UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 234

Docket No. DA-4324-10-0072-I-1

Nyles Duncan,

Appellant,

v.

Department of the Air Force,

Agency.

December 7, 2010

Andrew L. McNamara, Esquire, Albany, New York, for the appellant.

Rick W. Tague, Esquire, and William M. Ekadis, II, Esquire, Tinker Air Force Base, Oklahoma, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency filed a petition for review of the initial decision that granted the appellant's request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). For the reasons set forth below, we GRANT the petition for review and REVERSE the initial decision.

BACKGROUND

¶2 Under 5 U.S.C. § 6323, Federal employees are to be given up to 15 days of paid leave a year to attend training sessions required of them as members of military reserves or the National Guard. *See Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1333-34 (Fed. Cir. 2003); *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 9 (2007). Until this section was amended in 2000, the Office of Personnel Management interpreted this provision as providing 15 calendar days of leave each year, rather than 15 workdays, and Federal agencies therefore followed the practice of charging employees' military leave accounts for absences on non-workdays (e.g., weekends and holidays) when those days fell within a period of absence for military training. *Id.* In *Butterbaugh*, however, the U.S. Court of Appeals for the Federal Circuit held that even before the 2000 amendment, agencies were not entitled to charge employees' military leave accounts for days when they would not otherwise have been required to work. *Id.*

¶3 The appellant is a former civilian employee of the agency who retired in 2005. *See* Initial Appeal File (IAF), Tab 6, subtab 4a, Tab 8 at 1, Tab 12 at 6. He also served in the Air Force Reserve. IAF, Tab 8 at 1, Tab 12 at 6. The appellant filed a Board appeal alleging that the agency violated his rights under USERRA when it improperly charged military leave on non-work days.[1] IAF, Tab 1. As a result of the agency's alleged denial of paid military leave benefits, the appellant exhausted his military leave and was required to use 4 days of

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[1] The appellant specifically alleged that the agency improperly charged military leave for intervening non-workdays on: July 26-27, 1980, August 1-2, 1981, July 24-25, 1982, May 7-8, 1983, April 21-22, 1984, April 20-21, 1985, April 19-20, 1986, April 11-12, 1987, April 16-17, 1988, April 22-23, 1989, April 7-8, 1990, April 6-7, 1991, April 11-12, 1992, April 17-18, 1993, July 16-17, 1994, April 1-2, 1995, June 3-4, 1995, March 29-30, 1997, and March 7-8, 1998. IAF, Tab 8 at 2-3.

annual leave to fulfill his military obligations.[2] *Id.*; IAF, Tab 12 at 5-6. The agency responded that it did not violate the appellant's rights under USERRA, and that the appellant presented no evidence to substantiate his claim. IAF, Tab 6, subtab 1.

¶4 After holding a hearing, Hearing Compact Disc (HCD), the administrative judge issued an initial decision that granted the appellant's request for corrective action under USERRA. Initial Decision (ID) at 1, 9. She found that the Board has jurisdiction over the appeal, ID at 1, and that the appellant proved by preponderant evidence that the agency violated his rights under USERRA when it improperly charged military leave for non-workdays and required him to use annual leave to fulfill his military obligations on the dates specified. ID at 4-8. The administrative judge relied upon the appellant's testimony, the military reserve point statement,[3] the military time and attendance records obtained from the Defense and Finance Accounting Service (DFAS), and calendars and worksheets prepared by the office of the appellant's representative, which calculated the dates the appellant exhausted his military leave and was required to use annual leave to fulfill his military obligations. *See* ID at 4-5, 7-8. She ordered the agency to correct its records to reflect that no military leave or other leave was charged for days the appellant was not scheduled to work in his civilian job, and to compensate the appellant for any leave he was forced to use as a result of the agency's improper administration of military leave on the dates specified. ID at 9.

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[2] He specified that the agency improperly required him to use annual leave on September 27, 1996, and from April 28 through May 2, 1997. IAF, Tab 8 at 3.

[3] The military reserve point statement sets forth the reservist's credit points, which accrue toward retirement and are used to determine retention in the reserves or eligibility for promotion. *See* IAF, Tab 12, Ex. E.

¶5 The agency filed a petition for review of this decision,[4] alleging that the administrative judge disregarded Board precedent in finding the appellant met his burden of proof. *See* Petition for Review (PFR) File, Tab 1. The appellant responded in opposition. PFR File, Tab 5.

ANALYSIS

¶6 An appellant is entitled to relief under USERRA if, as a result of the agency's improper administration of military leave, he was forced to use annual leave or leave without pay in order to fulfill his military obligations. *Cobb v. Department of Defense*, 106 M.S.P.R. 390, ¶ 6 (2007). Where an agency improperly denies an employee military leave benefits, the Board has the authority to order the agency to correct its records to reflect a proper accounting of the employee's military leave and to order compensation for any resulting lost wages or benefits. 38 U.S.C. § 4324(c)(2); *Pucilowski v. Department of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007); *Machulas v. Department of the Air Force*, 109 M.S.P.R. 165, ¶ 6 (2008). Where the appellant alleges that the agency denied him a benefit of employment on the basis of his military service, he must prove by preponderant evidence that his military service was a "substantial or motivating factor" in the adverse employment action. *See Cobb*, 106 M.S.P.R. 390, ¶ 6. In military leave cases, i.e., *Butterbaugh* cases, it is generally self-evident that, if the agency improperly charged the appellant's military leave account on a non-workday when the appellant was performing military duties, the appellant's military service was a substantial or motivating factor in the action. *Id.*

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[4] The agency raises several claims on review, including but not limited to, challenges to the administrative judge's credibility findings and weighing of the evidence, and her decision to exclude Colonel William Ekadis as a witness for the hearing. *See* PFR file, Tab 1 at 4-7. However, in light of our findings concerning the insufficiency of the appellant's evidence, we need not address these claims.

¶7 In its petition for review, the agency alleges that the Board should reverse the initial decision as the administrative judge's findings are inconsistent with Board precedent. *See* PFR File, Tab 1 at 4; ID at 4-9. It cites to other *Butterbaugh* cases in which the Board has required more than an appellant's personal recollection and reliance on military documents to carry the burden of proof, and has insisted on documentary evidence that the agency improperly charged him military leave for the alleged period with the result that he was forced to use another form of leave for his military obligations. *See id.* at 3. For the reasons set forth below, we agree.

¶8 At the hearing, the appellant testified that the agency charged military leave on non-workdays and required him to use annual leave to fulfill his military obligations after he exhausted his military leave. HCD (testimony of the appellant). His recollection of the specific dates that the agency charged military leave and required him to use annual leave is based upon his review of the military reserve point statement and military time and attendance records that he obtained from DFAS, which set forth his military reserve points and the dates of his active and inactive military duty. *See id.*; IAF, Tab 12, Exs. C-F. To corroborate his testimony, the appellant submitted calendars of the dates of his military service and worksheets calculating when he exhausted his military leave and when he was required to use annual leave, which the office of the appellant's representative prepared based upon the DFAS military records. *See* HCD (testimony of Michelle Richards); IAF, Tab 12, Exs. A-B. The appellant neither submitted time and attendance records from his civilian employment, nor showed that he attempted to obtain these records from the National Personnel Records Center in St. Louis, Missouri. *See* IAF, Tab 6, subtab 1.

¶9 We find that the appellant has not submitted sufficient evidence to establish that, more likely than not, the agency improperly charged military leave on non-workdays and that he was required to use annual leave to fulfill his military obligations on the dates specified. Although the appellant identified

specific dates that the agency allegedly charged military leave on non-workdays and required him to use annual leave, it is apparent that these dates are based upon speculation arising from his review of the DFAS records showing his dates of military service and his understanding that the agency would have charged him military leave on non-workdays. Such speculation does not rise to the level of preponderant evidence. *See Haskins*, 106 M.S.P.R. 616, ¶ 13; *O'Bleness v. Department of the Air Force*, 106 M.S.P.R. 457, ¶ 10 (2007); *Cobb*, 106 M.S.P.R. 390, ¶ 9; *Davenport v. Department of Justice*, 104 M.S.P.R. 580, ¶ 13 (2007); ID at 4-8. Further, the record does not contain documentary evidence that specifically identifies the dates the agency actually charged military leave, let alone if and when the agency actually required him thereafter to use annual leave to cover his absence for military service. *See Haskins*, 106 M.S.P.R. 616, ¶¶ 13-14; *O'Bleness*, 106 M.S.P.R. 457, ¶ 10; *Cobb*, 106 M.S.P.R. 390, ¶¶ 9-10; *Davenport*, 104 M.S.P.R. 580, ¶ 13. As the appellant failed to provide sufficient evidence to substantiate his claim that the agency charged military leave on non-workdays and required him to use annual leave to fulfill his military obligations on the specified dates, the appellant is not entitled to relief under USERRA. *See Haskins*, 106 M.S.P.R. 616, ¶¶ 13-14; *O'Bleness*, 106 M.S.P.R. 457, ¶¶ 10-12; *Cobb*, 106 M.S.P.R. 390, ¶¶ 9-10; *Davenport*, 104 M.S.P.R. 580, ¶ 13.

¶10 Based on the foregoing, we find the appellant failed to prove by preponderant evidence that the agency violated his rights under USERRA. We therefore REVERSE the initial decision and DENY the appellant's request for corrective action under USERRA.

ORDER

¶11 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.