



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 19, 2016

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BOARD DECISIONS

Appellant: Gary Kalus
Agency: Department of Homeland Security
Decision Number: [2016 MSPB 9](#)
Docket Number: NY-1221-15-0110-W-1
Issuance Date: February 12, 2016
Appeal Type: Individual Right of Action (IRA)

IRA Appeals
Timeliness
Exhaustion

On December 7, 2011, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC), alleging that the agency retaliated against him for protected whistleblowing by failing to nominate him for a fiscal year 2011 performance award. On August 29, 2012, OSC closed the complaint without taking corrective action and notified the appellant of his Board appeal rights. The appellant, however, did not file a Board appeal.

On August 10, 2014, the appellant filed another whistleblower complaint with OSC on the same matter and submitted additional evidence to support his claim. On December 8, 2014, OSC closed the file without taking corrective action and notified the appellant of his Board appeal rights. On February 8, 2015, the appellant filed an IRA appeal with the Board.

The administrative judge dismissed the appeal as untimely filed. He found that the matters raised in this appeal were the same as those previously raised before OSC in December 2011, and thus, the appellant's February 8, 2015 IRA appeal was untimely filed with respect to OSC's August 29, 2012 close-out letter. The administrative judge further found that the circumstances did not warrant equitable tolling. The appellant filed a petition for review.

Holding: The Board granted the petition for review, vacated the initial decision, found that the IRA appeal was timely filed, and remanded the appeal to the regional office for further adjudication.

1. An IRA appeal must be filed no later than 65 days after the date that OSC issues its close-out letter, or, if the letter is received more than 5 days after its issuance, within 60 days of the date of receipt.
2. Although the appeal would have been untimely with respect to OSC's August 29, 2012 closeout letter, it was timely with respect to the December 8, 2014 closeout letter. When OSC reopened the proceedings in this matter, it deprived the August 29, 2012 letter of the finality required for purposes of Board review, and thus, the December 8, 2014 letter is the operative one.
3. Absent egregious circumstances evidencing an abuse of process, the Board will accept OSC's decision to reopen at face value.
4. The Board distinguished between situations in which OSC declines to reopen a case and situations like this one in which OSC does reopen the case. In the former, OSC's decision does not trigger a new IRA filing period; in the latter, it does.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Peter McMillan

Respondent: Department of Justice

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2015-3042](#)

Issuance Date: February 16, 2016

Uniformed Services Employment and Reemployment Rights Act (USERRA) Discrimination Substantial Evidence

The appellant was a Drug Enforcement Agency (DEA) Criminal Investigator stationed in Lima, Peru. He was also a Major in the Army Reserves, and was scheduled to complete 1 week of military service from July 17 through July 26, 2010. As part of his military service, the appellant was assigned to write a "two to three page intelligence assessment on the historical impact of the DEA's expulsion from Bolivia on drug trafficking, public corruption and social effects." In assigning this task to the appellant, the Army was mindful of his expertise in DEA matters and wanted to leverage that expertise.

Prior to leaving for military service, the appellant sought guidance from some of his superiors at the agency in writing the report. The appellant's third-level supervisor gave him permission to use a sensitive DEA document as a source and reference for his report, on the condition that the appellant would submit the report to him for review before disseminating it to the Army.

While on military leave, the appellant submitted his report to the agency for review. The appellant also informed the agency that he would be participating in a military conference in which his "dual capacity as a MI Reservist and 'working' agent," would allow him "to be a proponent for DEA's viewpoint in the Southern Cone." The appellant's third-level supervisor balked at this idea, and an unpleasant email exchange ensued. The third-level supervisor also disapproved the appellant's report and forbade him from using the DEA document as a source at all.

On September 14, 2010, less than 2 months after his return from military service, the appellant requested a tour extension in Lima. The agency denied the request the next day. After exhausting his remedies with the Department of Labor, the appellant filed a USERRA appeal with the Board. The administrative judge denied the appellant's request for corrective action,

finding that there was no evidence that the agency's decision was motivated by the appellant's uniformed service. The full Board remanded the appeal for further adjudication, holding that "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." On remand, the administrative judge again denied the appellant's request for corrective action, finding that the agency's decision was not motivated by the appellant's military service but was instead based on legitimate, nondiscriminatory reasons. The full Board affirmed, and the appellant petitioned the court for review.

Holding: The court reversed the Board's decision because it was not supported by substantial evidence. It granted the appellant's request for corrective action and remanded for determination of an appropriate remedy.

1. **Evidentiary Framework** - To prevail on the merits of a USERRA discrimination appeal, the appellant must show that his military service was a substantial or motivating factor in the agency's action. If the appellant meets this burden, the burden shifts to the agency to show that the action would have taken place for a valid reason.

2. **The Appellant's Burden** - Employers will rarely concede an improper motivation for their actions, but an improper motivation may be inferred upon consideration of the following factors: (1) proximity of time between the military service and the employment action; (2) inconsistencies between the employer's proffered reasons for the action and other actions of the employer; (3) the employer's expressed hostility towards members protected by USERRA together with a knowledge of the employee's military activity; and (4) disparate treatment of covered employees compared with other employees with similar records or offenses. All four factors in this case weighed in the appellant's favor and entailed an inference of discrimination.

A. There was less than 2 months between the appellant's military service and the agency's action, thus demonstrating a close proximity in time.

B. The agency's proffered reasons for its action (performance issues, failure to follow chain of command, and disrespectful tone in the appellant's emails) were not well-supported. There was no explanation of how the appellant's performance in the current rating period was below his performance in prior rating periods, in

which he received higher ratings and was granted tour extensions. The Lima office had not instituted or followed a strict chain of command policy prior to the incidents at issue here. Although the tone of the appellant's emails was not "ideal," it was not beyond the pale, especially considering that the appellant's third-level supervisor initiated the hostile tone.

- C. The appellant's third-level supervisor's emails expressed hostility to the appellant's military assignment.
- D. The agency failed to take action against another employee who disregarded the chain of command.

3. The Agency's Burden - The agency failed to prove that it would have taken the action at issue even in the absence of the appellant's uniformed service. Notably, all of the agency's proffered reasons for denying the appellant's tour extension were related to the project that the appellant was assigned to perform as part of his military service and his interaction with agency officials in connection thereto.

Petitioner: Carl D. Hayden

Respondent: Department of the Air Force

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2015-3073](#)

MSPB Docket No. CH-4324-13-0534-I-1

Issuance Date: February 12, 2016

**Uniformed Services Employment and Reemployment Rights Act (USERRA)
Reemployment
Discrimination
Reprisal**

The appellant was a GS-11 Protocol Specialist for the agency. Due to changes in personnel and workload at his duty station, the appellant began accreting more and higher-level duties. Because of this, on March 26, 2012, the appellant's supervisor put in a request to upgrade the appellant's position to GS-12. Meanwhile, the appellant, who was also a member of the Air Force Reserve, was called to active duty from April 10, 2012 to December 2012. Initially, the agency declined to process the upgrade during the appellant's absence because he was not available for an in-person desk audit. Later, the workload in the appellant's area decreased and there was no need for

additional GS-12s. Therefore, the agency declined to process the upgrade at all, even after the appellant's return.

In March , 2013, the appellant asked his supervisor to re-submit the upgrade request. The appellant alleged that, in response, his supervisor told him that she did not recommend his promotion because of his excessive absence for Reserve duties. The appellant then sought assistance from the Employer Support of the Guard Reserve (ESGR) office. During a subsequent meeting about his performance, the appellant's supervisors told him that he was no longer working at the GS-12 level.

The appellant filed a Board appeal, alleging that the agency's failure to upgrade his position violated USERRA's discrimination, reemployment, and retaliation provisions. The administrative judge denied the appellant's request for corrective action, and the full Board affirmed. The appellant then petitioned for review with the Federal Circuit.

Holding: The court affirmed the Board's decision as to the reemployment and retaliation claims, but vacated the Board's findings on the discrimination claim and remanded for further adjudication.

1. **Discrimination** - To prevail on the merits of a USERRA discrimination claim, the appellant must show that his military service was a substantial or motivating factor in the agency's action. If the appellant meets this burden, the burden shifts to the agency to show that the action would have taken place for a valid reason.

- A. **Appellant's Burden** - The court affirmed the Board's finding that the appellant met his initial burden to show that the agency's actions were discriminatory. The agency considered the appellant's military absences to be problematic, and they were a motivating factor in its decision not to upgrade his position.
- B. **Agency's Burden** - The record was insufficient to conclude that the agency showed that it would have declined to upgrade the appellant's position notwithstanding his uniformed service. The in-person desk audit was discretionary, and the appellant's unavailability for it due to his uniformed service was not a sufficient reason for the agency to deny the upgrade. Furthermore, although there were displaced employees who might have been entitled to the GS-12 position over the appellant, the Board misallocated the burden of proof. It

required the appellant to show that he would have been successful in competing for any new GS-12 position rather than requiring the agency to show that he would not have been. Because there was insufficient evidence that, had the agency processed the upgrade at the time it was requested, the appellant would have had to compete for the position and would not have won, the court vacated and remanded for further findings.

2. Reemployment -The appellant did not prove his reemployment claim because position upgrades are not incidents or advantages generally granted to all employees. Nor was the upgrade “reasonably certain” to accrue to the appellant.

4. Retaliation - The appellant did not prove his retaliation claim because he presented no evidence that the agency bore any discriminatory animus towards him for seeking assistance from the ESGR. To the contrary, the agency presented evidence that it did not need additional GS-12 Protocol Officers at the time, and that the appellant’s supervisors were concerned about helping him overcome a decline in his performance and prepare for eventual promotion to GS-12.