UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 232

Docket No. DC-4324-09-0240-I-1

Joseph S. Murray,

Appellant,

v.

National Aeronautics and Space Administration,

Agency.

December 18, 2009

Joseph S. Murray, Hampton, Virginia, pro se.

Kenneth H. Goetzke, Jr., Esquire, Hampton, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that denied his request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the following reasons, we DENY the petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), REOPEN the appeal on our own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DENYING the appellant's request for relief.

BACKGROUND

¶2 The appellant, formerly a GS-13 Contract Specialist before his April 3, 2004 retirement, filed a USERRA appeal alleging that the agency denied him a benefit of employment in the form of annual leave when it did not use his military service to establish his initial civil service leave accrual rate. Initial Appeal File (IAF), Tab 1 at 2, 5-6, 10. The appellant asserted that he was hired into the civil service while still a member of the United States Air Force on terminal leave, and that as a result of the agency's inaction he did not reach the maximum annual leave accrual rate of 8 hours per pay period for nearly 15 years, resulting in a loss of 884 hours of leave. *Id*. at 6. The administrative judge (AJ) informed the appellant of the jurisdictional requirements for filing a USERRA appeal and ordered him to prove that the Board had jurisdiction over the appeal. IAF, Tab 3.

¶3 After the parties filed their responses on the jurisdictional issue, the AJ found that the Board had jurisdiction over the appeal because the appellant exhausted his administrative remedies and alleged that he was denied an employment benefit (annual leave) because of his military service. IAF, Tab 10 at 3. Nevertheless, the AJ notified the parties that he intended to dismiss the appeal for failure to state a claim upon which relief can be granted. *Id*. at 3. The AJ noted that USERRA's predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (commonly referred to as the Veterans' Reemployment Rights Act (VRRA), 38 U.S.C. § 2021(b)(3)(1988)), which was in effect from the date of the appellant's September 1983 agency appointment through USERRA's effective date in 1994, only applied to members of a reserve component of the armed forces, and the appellant had not alleged that he was a member of such a component. *Id*. at 3-4. The AJ also informed the parties that, regarding any claim for relief after the effective date of USERRA, Congress had limited, under 5 U.S.C. § 6303(a), the circumstances under which military retirees may receive credit for active military service in computing their civilian

years of service and leave accrual rates to those situations where (1) the military retirement was based on a disability resulting from injury or disease received in the line of duty as a direct result of armed conflict, or caused by an instrumentality of war and incurred in the line of duty during a period of war, (2) the military service was performed during a war or in a campaign or expedition for which a campaign badge has been authorized, or (3) on November 30, 1964, the employee was employed in a position "to which this subchapter applies" and thereafter continued to be so employed without a break in service of more than 30 days. *Id*. at 4-5. The AJ afforded the parties an opportunity to address these issues. *Id*. at 6.

¶4 After the parties filed their responses, and after hearing oral argument from the parties by telephone because no material facts were in dispute, the AJ denied the appellant's request for relief. IAF, Tab 16, Initial Decision (ID) at 1; *see id*. at 3. The AJ found that the Board's authority under USERRA was limited to enforcing an appellant's rights as they existed at the time the claim accrued, i.e., those rights that existed under VRRA, and that the appellant had failed to state a claim for relief for the period between September 26, 1983, when he was appointed to his civilian position at the agency, and November 1, 1983, when he retired from the Air Force and became a member of the Retired Reserve, because VRRA only applied to members of a reserve component of the armed forces. ID at 5-6. The AJ further found that, even assuming that the appellant could bring a VRRA or USERRA claim for the period beginning November 1, 1983, he still failed to establish his entitlement to relief because 5 U.S.C. § 6303(a) generally prohibits retired military members from receiving credit for military service for purposes of calculating annual leave while entitled to military retirement pay, and the exceptions set forth in the statute to that general rule were not met. ID at 6-9.

¶5 The appellant has timely petitioned for review of the initial decision, and the agency has timely responded to the petition. Petition for Review (PFR) File, Tabs 1-3.[1]

ANALYSIS

¶6 The appellant asserts on review that the initial decision is improperly based on a narrow view of USERRA and VRRA, and that the Board has held that USERRA should be broadly and liberally construed. PFR File, Tab 1 at 4. In this regard, he appears to contend that the AJ should have held that the agency erroneously failed to grant him credit under 5 U.S.C. § 6303(a) during the period when he was on terminal leave from the Air Force and occupying a position with the agency, between September 26, 1983, and November 1, 1983, regardless of whether he was a member of the reserves at that time. *See id*. at 4-5.

¶7 Congress has expressed its intent that the anti-discrimination provisions of USERRA be broadly construed and strictly enforced. *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484 (Fed. Cir. 1998); *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1, ¶ 7 (1999) (Congress enacted USERRA as remedial

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[1] The appellant also requests that the Board reopen, reconsider, and join his appeal in MSPB Docket No. DC-3443-03-0716-I-1 with this appeal. PFR File, Tab 1 at 5; *id.*, Tab 4. The Board has the authority to reopen and reconsider appeals in which it has issued a final decision. *See* 5 U.S.C. § 7701(e)(1)(B); *Metallo v. Department of Defense*, 110 M.S.P.R. 229, ¶ 15 (2008); 5 C.F.R. § 1201.118. In deciding whether to reopen an appeal, the Board will balance the desirability of finality against the public interest in reaching the right result, and will exercise its authority to reopen only in unusual or extraordinary circumstances. *Smith v. Department of the Army*, 110 M.S.P.R. 50, ¶ 15 (2008). The Board generally exercises its authority to reopen an appeal only within a short and reasonable time period, usually measured in weeks, not years. *Metallo*, 110 M.S.P.R. 229, ¶ 15. Here, over 5 years have elapsed since the Board issued its Final Order on July 15, 2004, denying the appellant's petition for review in MSPB Docket No. DC-3443-03-0716-I-1. *See Murray v. National Aeronautics & Space Administration*, 96 M.S.P.R. 537 (2004) (Table). Moreover, the appellant has not shown unusual or extraordinary circumstances that warrant reopening that appeal. Therefore, we DENY his request to reopen and reconsider his earlier appeal, and DENY his request to join that appeal with this one.

legislation, which was to be interpreted liberally to protect those persons who have served in our armed forces), *aff'd*, 250 F.3d 754 (Fed. Cir. 2000) (Table), *and overruled on other grounds by Fox v. U.S. Postal Service*, 88 M.S.P.R. 381 (2001). Nevertheless, as the AJ found, the Board cannot adjudicate claims of practices that were not prohibited before the passage of USERRA in 1994. ID at 5; *see Mc David v. Department of the Navy*, 101 M.S.P.R. 540, ¶ 9 (2006). As the AJ also found, VRRA, which was in effect from the date of the appellant's September 1983 appointment through USERRA's effective date in 1994, only applied to members of a "Reserve component of the Armed Forces," and the appellant did not become such a member until November 1, 1983. ID at 5; IAF, Tab 11 at 4; *see Mc David*, 101 M.S.P.R. 540, ¶ 10. Thus, the AJ correctly denied relief for the period between September 26, 1983, and November 1, 1983.

¶8 The appellant also contends that the agency should have complied with the Office of Personnel Management's (OPM's) initial interpretation of 5 U.S.C. § 6303(a) and afforded him credit for all of his military service for civil service leave accrual purposes. PFR File, Tab 1 at 4-5. The appellant further claims that the AJ should have overturned OPM's 2006 decision that "approved [his] claim but denied corrective action based on the Barring Act" because the Barring Act does not limit relief in USERRA cases. *Id*. at 5.

¶9 OPM had issued an August 10, 2006 "Leave Claim Decision" that granted the appellant's request for a correction of the amount of military service that was creditable for his leave accrual, but did not order corrective action because military service credit prior to July 19, 1999, was time barred under the Barring Act, 31 U.S.C. § 3702(b)(1), and as of July 19, 1999, the appellant was already receiving the maximum 8 hours per pay period of annual leave accrual. IAF, Tab 9 at 9-12. In that decision, OPM interpreted 5 U.S.C. § 6303(a) as entitling the appellant to "credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment, because the claimant's appointment to a Federal civilian position on September 26, 1983, was

effective before his November 1, 1983, retirement date from the military." *Id*. at 10; *see id*. at 11 ("[T]he effective date of the claimant's military retirement on November 1, 1983, does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment.").

¶10 However, the Department of Justice's (DOJ) Office of Legal Counsel (OLC), in an October 16, 2007 Memorandum Opinion for the General Counsel of the Department of Defense (DOD), interpreted the applicable provisions differently, and concluded that a member of a uniformed service who is appointed to a civilian position while on terminal leave pending retirement is entitled to credit for his years of active military service only for the duration of his terminal leave; once the employee retires from the uniformed service, he no longer is entitled to credit for his years of active military service unless he satisfies one of the statutory exceptions set forth at 5 U.S.C. § 6303(a)(A)-(C), (e). *Id*. at 13-22. After considering the opposing views of DOD and OPM, and reviewing the text of the applicable statutes, OLC concluded that OPM's interpretation of section 6303(a), as reflected in the above "Leave Claim Decision," conflicted with and was not a permissible construction of the plain terms of the statute, and that OPM was authorized to reduce the leave accrual rate of an employee after a military retirement of the employee. *Id*. at 13, 16-21.

¶11 In CPM [Compensation Policy Memorandum] 2009-03, OPM's "Guidance on Implementing Office of Legal Counsel Opinion," OPM wrote that after DOD requested that OLC provide a legal opinion regarding the annual leave entitlements of individuals appointed to a federal civilian position while on terminal leave pending military retirement under the law in effect before October 17, 2006, OLC "issued a legal opinion . . . which supersedes previous OPM guidance." *Id*. at 36. OPM explained the October 16, 2007 OLC opinion as follows:

> The OLC opinion provides that under the law in effect prior to October 17, 2006, any current or former employee who was a

> member of the uniformed services and appointed to a Federal civilian position **before October 17, 2006**, while on terminal leave pending retirement from the uniformed service, was entitled to credit for all of his or her years of active military service for the purpose of determining his or her annual leave accrual rate, **but only during that period of terminal leave**. Once the employee became a retired member of a uniformed service, military service ceased to be creditable for annual leave accrual purposes unless the service qualified under the special circumstances described in 5 U.S.C. § 6303(a)(A)-(C) or (e). Thus, the employee's annual leave accrual rate entitlement should have been re-determined effective on the first pay period occurring after the day on which the employee became a retired member of a uniformed service.

Id. at 36-37.

¶12 We find that the AJ in this case correctly agreed with the reasoning set forth by DOJ's OLC, finding it persuasive and applicable in the instant case. ID at 8-9. Under 5 U.S.C. § 6303(a), an employee who is a retired member of a uniformed service is entitled to credit for active military service only if (A) his retirement was based on a disability (i) resulting from injury or disease received in the line of duty as a direct result of armed conflict, or (ii) caused by an instrumentality of war and incurred in the line of duty during a period of war, (B) that service was performed in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized, or (C) on November 30, 1964, he was employed "in a position to which this subchapter applies and thereafter he continued to be so employed without a break in service of more than 30 days."[2] The plain language of the above statute provides that a retired member of a uniformed service is entitled to credit for his active military service

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[2] Under 5 U.S.C. § 6303(e), OPM must promulgate regulations under which a new civilian employee would receive credit for past uniformed service if such service was performed in a position the duties of which "directly relate to the duties" of the civilian appointment and, in the judgment of the head of the appointing agency, granting credit for such service "is necessary in order to achieve an important agency mission or performance goal." *See* 5 C.F.R. § 630.205(b). The appellant has not claimed that he is entitled to relief based on this provision.

in calculating his annual leave entitlement only if the retired member of a uniformed service meets at least one of the above three exceptions.

¶13 The appellant claims that he falls within the exception set forth at 5 U.S.C. § 6303(a)(C) because his active duty military "position" was a position "to which . . . subchapter [I of ch. 63, title 5] applies," the legislative history of section 6303 shows that an earlier version of the exception that specifically referenced *civilian* positions was removed, and this suggests that the exception was intended to apply to both civilian and non-civilian positions. PFR File, Tab 1 at 5. The appellant has shown no error in the AJ's determination, however, that the third exception set forth above, which applies to individuals employed on November 30, 1964, "in a position to which this subchapter applies," does not apply in this case because the phrase "position to which this subchapter applies" does not include active duty military positions. ID at 9; *see* 5 U.S.C. § 6303(a) (setting forth the annual leave to which an "employee" is entitled); 5 U.S.C. § 6301(2)(A) (defining "employee," for purposes of subchapter I, as an employee under 5 U.S.C. § 2105); 5 U.S.C. § 2105(a)(1) (defining an "employee" as an individual who, among other things, has been appointed in the *civil service*). In support of this determination, we note that 5 U.S.C. § 6311 provides that OPM may prescribe regulations necessary for the administration "of this subchapter." The appellant does not claim that OPM has the authority to prescribe regulations relating to annual leave accrual for active duty military personnel. *See* 10 U.S.C. § 701(a) (a member of an armed force is entitled to leave at the rate of 2½ calendar days for each month of active service, excluding periods such as AWOL, absence over leave, and confinement as the result of a sentence of court-martial).

¶14 Although the appellant claims that the legislative history of section 6303 shows that an earlier version of the exception that specifically referenced *civilian* positions was removed, and that this suggests that the amended exception was intended to apply to both civilian and non-civilian positions, this argument is without merit. It appears that, as part of the 1966 recodification of title 5 of the

U.S. Code, the phrase "employed in a position to which this subchapter applies," which is presently set forth at 5 U.S.C. § 6303(a)(C), replaced the phrase "employed in a civilian office to which this Act applies." *See* S. Rep. No. 89-1380, at 143-44 (1966). However, the Senate Report clearly notes that the purpose of the bill was to restate in comprehensive form, "without substantive change," the statutes in effect before July 1, 1965, that relate to government employees, the organization and powers of federal agencies generally, and administrative procedure, and that "there are no substantive changes made by this bill enacting title 5 into law." *Id*. at 18, 20; *see Vacchiano v. Office of Personnel Management*, 49 M.S.P.R. 1, 7 (1991) (Congress did not intend that the addition in the 1966 title 5 recodification of the phrase "receiving annuity from the Fund" after the term "annuitant" would have any substantive effect). Thus, we do not consider the change in the statute to be a substantive one that would apply the leave provisions of 5 U.S.C. ch. 63, subchapter I, to non-civilian positions.

¶15 Accordingly, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING the appellant's request for relief in this case.

ORDER

¶16 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.