



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 16, 2018

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Michael J. O'Farrell, Jr.
Respondent: Department of Defense
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2017-1223](#)
Issuance Date: February 9, 2018
MSPB Docket No. DE-4324-14-0013-I-1

Miscellaneous Topics

--USERRA

---- Entitlement to military leave pursuant to 5 U.S.C. § 6323

The petitioner was a General Attorney in the Office of Counsel for the aviation subordinate command of the Defense Logistics Agency (DLA) within the Department of Defense (DOD). He was also a member of the U.S. Army Reserve at all times relevant to this matter. On September 11, 2012, during the petitioner's service, President Barack Obama published a notice in the Federal Register "continuing for [one] year the national emergency . . . with respect to the terrorist attacks of September 11, 2001, and the continuing and immediate threat of further attacks on the United States."

On April 17, 2013, the petitioner received an order from the U.S. Army that directed him to replace a civilian attorney employed at the Naval Surface Warfare Center (NSWC). The NSWC attorney, who was also a member of the U.S. Army Reserve, was replaced because he had been deployed to Afghanistan. The order specifically stated that the petitioner was "ordered to active duty for operational support under provision of [10 U.S.C. §] 12301(d)." The order further stated that his "operational support" would consist of his "serv[ic]e as[] legal counsel."

The petitioner reported for duty on April 22, 2013, and he served a total of 162 days, until September 30, 2013. It was undisputed that, by August 26, 2013, the petition had used his 15 days of military leave and most of his accrued annual leave and advance annual leave. To avoid being placed on military leave without pay for the remainder of his active duty service, the petitioner requested via email an additional 22 days of leave pursuant to 5 U.S.C. § 6323(b). DLA denied this request because the order did not state that he was "under contingency orders." The petitioner filed an Office of Personnel Management Form 71, Request for Leave or Approved Absence, but DLA again denied this request because his "active duty is not in support of a contingency operation."

The petitioner filed a Board appeal, alleging that DOD failed to grant him military leave for active military service in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The administrative judge denied the claim and dismissed the appeal, and the Board issued a decision stating that the two Board Members could not agree on the disposition of the petition for review. Thus, the initial decision constituted the final decision of the Board in this appeal. The petitioner appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

The question before the court was whether, under the proper construction of 5 U.S.C. § 6323(b), the Board erred in denying the petitioner's request for 22 days of additional military leave. The court noted that the Board found that the petitioner was not entitled to this additional leave because there was no specific contingency operation identified in the military order, but the Board failed to analyze what qualified as "support" or as a "contingency operation" under the relevant statutory provisions. The court first determined that the Board misinterpreted 5 U.S.C. § 6323(b), which states that an employee who "performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in [10 U.S.C. §] 101(a)(13) [(2012)] . . . is entitled . . . to leave without loss of, or reduction in, pay, leave to which he otherwise is

entitled, credit for time or service, or performance or efficiency rating” that shall not exceed 22 workdays in a calendar year. The court evaluated the relevant statutory provisions, regulations, and legislative history, and it came to the following conclusions: (1) “in support of” includes indirect assistance to a contingency operation; (2) “contingency operation” includes a military operation that results in service members being called to active duty under any provision of law during a national emergency; (3) upon request, a service member is entitled to additional leave as long as leave is “appropriate” under the requirements set forth in section 6323; and (4) the service member’s request for additional leave need not take any particular form or use any particular language.

The court concluded that the Board abused its discretion when it determined that the petitioner was not entitled to additional leave under 5 U.S.C. § 6323(b). In reaching this conclusion, the court noted that the petitioner replaced an NSWC attorney who directly supported the contingency operation through the NSWC attorney’s deployment to Afghanistan, the petitioner provided assistance to the U.S. Navy’s warfighting capabilities while serving on active duty at NSWC, the order calling him to active duty was made pursuant to 10 U.S.C. § 12301(d), which qualifies as a “provision of law,” and the order states that he would provide “operational support” for this mission.

The court rejected the Government’s counterarguments, and it reversed the Board’s final decision. The court noted that its holding did not mean that all reservists called to active duty during a national emergency will be entitled to additional leave because they must demonstrate that their call to active duty was “in support of a contingency operation” as construed therein.

NONPRECEDENTIAL:

Hirschfield v. Office of Personnel Management, No. [2017-2607](#) (Feb. 12, 2018) (MSPB Docket No. PH-0845-17-0035-I-1) (finding that 5 U.S.C. § 8418, which governs the calculation of the deposit required when a federal employee enters into a post-retirement marriage and elects a survivor annuity, does not impose an unequal burden on same sex couples and does not violate Ms. Hirschfield’s right to equal protection, and upholding the administrative judge’s decision to affirm OPM’s annuity overpayment calculation).

Klippel v. Department of Homeland Security, No. [2017-1636](#) (Feb. 13, 2018) (MSPB Docket No. DC-0752-13-0616-I-2) (Rule 36 affirmance).

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