

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 93

Docket No. DA-4324-12-0105-I-1

**Milo D. Burroughs,
Appellant,**

v.

**Department of the Army,
Agency.**

December 5, 2013

Milo Burroughs, Yelm, Washington, pro se.

Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that denied his 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 the reasons set forth below, we GRANT the appellant's petition for review and REMAND the appeal for further adjudication.

BACKGROUND

¶2 In 2005, the agency advertised a DB-0861-4 Lead Aerospace Engineer position under vacancy announcements WTAA05470479 and WTAA05470479D.

Initial Appeal File (IAF), Tab 6 at 10-15. The appellant applied but was not selected. He elected not to file a USERRA claim with the Department of Labor and exercised his right to file an appeal directly with the Board on November 28, 2011. IAF, Tab 1, Tab 43 at 1; *see* [5 C.F.R. § 1208.11](#)(a).

¶3 In an initial decision issued on the written record because the appellant withdrew his hearing request, IAF, Tab 40, the administrative judge found that the appellant failed to show by preponderant evidence that his uniformed service was a motivating factor in the nonselection. Initial Decision (ID) at 4-5. The appellant petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition for review and the appellant replies to the agency's response. *Id.*, Tabs 3, 4.

ANALYSIS

The appellant did not show that his uniformed service was a substantial or motivating factor in his nonselection.

¶4 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. *McMillan v. Department of Justice*, [120 M.S.P.R. 1](#), ¶ 13 (2013).

¶5 To prevail on the merits of a USERRA claim under [38 U.S.C. § 4311\(a\)](#), an appellant must prove by preponderant evidence that his uniformed service was a substantial or motivating factor in the agency action. *McMillan*, [120 M.S.P.R. 1](#), ¶ 19. If the appellant makes that showing, the agency can avoid liability by showing, as an affirmative defense, that it would have taken the same action for a valid reason without regard to his uniformed service. *Id.*; see *Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013 (Fed. Cir. 2001). An agency therefore violates section 4311(a) if it would not have taken the action but for the appellant's uniformed service. *Erickson v. U.S. Postal Service*, [571 F.3d 1364](#), 1368 (Fed. Cir. 2009).

¶6 The administrative judge found that the appellant failed to meet his burden of proof because he offered no evidence, merely his own speculations, that his uniformed service was a substantial or motivating factor in his nonselection. ID at 4. On review, the appellant again explains why he believes that the agency discriminated against him on the basis of his uniformed service, but he points to no evidence to substantiate his claim. PFR File, Tab 1. Therefore, we affirm the administrative judge's finding that the appellant failed to prove a violation of [38 U.S.C. § 4311\(a\)](#).

The appeal must be remanded to afford the appellant the opportunity to prove his claim of retaliation under [38 U.S.C. § 4311\(b\)](#).

¶7 The appellant correctly argues on review that he raised below a claim of retaliation under section 4311(b) and that the administrative judge failed to consider his claim. PFR File, Tab 1 at 1, Tab 4; see IAF, Tab 9 at 1. According to section 4311(b):

An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.

The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

[38 U.S.C. § 4311](#)(b). If an appellant engages in one or more forms of the protected activity described above, an agency violates section 4311(b) if the appellant's protected activity "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's [protected activity]." [38 U.S.C. § 4311](#)(c)(2). The "motivating factor" language set forth in section 4311(c)(2) mirrors the identical language of section 4311(c)(1), which applies in actions brought under section 4311(a). Because the two provisions are substantively identical, as is the case with section 4311(a), an agency violates section 4311(b) if it would not have taken the action but for the appellant's protected activity.

¶8 We have not yet had an opportunity to address the burden of proof in cases brought under section 4311(b) and the administrative judge neglected to afford the appellant notice of what is required to establish a claim of retaliation for activity protected by USERRA. The Board has held that an administrative judge must inform an appellant of the USERRA burdens and methods of proof in a USERRA appeal. *Haynes v. U.S. Postal Service*, [89 M.S.P.R. 9](#), ¶ 7 (2001). Because the appellant has not been afforded this notice, a remand is required. *Id.*, ¶¶ 7-8.

¶9 Finally, we note that the appellant's pleadings are not always clear. To the extent that he raises claims under other than [38 U.S.C. § 4311](#), *see* PFR File, Tab 1 at 1, Tab 4 at 3, the administrative judge ruled that the only issue under consideration in this appeal was the appellant's USERRA claim. IAF, Tab 41 at 1. Although afforded an opportunity to object to the administrative judge's ruling, *id.* at 3, the appellant did not do so in either of the pleadings he filed. *See* IAF, Tabs 42, 43. Therefore, we find that any such claims are precluded in this appeal. If the appellant wishes to pursue a claim of reprisal for whistleblowing or

violations of his veterans' preference rights with respect to this nonselection, he may do so by filing new appeals with the regional office. Further, to the extent the appellant raises a claim of bias, *see* PFR File, Tab 4 at 4-5, his allegations are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

ORDER

¶10 We remand this appeal for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall inform the appellant of the burdens and elements of proof in a USERRA retaliation claim brought under [38 U.S.C. § 4311](#)(b). After affording such notice, the administrative judge shall allow for further development of the record and issue a new initial decision addressing this claim.

FOR THE BOARD:

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