployment to such an extent that it should be considered his "employer" under USERRA. We therefore find that the appellant has established jurisdiction under USERRA. *See Groom v. Department of the Army*, 82 M.S.P.R. 221, ¶ 9 (1999) (the Board has authority to consider a non-frivolous claim that a federal agency violated an individual's reemployment rights under USERRA). The AJ did not resolve the conflicting evidence regarding the degree of control that the agency exercised over the appellant's reemployment in the Financial Manager position. Further, it is unclear whether the parties understood the importance of resolving this conflict because the AJ did not consider DHS to have been the appellant's employer under USERRA. Under these circumstances, the appeal must be remanded. *Cf. Machulas v. Department of the Air Force*, 109 M.S.P.R. 165, ¶ 11 (2008) (it may be appropriate to remand an appeal when the parties are not put on notice of an important issue).

ORDER

¶20 For the reasons stated above, the appeal is remanded for further proceedings. We note that in a reemployment appeal, ordinarily the agency bears the burden of proving that it met its obligations under USERRA. *See Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005). In the ordinary case, however, there is no dispute over whether the respondent agency in a reemployment appeal was the appellant's "employer" prior to his absence to perform uniformed service.

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[5] This February 5, 2008 action did not moot the appeal because an individual who qualifies for reemployment and makes a proper request for such is entitled to be reemployed "promptly." 38 U.S.C. § 4313(a). As noted above, in September 2007 the appellant requested reemployment effective October 1, 2007.

Here there is such a dispute, and as detailed above, whether DHS was the appellant's "employer" is an issue that goes to the Board's subject matter jurisdiction as well as to the merits. Under these circumstances, it is appropriate to place the burden on the appellant to show, by preponderant evidence, that DHS was his "employer." *Cf. Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1017, 1019-20 (Fed. Cir. 2002) (if a merits issue is also jurisdictional, the burden of proof is properly placed on the appellant; this is so, even in the kind of case where jurisdiction is established by non-frivolous allegations).

FOR THE BOARD:

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