UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 90

Docket No. DE-4324-10-0548-I-1

Nathan Gjovik,

Appellant,

v.

Department of Health and Human Services,

Agency.

September 30, 2011

Nathan Gjovik, Rapid City, South Dakota, pro se.

K. Keian Weld, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate concurring opinion.

OPINION AND ORDER

¶1 This matter is before the Board on an interlocutory appeal certified by the administrative judge in a February 3, 2011 Order. The issue before the Board is whether the Board has jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) to consider an appeal brought by a career member of the Commissioned Corps based on alleged actions taken by the agency employing him in that capacity. Because we agree with the administrative judge's conclusion that the Board's jurisdiction does extend to include these individuals,

we AFFIRM the administrative judge's ruling and RETURN the case to the Denver Field Office for further adjudication.

BACKGROUND

¶2 The appellant served in the Commissioned Corps of the Public Health Service (PHS) in various engineering positions for his entire federal service from May 16, 1988, to November 1, 2010. Initial Appeal File (IAF), Tab 20, Subtabs 4a, 4f; Tab 24, Subtab 7. The appellant did not have any military service or creditable PHS civil service. IAF, Tab 20, Subtab 4f at 2-4.

¶3 On July 1, 2007, the appellant was transferred to be a "Sup[ervisor] Facilities Management Engineer II" assigned to the Indian Health Service, Rapid City, South Dakota. *Id.* at 3-4. The appellant was subsequently given a temporary duty assignment to a different location on November 16, 2009, as a "Facilities Management Engineer Consult[ant]," but still with the Indian Health Service, Rapid City, South Dakota. *Id.* at 3; *see also* IAF, Tab 20, Subtab 1 at 2.

¶4 The appellant in his appeal asserted that the agency reassigned him in November 2009, included false information in his Commissioned Officers' Effectiveness Reports, denied him two promotions, and subjected him to a hostile work environment. IAF, Tab 1 at 5, Tab 21 at 4-5. The appellant contends that the agency took these actions because of his status as a uniformed service member. IAF, Tab 1 at 5, Tab 21 at 6.

¶5 The agency filed a motion to dismiss the appeal as outside of the Board's jurisdiction. IAF, Tab 5. The administrative judge denied the agency's motion to dismiss but subsequently held a status conference and issued an order in which he required the parties to file evidence and/or argument regarding the Board's jurisdiction. IAF, Tab 18. Specifically, he ordered the parties to address whether a career member of the Commissioned Corps of the PHS may bring a USERRA appeal based on his treatment by the PHS while serving as a career uniformed service member of the Corps. *Id.*

¶6 The agency filed two responses and addressed the jurisdictional question raised by the administrative judge. In both responses, the agency argued that because the appellant has never been a civilian employee and was appointed without regard to civil service laws, allowing his claim would not further the purpose of USERRA. IAF, Tab 20, Subtab 1 at 1, Tab 24 at 8-12. The agency expanded on this argument in its second submission. It asserted that allowing an attack on a personnel action through USERRA provides an impermissible review of actions taken during the course of career uniformed service. IAF, Tab 24 at 12-14. Further, the agency contended that the appellant's claim is against his uniformed service employer and not an employer of a civilian position, which is beyond the scope of USERRA. *Id*. at 1-2.

¶7 The appellant also filed a response. In his response, the appellant argued that he is a covered employee based on his uniformed service and the agency's action was discriminatory based on his membership in the Commissioned Corps. IAF, Tab 21 at 6-8. The appellant stated that *Woodman v. Office Personnel Management*, 258 F.3d 1372, 1377 (Fed. Cir. 2001), cited by the administrative judge for the proposition that USERRA was intended to apply to non-career military service, is inapposite to his claim. IAF, Tab 21 at 6-7. He explained that *Woodman* relates to reemployment rights and his claim does not allege a failure to provide reemployment under 43 U.S.C. § 4312, but is one of discrimination under 43 U.S.C. § 4311. *Id.*

¶8 In an order issued November 23, 2010, the administrative judge found that under the liberal construction of USERRA, the appellant established jurisdiction over his appeal. IAF, Tab 26 at 1-2. The administrative judge found that the appellant is a member of the uniformed service and has alleged that he was discriminated against based on that status with regard to a benefit of employment. *Id.* Further, the appellant first sought relief from the Department of Labor and, therefore, has pled all of the necessary elements to establish the Board's jurisdiction. *Id.* The administrative judge, however, left open the issue of

whether the appellant had stated a claim upon which relief could be granted and allowed the parties the opportunity to file evidence and argument on that issue. *Id.* at 5-6.

¶9 Both the agency and the appellant responded. IAF, Tabs 29, 30. In the appellant's response, he added that he was "effectively forced to retire" because of the agency's actions. IAF, Tab 30 at 4. Although the administrative judge provided greater detail and explanation for his conclusion that the Board has jurisdiction over the appellant's USERRA claim, his prior holdings as stated above remained unchanged. IAF, Tab 32 at 8-21.

¶10 The agency filed a motion for certification of interlocutory appeal to which the appellant responded. IAF, Tabs 34, 35. On February 3, 2011, the administrative judge certified the issue of jurisdiction for interlocutory appeal. IAF, Tab 50.

ANALYSIS

¶11 Neither the Board, nor our reviewing court, has ruled on whether the Board has jurisdiction to consider a USERRA claim brought by a career uniformed service member of the Commissioned Corps based on alleged actions taken by the employing agency while the appellant served in that capacity. Further this is an important question of law about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of this proceeding.

¶12 Accordingly, this case is appropriate for review on an interlocutory appeal. *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4, ¶ 7 (2009); 5 C.F.R. § 1201.92. For the reasons set forth below, we AFFIRM the administrative judge's decision and RETURN the case to the administrative judge for adjudication in accordance with this decision.

¶13 The starting point for every case involving statutory construction is the language of the statute itself. *MacLean*, 112 M.S.P.R. 4, ¶ 9 (citations omitted).

In the statute at issue in this appeal, the language is clear beginning with the purpose of USERRA. Congress specifically articulated its intention in creating the statutory framework for effecting USERRA, and among those stated reasons was to protect those who serve in the uniformed services from discrimination based on that service. 38 U.S.C. § 4301(a)(3). Congress further stated that the Federal Government should serve as a model employer in carrying out the statutory mandate to protect those who serve in the uniformed services. 38 U.S.C. § 4301(b).

¶14 Moreover, the Board has noted the express intent of Congress that the anti-discrimination provisions of USERRA be broadly construed and strictly enforced. *Murray v. National Aeronautics & Space Administration*, 112 M.S.P.R. 680, ¶ 7 (2009), *aff'd*, 387 F. App'x 955 (Fed. Cir. 2010). The U.S. Court of Appeals for the Federal Circuit has asserted its support for the Board's expansive interpretation of USERRA. *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484 (Fed. Cir. 1998).

¶15 USERRA prohibits an employer from denying a member of the uniformed service a benefit of employment on the basis of that membership. Specifically the statute provides:

> 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.

38 U.S.C. § 4311(a).

¶16 The appellant falls within the definition of a member of the uniformed services. 38 U.S.C. § 4303(16). Further, the appellant has claimed that he was: denied certain benefits of employment, including the denial of two promotions; reassigned to an undesirable location; and subjected to a hostile work environment. Finally, he contends he suffered a constructive removal because of

his membership in a uniformed service. IAF, Tab 1 at 5, Tab 21 at 4-5, Tab 30 at 4-6. Denials of promotion and retention in employment are specifically covered in section 4311(a); therefore, these aspects of the appellant's allegation fall within the statute. For the remaining issues regarding reassignment and hostile work environment, we must look to the meaning of the term "benefit of employment." Congress has explained that:

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2). The definition encompasses location of assignment, and the Board has interpreted this to include coverage of a hostile work environment claim based on uniformed service. *Petersen v. Department of the Interior*, 71 M.S.P.R. 227, 239 (1996).

¶17 The agency argues that coverage should only apply to civilian service employment and cites for support cases arising under the reemployment sections of USERRA. IAF, Tab 34 at 11-14, citing *Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547 (E.D. Va. 2010); *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368-69 (Fed. Cir. 2009); *Woodman*, 258 F.3d at 1377-79. The cases the agency cites, however, relate to restoration and reemployment.[1] Two types of cases arise

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[1] The agency cites *Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840 (7th Cir. 2005), and *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir. 2000), for the proposition that Congress intended USERRA to minimize the disruption and disadvantages that uniformed service may have on civilian employment, emphasizing that it is only civilian service that is at issue under USERRA. IAF, Tab 34 at 12. These cases are also not on point as they only address the first two of the three stated purposes of USERRA, but not the one under which the appellant alleges his claim falls. *See* 38 U.S.C. § 4301(a)(1), (2). The appellant asserts his claim under 38 U.S.C. § 4301(a)(3), and the stated purpose of that section is "to prohibit discrimination

under USERRA: (1) reemployment cases, in which an appellant claims that an agency has not met its obligations under 38 U.S.C. §§ 4312-4318 following the appellant's absence from civilian employment to perform uniformed service; and (2) so-called "discrimination" cases, in which an appellant claims that an agency has taken an action prohibited by 38 U.S.C. § 4311(a) or (b). *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 5 (2005). The agency contends that USERRA was not intended to include those who are still serving when the action is taken by the agency employing the appellant in his uniformed service capacity. IAF, Tab 34 at 10-14. The law, however, is not framed so narrowly. Here the appellant's allegations fall under the second type of USERRA claim, and the agency has not cited any statute or precedent for precluding a member of the uniformed service from bringing a claim under this section even if it is against the agency employing the appellant as a career member of the uniformed service. The administrative judge, citing case law from several circuits including the Board's reviewing circuit court, explained, and we agree, that providing an exception where one does not exist is disfavored. IAF, Tab 32 at 13-14, citing *United States v. Sabhnani*, 599 F.3d 215, 245 (2d Cir. 2010); *Owens v. Samkle Automotive, Inc.*, 425 F.3d 1318, 1321 (11th Cir. 2005); *Campion v. Merit Systems Protection Board*, 326 F.3d 1210, 1214 (Fed. Cir. 2003); *United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002); *Anthony v. Interform Corp.*, 96 F.3d 692, 696 (3d Cir. 1996); *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-41 (Fed. Cir. 1985).

¶18 The agency also focuses on the ramifications of allowing a career uniformed service officer to bring a claim under USERRA against the agency employing the officer in that capacity. IAF, Tab 34 at 14-21. While the Board recognizes the potential impact of allowing individuals who otherwise do not

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against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3); IAF, Tab 35 at 4.

have the right to seek review of agency actions to bring a USERRA claim, this is not a basis for ignoring the clear language of the statute.[2] Moreover, the Board's decision that it has jurisdiction to consider an appeal is not dispositive of the merits of the underlying claim. Indeed, we believe that a career member of a uniformed service will likely have a very difficult challenge in establishing that an employer of career uniformed service members is discriminating based on an appellant's membership in its uniformed service.[3] Still, absent statutory language or clear legislative history of an intent to exclude career uniformed service members from coverage in situations such as this one, we do not find that such an exclusion exists.

¶19 Similarly, we do not find that Congress intended to exclude the agency from the definition of employer under USERRA. Section 4303 of Title 38 includes the Federal Government in the list of employers for the purposes of USERRA. 38 U.S.C. § 4303(4)(A). In section 4303(5), Congress specifically exempted specified agencies and specifically included military departments with respect to its civilian employees but did not exempt any part of the Department of Health and Human Services or otherwise limit the coverage of its employees under USERRA. Further, within the same section at 4303(16), Congress

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[2] The agency's contention that members of the Commissioned Corps already have an avenue of redress, and therefore USERRA should not apply, is unpersuasive. In enacting USERRA, Congress specifically stated that nothing in the statute should alter a law, policy, plan, or practice "that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter." 38 U.S.C. § 4302(a)

[3] We note that in this case, while the acting agency component within the Department of Health and Human Services, the Public Health Service, employs members of the Commissioned Corps, the agency component that is alleged to have discriminated, the Indian Health Service, does not. 42 U.S.C. § 204. Here the appellant alleged that it was members of the Indian Health Service, where the appellant was assigned, that engaged in discrimination creating a hostile work environment, as well as caused the Public Health Service to deny him two promotions, reassign him, and eventually caused his involuntary retirement. IAF, Tab 1 at 5, Tab 21 at 4-6, Tab 30 at 4.

included, among those in uniformed service, members of the Commissioned Corps of the Public Health Service. We therefore find no basis to presume that the failure to exempt or further define the inclusion of the Public Health Service and/or the Department of Health & Human Services was an oversight.[4]

¶20 Based on the foregoing, we find that the Board has authority to exercise its jurisdiction pursuant to USERRA even when the appeal is brought by a career member of the uniformed service and the agency action at issue is taken by the agency employing the uniformed service member in that capacity.

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[4] Exclusion from certain civil service laws, such as means of appointment, does not result in exclusion from coverage under all civil service laws if the appellant otherwise meets the definition of a covered individual. *Cf. Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4, ¶ 10 (2006) (the appellant's appointment under 42 U.S.C. § 209(f) without regard to civil service laws did not preclude him from coverage under the Whistleblower Protection Act). Therefore, merely because the appellant was appointed under 42 U.S.C. § 204 without regard to civil service laws does not preclude his coverage under USERRA if he otherwise falls within the defined parameters of the statute.

ORDER

¶21 Accordingly, we affirm the administrative judge's denial of the agency's motion to dismiss for lack of jurisdiction, holding that the appellant's appeal is not precluded under USERRA. We therefore return this case to the administrative judge for further adjudication of the appellant's appeal.

FOR THE BOARD:

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

CONCURRING OPINION OF MARY M. ROSE

in

Nathan Gjovik v. Department of Health and Human Services

MSPB Docket No. DE-4324-10-0548-I-1

¶1 I agree with the majority that the Board has jurisdiction over this appeal. I believe that the plain language of the statute compels a finding that the Board has jurisdiction over a USERRA appeal brought by an officer of the Public Health Service (PHS) Commissioned Corps alleging that the Corps discriminated against him based on his status as a Corps officer. I write separately to express my discomfort with the implications of this decision.

¶2 Commissioned officers in the PHS Commissioned Corps are subject at all times to immediate deployment by the President of the United States in times of war or emergency. Should the President order deployment, Corps officers become de facto military officers. Thus, the same policy considerations underlying Congress's decision to exclude Board jurisdiction over USERRA appeals brought by military officers against their military employers also apply to Commissioned Corps officers. Common sense dictates treating the two classes of officers the same for purposes of determining Board jurisdiction. However, Congress has left a loophole in the statute that excludes military officers, but not Commissioned Corps officers, from bringing USERRA appeals under these circumstances. The Board must apply the statutes that are enacted by Congress, even when those statutes contain what could well be a mistake. I would hope that this apparent mistake will be brought to Congress's attention so that it can be corrected. Until that happens, I must agree with the majority's decision.

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Mary M. Rose
Member