UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 88

Docket No. AT-4324-10-0736-I-1

Misty J. West,

Appellant,

v.

Department of the Air Force,

Agency.

September 30, 2011

Misty J. West, Wetumpka, Alabama, pro se.

Bryan Adams, Maxwell Air Force Base, Alabama, 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 a September 24, 2010 initial decision that denied her 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 reasons set forth below, we DENY the appellant's petition for review.

BACKGROUND

¶2 In June 2002, the agency appointed the appellant to the position of GS-07 Information Technology (IT) Specialist through the Palace Acquire Outstanding

Scholars Program. Initial Appeal File (IAF), Tab 5 at 5, 25-26; Tab 13 at 5. In August 2005 the appellant completed that internship and the agency reassigned her to a permanent GS-11 IT Specialist position. IAF, Tab 4 at 7-8; Tab 5 at 5, 21. Beginning March 19, 2007, the agency placed the appellant in leave without pay status because she was called to active military duty. IAF, Tab 5 at 6, 16; Tab 13 at 5; Tab 15 at 3. Following her active duty, the appellant returned to the agency effective March 1, 2010, in the position of GS-11 IT Specialist. IAF, Tab 5 at 6, 9; Tab 13 at 5; Tab 15 at 3.

¶3 The appellant filed an appeal in which she contended that the agency violated her reemployment rights under USERRA. Specifically, she argued that, based on the experiences of her peers in the internship program, the agency would have promoted her to GS-12 had she not left on active duty. IAF, Tab 1 at 5. The appellant also argued that the agency realigned her position such that she was essentially made to take a step backward upon her return from active duty. IAF, Tab 13 at 6.

¶4 After holding a hearing, the administrative judge denied the appellant's request for corrective action. Initial Decision (ID) at 1. The administrative judge found that the agency reemployed the appellant in the same GS-11 IT Specialist position that she held in March 2007 before she left for military service. ID at 3. The administrative judge also found that promotions from GS-11 to GS-12 were not a "perquisite of seniority" but instead depended on management's discretion in filling a competitive position. ID at 6-7. Thus, the administrative judge determined that the agency properly reemployed the appellant upon her return from active duty. ID at 7-8.

¶5 The appellant has filed a petition for review in which she asserts that the administrative judge made various factual errors and erroneously concluded that the agency placed her in an appropriate position following her military duty. Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶6 With exceptions not pertinent here, USERRA provides that an employee returning from uniformed service of more than 90 days shall be reemployed:

> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, **or** a position of like seniority, status and pay, the duties of which the person is qualified to perform . . . .

38 U.S.C. § 4313(a)(2) (emphasis supplied). Thus, the agency may comply with the plain language of the statute by reemploying the employee *either* in the position the employee would have held had she not left for uniformed service, *or* a position of like seniority, status, and pay for which she is qualified. 38 U.S.C. § 4313(a)(2).

¶7 The administrative judge found that the agency placed the appellant in the position that she held prior to her active uniformed service, with all step increases and annual salary adjustments that she would have received had she not been called up to active duty. ID at 3. She therefore concluded that the agency reemployed the appellant in the position she would have held but for her uniformed service. *Id.* at 8. In her petition for review, the appellant reiterates her argument below that the agency should have promoted her to GS-12 upon her return from active duty. PFR File, Tab 1 at 6-9.

¶8 When an agency reemploys an employee in the position she would have held absent her uniformed service, the agency must, under the escalator principle, provide the employee with "any incident or advantage of employment that [the employee] may have been entitled to had they not been absent." *See* 5 C.F.R. § 353.106(c). Courts have found that an employee returning from uniformed service should be reemployed at a higher grade than she held when she left civilian employment if advancement to the higher grade was a perquisite of seniority, a reward for length of service, or a benefit that would have accrued through the mere passage of time. *E.g., Tilton v. Missouri Pacific Railroad Co.*,

376 U.S. 169, 174-81 (1964); *McKinney v. Missouri-Kansas R. Co.*, 357 U.S. 265, 272 (1958); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 701 (8th Cir. 1983). Although it need not be absolutely foreseeable, such advancement "must have been reasonably certain to have accrued in the employee's absence." *Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶ 10 (2008). Advancement is not reasonably certain if it is dependent on the exercise of "a discriminating managerial choice" and the fitness and ability of the employee. *Id.*

¶9 The administrative judge found that the evidence did not indicate that the appellant's promotion was a perquisite of seniority, a reward for length of service, or a benefit that would have accrued through the mere passage of time. ID at 6. In that regard, the administrative judge found that the appellant's peers from the internship program "were promoted through the competitive process, which required for management to exercise its discretion in the selection." *Id.* Further, as noted in *Leite*, there is no basis for requiring an agency to consider an absent employee for promotion as though she had the experience and skills she might have obtained if she had continued her civilian employment. *Leite*, 109 M.S.P.R. 229, ¶ 13. Thus, we agree with the administrative judge that the agency was not required to promote the appellant to GS-12 upon her return from active military service.

¶10 In her petition for review, the appellant reiterates her argument that she is not doing the same job because the agency realigned the position. PFR File, Tab 1 at 5. Specifically, she claims that before her active duty service, she was in charge of "millions of dollars and massive amounts of data used by the entire Air Force," but now she is "in charge of nothing," and she is in a position of less responsibility than before. *Id.* at 8. The appellant also contends that the administrative judge incorrectly found that the appellant reported to the same supervisor before and after her absence serving on active duty. PFR File, Tab 1 at 5. She also argued below that a lower-ranking official assigned her tasks as a

result of the realignment of her position during her absence, and claimed "this was essentially a step backwards for me." IAF, Tab 13 at 6.

¶11 The appellant's arguments fail because the agency was not obligated to return the appellant to her former position, but instead was required to place the appellant in the position she would have held but for her uniformed service. Therefore, even if the appellant's current position is not the same as her former position, the agency has not violated her reemployment rights if the evidence shows that it returned her to the position she would have held absent her uniformed service. In any event, the administrative judge found that the agency "has the discretion to realign its workforce" and she found no evidence that the scope of the appellant's duties changed. ID at 8. In addition, the appellant identifies no requirement that she have the exact same supervisor both before and after her absence for active military service. Further, the appellant does not assert, and the record does not reflect, that the authority, grade, or duties of her supervisors changed.

¶12 In complaining that her position has been realigned and that a lower-ranking individual gives her assignments, the appellant essentially argues that the agency placed her in the same position, but that position does not carry the same status as it did before she left for active duty. Evidence that a position is not of like seniority, status and pay may, in an appropriate case, be relevant to a determination of whether the position is the position the employee would have held but for her uniformed service. Here, however, the appellant essentially concedes that she has been returned to her former position, which still exists at the agency, and the evidence shows that she was not entitled to a promotion to GS-12 on her return to duty. Even assuming that her former job has changed in the manner the appellant alleges, it is the job she would have held absent her uniformed service. It is possible that, if she had not been absent performing uniformed service, the appellant might have sought reassignment to a different position if she found her duties and responsibilities had been reduced, but

whether she would have sought reassignment and whether she would have been afforded a reassignment if she had are far too speculative to permit the Board to conclude that she would have occupied some other position but for her uniformed service. Any hypothetical reassignment would have involved the exercise of a discriminating management choice, and would not be reasonably certain.

¶13 Accordingly, we agree with the administrative judge's finding that the agency placed the appellant in the position in which she would have been employed if her employment had not been interrupted by her uniformed service.[*] Therefore, the agency has satisfied its statutory obligations. *See* 38 U.S.C. § 4313(a)(2)(A); *e.g.*, *Leite*, 109 M.S.P.R. 229, ¶ 8; 5 C.F.R. § 353.106(c).

¶14 Finally, the appellant identifies certain alleged errors in the initial decision. PFR File, Tab 1 at 4-5. These errors involve the date of the appellant's promotion to GS-11, the date she notified the agency of her intent to return from active military service, and the amount of time that elapsed between the promotion of one of the appellant's peers and the appellant's active duty assignment. *Id.* The appellant fails to explain why any of these alleged errors are material and thus would change the outcome of her appeal. An adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

ORDER

¶15 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)).

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[*] Although the appellant alleges that her position is developmental to GS-12, PFR File, Tab 1 at 6, the record shows that the job series and developmental level of the appellant's position was GS-2210-11. IAF, Tab 18 at 2; *see* IAF, Tab 5 at 21.

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.