UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 230

Docket No. AT-4324-09-0704-I-1

Robert L. Michaels,

Appellant,

v.

Department of Defense,

Agency.

December 16, 2009

Robert L. Michaels, Troy, Alabama, pro se.

John K. Moroney, Esquire, Boston, Massachusetts, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision 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 failure to state a claim upon which relief can be granted. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed an appeal against his current employer, the Department of Defense (DOD), Defense Contract Management Agency (DCMA), seeking review of his leave record to determine if he had been improperly charged leave for the years 1982 to 1996 during times he performed military duty. Initial Appeal File (IAF), Tab 1 at 1, 3, 5. The appellant requested a hearing in his appeal. *Id*. at 2.

¶3 The agency filed a motion to dismiss the appeal for lack of jurisdiction based on its assertion and undisputed evidence that the appellant was not a DOD employee during the time he was on military duty from 1982 to 1996, but, rather, a civilian employee of the Department of the Army. IAF, Tab 9 at 2-3. The agency renewed its motion to dismiss the appeal after the appellant apparently admitted, during a telephonic status conference conducted by the administrative judge, that he was a Department of the Army civilian employee during the time period at issue in his appeal. IAF, Tab 10 at 2.

¶4 Without holding the appellant's requested hearing, the administrative judge issued an initial decision finding that: the Board has jurisdiction over the appellant's USERRA appeal; and the appeal must be dismissed for failure to state a claim upon which relief can be granted. IAF, Tab 11, Initial Decision (ID) at 1, 4. The administrative judge found that the appellant filed his USERRA appeal against his current employer, DOD, but that the undisputed evidence shows that the appellant was a civilian employee of the Department of the Army at the time he claims he was improperly charged military leave while he performed military service. ID at 2-3. The administrative judge found that the appellant failed to state a claim upon which relief can be granted because DOD could not have improperly administered the military leave at issue in the appeal as it did not employ the appellant during the time period at issue, and, therefore, the administrative judge would be unable to order DOD to compensate the appellant

even if the appellant proved his allegations that he was improperly charged leave from 1982 to 1996 while performing military service. ID at 3-4.

¶5 The appellant has filed a petition for review, to which the agency responds in opposition. Petition for Review File, Tabs 1, 4.

ANALYSIS

¶6 We deny the appellant's petition for review because it does not provide a basis for Board review under 5 C.F.R. § 1201.115(d). However, we reopen this appeal on our own motion, vacate the initial decision, and dismiss this USERRA appeal for lack of jurisdiction.

¶7 To establish Board jurisdiction over a USERRA discrimination appeal arising under 38 U.S.C. § 4311(a), the 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. *Lubert v. U.S. Postal Service*, 110 M.S.P.R. 430, ¶ 11 (2009). An allegation that an employer took or failed to take certain actions based on an individual's military status or obligations in violation of USERRA constitutes a nonfrivolous allegation entitling the appellant to Board consideration of his claim. *Baker v. Department of Homeland Security*, 111 M.S.P.R. 277, ¶ 12 (2009). Once an appellant has established Board jurisdiction over his USERRA claim, he has an unconditional right to a hearing on the merits of his claim. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶¶ 17-18 (2008).

¶8 Here, the appellant has alleged that he was denied a benefit of employment in violation of 38 U.S.C. § 4311(a) when he was forced to use annual leave or leave without pay in order to fulfill his military reserve duty obligations. IAF, Tabs 1, 8; *see Pratt v. Department of Transportation*, 103 M.S.P.R. 111, ¶ 6 (2006) (under USERRA, the Board has jurisdiction over an appellant's claim that,

as a result of the agency's improper administration of military leave under 5 U.S.C. § 6323, he was denied a benefit of employment in violation of 38 U.S.C. § 4311(a) by being forced to use annual leave or leave without pay in order to fulfill his military obligations). However, the appellant has failed to nonfrivolously allege that DOD, the respondent agency in this appeal, is responsible for this alleged denial of a benefit of employment because the undisputed evidence shows, that the appellant does not dispute, that he was employed by the Department of the Army* during the period of time he alleges he was improperly charged leave to perform military duty. IAF, Tab 8 at 38, 42, 47-49, 51-52, 56, 61, 66-70, 78-79, Tab 9, Exs. 1-15; *see Francis v. Department of the Navy*, 53 M.S.P.R. 545, 550-51 (1992) (finding that the military departments of DOD – the Department of the Air Force, the Department of the Navy, and the Department of the Army - are to be regarded as separate agencies from DOD for purposes related to the appointment and employment of civilian personnel); *see also Pervez v. Department of the Navy*, 193 F.3d 1371, 1373-74 (Fed. Cir. 1999) (the fact that the military departments are also part of DOD is not inconsistent with their treatment as separate agencies for personnel purposes). Thus, the appellant has failed to make a nonfrivolous allegation that the Board has jurisdiction over his USERRA claim against DOD, the named respondent agency in this appeal.

¶9 Accordingly, we dismiss the appellant's USERRA appeal against DOD for lack of jurisdiction. Because the undisputed evidence shows that the Department of the Army was the appellant's employing agency during the period of time he was allegedly improperly charged leave for performing military duty, the appellant may file a new USERRA appeal against the Department of the Army.

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* It appears from the appellant's submissions that, during the time period at issue, he worked for the Department of the Army as a U.S. Army Reserve Technician with dual status. IAF, Tab 8 at 5.

ORDER

¶10 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. 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:

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