UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 53

Docket No. DC-4324-11-0726-I-2

Peter A. McMillan,

Appellant,

v.

Department of Justice,

Agency.

July 16, 2013

Adam A. Carter, Esquire, and R. Scott Oswald, Esquire, Washington, D.C., for the appellant.

Leslie K. Schumacher, Esquire, and William G. Hughes, III, Esquire, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that denied his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA). For the reasons discussed below, we

GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal to the Washington Regional Office for further adjudication.[1]

BACKGROUND

¶2 The appellant, an officer in the United States Army Reserves, is employed by the Drug Enforcement Administration (DEA) as a GS-13 Criminal Investigator (Special Agent). *See* Initial Appeal File (IAF), Tab 1. On June 24, 2007, the appellant began a tour of duty at the DEA's Lima, Peru Country Office (LCO). *See* IAF, Tab 6, Subtab 2K. Initial foreign tours of duty for non-hardship posts are limited by agency regulation to 3 years. *See id.*, Subtabs 2N, 2O. If a DEA employee wishes to seek a tour renewal, he must submit a written declaration of intent to renew his tour. *Id*. The employee's declaration of intent is processed through the regional chain of command and then forwarded to the DEA's Foreign Administrative Support Section, Office of Global Enforcement (OGE), which makes the ultimate determination to approve or disapprove a tour renewal request. *Id*.

¶3 On June 27, 2008, the appellant requested a 1-year extension of his tour, which was originally scheduled to end in 2010. IAF, Tab 6, Subtab 2K. His request was granted. *Id*. From mid-December 2009 to mid-January 2010, the appellant took 30 days home leave, a benefit granted after 24 months of consecutive foreign service. Hearing Transcript 1 (HT-1) at 249; *see* IAF, Tab 6, Subtabs 4N, 4O. After returning to work, the appellant completed a Standard Form (SF) 71 requesting 4 weeks leave, including 2 weeks military and 2 weeks annual leave, in order to cover his orders for 2 weeks annual training, plus an additional 12 drill days needed to complete a "good year of service" for

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

retirement purposes. HT-1 at 250; *see* Refiled Appeal File (RAF), Tab 7, Ex. Y. The appellant's first-level supervisor, Group Supervisor Juan Arrivillaga, asked the appellant if he could take his military leave now and 2 weeks of annual leave later in the year. Hearing Transcript 2 (HT-2) at 38-39. The appellant sent Arrivillaga an email explaining why he needed the full 4 weeks, *see* RAF, Tab 7, Ex. Y, and after further discussion with the appellant, Arrivillaga approved 3 weeks leave.

¶4 On June 30, 2010, the appellant received the following instruction from his military supervisors:

> We've agreed to a project for you when you come on [July] 17th. We could use an Intel Assessment on how DEA's expulsion from [Bolivia] has affected drug trafficking in [Bolivia], with additional discussion on any political (corruption), or societal effects.
>
> If you come in on the weekend, you can get started researching the issue and we'll catch up with you on Monday. We'll also appreciate your DEA expertise looking at a couple other products while you're here. Look forward to seeing you!

RAF, Tab 7, Ex. AA. On July 7, 2010, the appellant informed LCO Field Intelligence Manager Michael Walsh that he was working on a military intelligence report on Bolivia and asked if he could obtain background information on the topic. HT-1 at 14-15, 26, 268-69. It is undisputed that Walsh was not in the appellant's chain of command, and that the appellant did not contact Arrivillaga before contacting Walsh. Walsh informed the appellant that he could provide him a copy of the agency's Foreign Situation Report (FSR) on Bolivia, provided he obtained permission from Patrick Stenkamp, Regional Director of the Southern Cone Region. *Id.* at 15. Walsh and the appellant testified that they walked to Stenkamp's office to discuss the matter, and that Stenkamp approved the appellant's use of the FSR. HT-1 at 15, 16, 268-69. Stenkamp did not directly contradict the testimony of Walsh and the appellant, but stated that he did not recall whether the meeting took place. HT-1 at 191.

¶5 The appellant was on military duty at Southern Command (SOUTHCOM) in Miami from July 17 to July 26, 2010. On July 19, 2010, he sent Walsh a draft of the military report, using his Army email address. RAF, Tab 7, Ex. D at 23-24. Walsh responded, "Nice report," and made some changes and additions to the draft. *Id*. at 23. The report was well received by the appellant's Army commanders, and the appellant was asked to supplement his report with additional historical background and give a briefing on the military's situation regarding Bolivia at a secure video teleconference (SVTC). *See* RAF, Tab 7 and 5. The following day, the appellant, again using his military email address, notified Walsh that he had been selected to "represent SOUTHCOM J2 in an SVTC with members of the Pentagon's Joint Staff in developing a sub-ICP level options paper for the NSS on potential response to any GoB [government of Bolivia] expulsion of the MILGP." IAF, Tab 6, Subtab 2I at 3. The appellant further stated that his "dual capacity as an MI Reservist and 'working' agent permits [him] to be a proponent for DEA's viewpoint in the Southern Cone." *Id*. Walsh forwarded the email to Stenkamp and the appellant's second-level supervisor, LCO Assistant Regional Director William Steffick. *Id*.

¶6 On July 20, 2010, Stenkamp advised the appellant by email that he had failed to present his request to represent DEA through his chain of command, that he was not to represent DEA at the meeting in question, that he was not authorized to participate in the meeting in his capacity as DEA Special Agent, and that if DEA were to be represented at the meeting, it would "be done at another level." *Id*. at 2-3. Stenkamp further advised the appellant that "[i]n all due respect, you are not qualified to weigh in on Bolivia." *Id*. at 3. The appellant responded later that day, stating that he "t[ook] issue" with Stenkamp's "characterization of my qualification to weigh in on a given topic" and Stenkamp's instruction that he not participate in the meeting in his capacity as a DEA Special Agent. *Id*. at 1-2. The appellant again used his military email address, but in the text he identified himself as "Peter A. McMillan, Special

Agent." *Id*. at 2. Stenkamp responded as follows: "You are not authorized to represent DEA policy or positions in this meeting. Period!!!!! Take all the issue you want." *Id*. at 1.

¶7 Following the conversation with Stenkamp, the appellant and Walsh continued to make edits to the report, which was now also being reviewed by Stenkamp. RAF, Tab 7, Ex. D at 19-22. In a July 21, 2010 email, Walsh advised the appellant that he "really need[ed]" to contact Arrivillaga before finalizing the report, and that "the latest consensus among upper management is that the report should not be attributable to DEA at all." *Id*. at 21. The appellant included Arrivillaga in his subsequent correspondence with Walsh. *See id*. at 19-20. Later that day, Walsh informed the appellant that Stenkamp now wanted all references to the FSR removed from the report. *Id*. at 19; *see* HT-1 at 21-22. The appellant objected, explaining that if he removed all references to the FSR, the majority of the document could not be substantiated and therefore could not be produced. RAF, Tab 7, Ex. D at 19. He further contended that DEA is a member of the intelligence community and that there was no logical reason not to cite the FSR. *Id*. Walsh responded that Steffick had stated that "it was a direct order from the Regional Director, and it is to be followed, no further discussion required. Is this clear?" *Id*.

¶8 On July 26, 2010, Arrivillaga issued a memorandum, emphasizing to the appellant the importance of maintaining a chain of command in LCO. IAF, Tab 6, Subtab 2H. He noted that it had come to his attention that the appellant had contacted Walsh regarding an FSR about Bolivia that he wanted to reference in a report for his military colleagues. *Id*. at 1. Arrivillaga explained that while he appreciated the appellant's service to the country, there apparently was some "misunderstanding as to [the appellant's] role as a DEA GS-13 and [the appellant's] role as a Major in the US Army." *Id*. "[T]o prevent any further misunderstandings," Arrivillaga instructed the appellant that he was not to represent anything associated with his DEA duties or work product to his military

colleagues. *Id*. Arrivillaga further instructed the appellant that he should refer any questions or requests from his military colleagues pertaining to his DEA employment to DEA's GS-15 military liaison assigned to SOUTHCOM. *See id*. Arrivillaga also expressed concerns about the propriety and tone of the appellant's July 20, 2010 email to Stenkamp, and noted the appellant's alleged recent failure to achieve "any tangible outcome, such as arrests, seizures, dismantling/disrupting of an organization." *See id*. at 2.

¶9 By memorandum dated September 14, 2010, the appellant requested the agency to renew his tour in LCO for an additional 2 years. *Id*., Subtab 2G. His request was initially reviewed by Arrivillaga, Steffick, and Stenkamp. *Id*. On September 15, 2010, Arrivillaga advised the appellant that LCO would not support his request for a tour renewal, in part because he was not meeting the office's desired goals in terms of seizures, arrests, and informant recruitment. *See* IAF, Tab 6, Subtab 2F at 1. Arrivillaga told the appellant that, although he could not file a grievance, he could, if desired, request a meeting with LCO management to further discuss the matter. *See id*. The appellant requested a meeting, which took place the following day in Stenkamp's office, with Arrivillaga and Steffick also present. The appellant requested that he be provided a written statement setting forth management's reasons for not concurring in his request for a tour renewal. Stenkamp advised the appellant that no such memorandum would be forthcoming, as none was required and the appellant had already been given the reasons verbally. *See id*. The appellant reiterated his request twice, at which point Stenkamp, by his own admission, stated: "Pete, ask me for a memo another time, and I'll give you a memo, but this time will indicate that your tour will be curtailed, not just simply not renewed. Get the hell out of my office." HT-1 at 21. On September 20, 2010, Arrivillaga, Steffick, and Stenkamp forwarded the appellant's September 14, 2010 memorandum, bearing their non-concurrences, to Larry Hornstein, OGE Section Chief. *Id*. Hornstein disapproved the appellant's request on January 3, 2011. *Id*., Subtab 2C.

¶10 The appellant filed a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS), alleging that the denial of his tour extension request was in violation of USERRA. *See id.*, Subtab 2B. By letter dated May 24, 2011, VETS advised the appellant that the information obtained during its investigation did not support a finding of a USERRA violation. *Id.* IAF, Tab 1.

¶11 The appellant timely filed the present USERRA appeal with the Board. IAF, Tab 1. Following a hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action on the ground that the appellant failed to meet his initial burden of showing that his military service was a substantial or motivating factor in the agency's decision to disapprove his tour extension request. RAF, Tab 19, Initial Decision. In reaching that conclusion, the administrative judge found "no evidence that the appellant's status or obligations as a military reservist played any part whatsoever" in the agency's decision. *Id.* at 11.

¶12 On petition for review, the appellant contends the administrative judge mischaracterized the evidence and failed to acknowledge conflicting testimony and make the necessary credibility determinations. Petition for Review (PFR) File, Tab 1. He further asks the Board to find that the agency did not deny his request for a valid reason, and that his tour would have been renewed "but for [his] run-ins with his managers over his military leave and over his military assignments." *Id.* at 15-16, 23-25. The agency has filed a timely response to the appellant's petition. PFR File, Tab 9. [2]

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[2] The appellant subsequently filed a motion requesting leave to reply to the agency's response, which, according to the appellant, contains new issues not brought up in his petition for review, and also asserts facts "that present a serious evidentiary question." PFR File, Tab 10. Although the Board's regulations in effect at the time of the filing did not provide for submissions beyond the petition for review and response to the petition, *see Stolarczyk v. Department of Homeland Security*, 119 M.S.P.R. 343, ¶ 6 n.2

ANALYSIS

USERRA prohibits discrimination based on the content and performance of specific military obligations.

¶13 Title 38 U.S.C. § 4301(a) sets forth the purposes of USERRA, one of which is "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). In furtherance of that aim,

> [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 to perform service.

38 U.S.C. § 4311(a). The grammar of the statute, as well as legislative history, indicate that the intent of Congress was to prohibit both discrimination based on the possession of military obligations and reprisal for the undertaking or performance of such obligations. *See* H.R. Rep. No. 103-65, at 17 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2450 (reported bill would "[c]ontinue to prohibit discrimination or acts of reprisal against an employee or applicant for employment because of a past, current, or future military obligation. . . ."); 140 Cong. Rec. H9117, 9133 (daily ed. Sept. 13, 1994) (statement of Cong. Montgomery) (section 4311 "prohibits discrimination and related acts of reprisal against persons who serve in the uniformed services"); 140 Cong. Rec. S13,634 (daily ed. Sept. 28, 1994) (statement of Sen. Rockefeller) (chapter 43 of title 38 would "[c]ontinue to protect employees or applicants for employment from discrimination or reprisal based on their military obligation. . . ."). Thus,

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(2012), our current regulations, which went into effect on November 13, 2012, do allow for a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a)(4). We grant the appellant's motion to the extent his reply is responsive to the agency's submission; however, we do not consider his new allegations of error. *See id*.

§ 4311(a) protects both military status, e.g., membership in the reserves, and military activity, e.g., performance of service.

¶14 The most significant and predictable consequence of reserve status with respect to the employer is the employee's absence from work. *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). For this reason, USERRA prohibits an employer from taking an adverse employment action based on the employee's use of or obligation to use military leave. *Id*. In this case, however, the appellant contends that the agency denied him a benefit of employment[3] based not only on his reservist status and use of military leave, but also on conflicts with management over his specific military assignments. Furthermore, while the agency cites the appellant's alleged performance issues as a reason for denying his request for a tour extension, it is undisputed that its decision was based in part on his interactions with Walsh and Stenkamp regarding his drafting the report for his military supervisors and participation in the Army's videoconference. *See* HT-2 at 68, 97 (Arrivillaga), 144-45 (Steffick), 190-97, 202 (Stenkamp).[4] We therefore consider whether and to what extent USERRA prohibits an employing agency from taking adverse employment actions based on an employee's specific military duties and the manner in which they are performed.

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[3] We find that by denying the appellant's request for a tour extension, the agency denied him a "benefit of employment" within the meaning of USERRA. *See* 38 U.S.C. § 4303(2) (defining "benefit of employment" to include "the opportunity to select . . . location of employment"); *see also Petersen v. Department of the Interior*, 71 M.S.P.R. 227, 235-36 (1996) (finding legislative history supports an expansive interpretation of "benefit of employment"); 140 Cong. Rec. H. at 9133 (statement of Cong. Montgomery) ("the intent has always been to have an expansive interpretation").

[4] Because Arrivillaga, Steffick, and Stenkamp intended for the appellant's request to be denied, and their nonconcurrences were a proximate cause of Hornstein's final decision, the Board may find a violation of § 4311(a) even if Hornstein himself did not improperly consider the appellant's military service. *See Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2012).

¶15 For purposes of the statute, the term "service in the uniformed services" means

> the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

38 U.S.C. § 4303(13). These examples suggest that in enacting § 4311(a), Congress was concerned primarily with acts of discrimination and reprisal based on the fact of an employee's military service and the absences such service entails. *Cf.* H.R. Rep. No. 103-65 at 21 (explaining that under § 4303(2), the term "benefit of employment," as used in § 4311(a) and elsewhere in USERRA, is "broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service").

¶16 However, canons of statutory construction dictate that the use of the word "includes" means the examples included under § 4303(13) are intended to be illustrative, not exhaustive. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012); *Solamon v. Department of Commerce*, 119 M.S.P.R. 1, ¶ 12 (2012). Furthermore, "[b]ecause USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of military beneficiaries." *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312-313 (4th Cir. 2001); *see Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (construing USERRA's predecessor liberally in favor of military members); H.R. Rep. No. 103-65 at 22 ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced."). Like absence from work, conflict between an employee's specific military assignments

and the interests of the civilian employer is a possible, albeit less common and foreseeable, consequence of an employee's military service. To allow reservists to face the prospect of adverse treatment by their civilian employers based on their military orders would be contrary to the overarching aim of Congress to "encourage noncareer service in the uniformed services by eliminating or minimizing disadvantages to civilian careers and employment which can result from such service." *See* 38 U.S.C. § 4301(a)(1); *cf. Erickson*, 571 F.3d at 1368. Accordingly, we conclude that USERRA should be read to prohibit adverse employment actions based on the content and performance of any military assignment, general or specific.

¶17 This does not imply that USERRA prohibits an employer from considering events which occur during a period of service but do not constitute performance of military duty. *Strausbaugh v. Government Printing Office*, 117 M.S.P.R. 566, ¶ 12, *aff'd*, 493 F. App'x 61 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 1286 (2013). Nor does USERRA prohibit an employer from taking action against an employee for gratuitous misconduct in the course of performing military duties. *Cf. Escher v. BWT Y-12, LLC*, 627 F.3d 1020, 1024-25, 1032 (6th Cir. 2010) (employer did not violate § 4311(b) when it terminated the employee for doing Naval Reserve business at work in violation of company policy). The protection of employment under § 4311 is based upon the employee's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of all employees. *Figueroa Reyes v. Hosp. San Pablo del Este*, 389 F. Supp. 2d 205, 212 (D.P.R. 2005). To the extent the appellant may have violated those standards, and was not required to do so by his military orders, his activity was not protected under § 4311(a).

¶18 However, to the extent an employee's military duties are themselves at odds with the interests of the civilian employer, the employer may not take action against the employee on that basis. If, as the appellant asserts, the agency would have renewed his tour but for his specific military assignments, the agency

violated USERRA regardless of whether its action was also based on his reservist status and general military obligation. We remand the appeal to provide the parties an opportunity to present additional evidence and argument in light of our holding.

The administrative judge must make additional credibility determinations on remand.

¶19 An employee who claims that an agency violated 38 U.S.C. § 4311(a) in taking an adverse employment action bears the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the action. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). If the appellant meets his initial burden, the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the action for a valid reason without regard to the employee's military service. *Erickson*, 571 F.3d at 1368; *Sheehan*, 240 F.3d at 1013; *see* 38 U.S.C. § 4311(c). An employer therefore violates § 4311(a) if it would not have taken the adverse employment action but for the employee's military service. *Erickson*, 571 F.3d at 1368; *see* H.R. Rep. No. 103-65 at 23.

¶20 An employee's military service is a motivating factor for an adverse employment action if the employer "relied on, took into account, considered, or conditioned its decision" on that service. *Erickson*, 571 F.3d at 1368; *see Escher*, 627 F.3d at 1026 ("Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision."). The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *Sheehan*, 240 F.3d at 1014. Discriminatory motivation under USERRA "may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members

protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses."[5] *Id*. "In determining whether the employee has proven that his protected status or activity was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken." *Id*.

¶21 The appellant argues that he did not in fact breach the agency's chain of command policy in contacting Walsh, and that the agency's proffered explanation was pretext for discrimination based on his reserve status and disputes with management over his military leave and military assignments. Based on the current record, there is a question as to whether the appellant acted entirely within the chain of command. The appellant contends that, given Stenkamp's approval to use the FSR, he did not violate the chain of command by sending a draft report to Walsh "as a courtesy." *Id*. However, assuming the appellant and Walsh obtained Stenkamp's approval to use the FSR, it remains undisputed that the appellant did not contact his supervisors before requesting information from Walsh. The appellant further argues that in his interactions with Walsh and Stenkamp he was acting in his capacity as a military officer, and therefore was not subject to the agency chain of command in the first instance. However, the

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[5] The Board has in some cases suggested that in order to establish discrimination under USERRA, an appellant must show that he was treated more harshly than employees without protected status. *See Strausbaugh*, 117 M.S.P.R. 566, ¶ 13; *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶ 18 (2000), *aff'd sub nom. Sheehan*, 240 F.3d 1009. However, it is well established that comparator evidence is only one means by which an employee may establish a discriminatory motive. *Sheehan*, 240 F.3d at 1014; *see Erickson*, 571 F.3d at 1369 (where employee was removed for excessive use of military leave, the fact that the agency could have lawfully removed him if his absence had not been service related did not excuse its action); *cf. Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010) (the administrative judge erred in requiring the appellant to show that she was treated more harshly than a similarly situated individual who was not a member of her protected class under Title VII).

appellant was not on military duty when he first approached Walsh for assistance with the report on July 7, 2010. Furthermore, the appellant indicated in his July 20, 2010 correspondence that he was acting in a dual capacity as a military officer and civilian DEA agent. *See* IAF, Tab 6, Subtab 2I.

¶22 Conversely, the record contains evidence indicating that the appellant's conduct, even if technically a breach of the chain of command, was considered acceptable at LCO. First, it is undisputed that there was no written chain of command policy. HT-2 at 90 (Arrivillaga). Furthermore, contrary to the testimony of the appellant's supervisors, Walsh testified that Special Agents are free to bring intelligence related questions to an intelligence analyst in the office without first meeting with an immediate supervisor, and that he did not believe the appellant acted inappropriately. HT-1 at 14-15, 19-20. Walsh's testimony was corroborated by Erika Jiminez, a Special Agent at LCO, who testified that there was an open door policy at LCO, and that, based on her experience, the environment was such that she or the appellant could freely approach Walsh and ask for help. *Id*. at 54-55. In the absence of a specific agency instruction that would have prohibited the appellant from contacting Walsh without going through his supervisors, and in light of the evidence that such actions were condoned by management, it is questionable whether the agency could have properly considered the appellant's breach of the chain of command as a factor in denying his request for a tour extension. *Cf. Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 55 (2011). If credited, the testimony of Walsh and Jiminez could therefore serve as circumstantial evidence that the agency's reliance on the chain of command issue as a basis for its action was pretext for discrimination based on the appellant's military service. *See Sheehan*, 240 F.3d at 1014 (discriminatory motivation under USERRA may be reasonably inferred from factors including inconsistencies between the proffered reason and other actions of the employer). However, the administrative judge did not acknowledge or attempt to resolve the conflict between their testimony and that of Arrivillaga,

Steffick, and Stenkamp. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). The administrative judge should make the necessary credibility determinations on remand.

¶23 The appellant further testified that, following his February 20, 2010 request for leave, Arrivillaga told him that he would not grant his request for 4 full weeks because the appellant had just come back from "vacation," and that he was not inclined to approve of "more" vacation. HT-1 at 251. The appellant asserted that Arrivillaga's tone, demeanor, and choice of words indicated that he was equating his military duty to vacation, thereby showing disrespect for his military service. *Id*. at 252-53. If credited, the appellant's account of Arrivillaga's reaction to his leave request would constitute evidence of animosity based on the appellant's military service.[6] *See Sheehan*, 240 F.3d at 1014 (discriminatory motivation

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[6] The appellant also alleged below that Arrivillaga told Jiminez that the appellant put his service to the U.S. Army ahead of his service to the DEA. RAF, Tab 7 at 13. However, Jiminez testified at the hearing that Arrivillaga did not make such a statement to her, HT-1 at 57-58, and the appellant has not disputed her testimony. The appellant further contends that the partial denial of his request for leave was in violation of 5 C.F.R. § 353.208, which provides that "[a]n employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. § 6304, military leave under 5 U.S.C. § 6323, earned compensatory time off for travel under 5 U.S.C. § 5550b, or sick leave under 5 U.S.C. § 6307, if appropriate, during such service." However, the appellant does not dispute that he was on military or annual leave during his required 2 weeks of annual military training for the period in question. The additional 12 drill days he needed to complete for retirement purposes could have been performed at another time. The appellant also objects that the administrative judge mischaracterized the granting of 3 weeks leave as a "compromise," and incorrectly described his home leave as annual leave. We discern no error in describing the result as a "compromise," and to the extent the administrative judge erred in referring to home leave as annual leave, that error did not affect the appellant's substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

under USERRA may be reasonably inferred from factors including an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity). For his part, Arrivillaga testified that he did not use the word "vacation," and did not view the appellant's military orders to be equivalent to a vacation. HT-2 at 101-02. However, while the administrative judge found Arrivillaga's testimony to be "detailed" and "in every respect credible and convincing," he did not acknowledge the appellant's testimony or attempt to resolve the conflict between his testimony and Arrivillaga's. Initial Decision at 10-11. Again, the administrative judge should make the required credibility determination on remand.

ORDER

¶24 We remand the appeal to the Washington Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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