

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

2013 MSPB 101

Docket No. AT-3443-07-0016-M-5

**Richard Erickson,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 31, 2013

Matthew D. Estes, Esquire, Washington, D.C., for the appellant.

Alice L. Covington, Washington, D.C., and Jeffrey L. Sheldon, Esquire,
Tampa, Florida for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review of the initial decision that granted the appellant's request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA). For the reasons discussed below, we DENY the agency's petition and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant was employed by the Postal Service from 1988 until his removal in 2000. During his tenure with the agency, the appellant was absent from his civilian position for lengthy periods while serving on active duty with the Army National Guard Reserve. In January 2000, the agency proposed to remove him for excessive use of military leave. The notice erroneously stated that, during his tenure with the agency, he had been on military leave for more than 5 years, excluding weekend drills and annual training, and therefore no longer retained USERRA employment rights.¹ On March 31, 2000, the agency issued a final decision removing him from his position for excessive use of military leave. The appellant subsequently reenlisted with the National Guard and remained on military duty until December 31, 2005. *Erickson v. U.S. Postal Service*, [571 F.3d 1364](#), 1369-70 (Fed. Cir. 2009) (*Erickson I*).

¶3 In September 2006, the appellant filed an appeal with the Board, alleging that the agency violated the nondiscrimination provision of USERRA, [38 U.S.C. § 4311](#), by removing him from his position based on his military service. The administrative judge then assigned to the case found that, contrary to the proposal

¹ Under [38 U.S.C. § 4312\(a\)](#), an employee who is absent from his position of employment because of military service is entitled to reemployment rights and other employment benefits under USERRA if, inter alia, “the cumulative length of the absence and all previous absences . . . by reason of service in the uniformed services does not exceed five years.” The 5-year limit applies to military-related absences “with respect to the employer relationship for which a person seeks reemployment,” and excludes certain types of service. [38 U.S.C. § 4312\(c\)](#); see [20 C.F.R. § 1002.32\(a\)\(2\)](#) (eligibility for reemployment requires, inter alia, that the employee have “five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer”); [20 C.F.R. § 1002.103\(b\)](#) (listing types of exempted service). In addition to the types of service exempted by statute, Department of Labor regulations recognize an equitable exception for “[s]ervice performed to mitigate economic harm where the employee’s employer is in violation of its employment or reemployment obligations to him or her.” [20 C.F.R. § 1002.103\(b\)](#); see 70 Fed. Reg. 75246-01, 75257 (Dec. 19, 2005).

notice, the appellant retained USERRA rights because his cumulative military leave from his position, not including periods of service excepted by statute, did not exceed the 5-year limit at the time of his removal. The administrative judge further found that the appellant's military service was a substantial factor in the agency's decision to remove him. However, the administrative judge denied relief based on his finding that the appellant had waived his rights by abandoning his civilian career in favor of a military career. *Erickson I*, 571 F.3d at 1367.

¶4 On petition for review, the full Board affirmed the initial decision, but modified it to deny relief on the grounds that the appellant's military service was not a motivating factor in the agency's decision to remove him. *Erickson v. U.S. Postal Service*, [108 M.S.P.R. 494](#), ¶ 6 (2008), *aff'd in part, rev'd in part and remanded*, [571 F.3d 1364](#) (Fed. Cir. 2009). The Board further found that the agency had not violated USERRA's reemployment provision, [38 U.S.C. § 4312](#), because the appellant did not timely request reemployment following the completion of his military service on December 31, 2005. *Erickson*, [108 M.S.P.R. 494](#), ¶¶ 7-8. The Board also estimated that, in any event, the cumulative length of the appellant's military-related absence, not including periods exempted by statute, had by then exceeded the statutory 5-year cap for retaining reemployment rights under USERRA.² *Id.*, ¶ 9. The appellant appealed the Board's decision to the Federal Circuit.

² In making that calculation, the Board did not consider the possible applicability of [20 C.F.R. § 1002.103\(b\)](#), which exempts service performed to mitigate economic harm caused by an agency's violation of USERRA. Moreover, because the appellant's post-removal military service occurred outside his employment relationship with the agency, it is questionable whether it could count toward the 5-year limit with respect to that employment relationship. See [38 U.S.C. § 4312\(c\)](#); [20 C.F.R. § 1000.32\(a\)\(2\)](#). In any event, the Board's calculation, which was unnecessary to the decision, was dicta and has no preclusive effect under the law of the case doctrine. See *New v. Department of Veterans Affairs*, [99 M.S.P.R. 404](#), ¶ 24 (2005).

¶5 The court reversed the Board's decision in part, finding that the agency had violated section 4311 by firing the appellant based on his use of military leave. *Erickson I*, 571 F.3d at 1368-70. Without deciding whether he had exceeded the 5-year limit when he completed his military service on December 31, 2005, the court agreed that the agency had not violated his reemployment rights under USERRA because he did not make a timely application for reemployment. *Id.* at 1370-71. Because the full Board had not addressed the question of whether the appellant had waived his USERRA rights by abandoning his civilian career, the court remanded for a finding on that issue. *Id.* at 1371-72.

¶6 On remand from *Erickson I*, the Board again denied the appellant's request for relief, finding that the appellant had abandoned his civilian career, thereby waiving his rights under USERRA. *Erickson v. U.S. Postal Service*, [113 M.S.P.R. 41](#), ¶¶ 9-10 (2010), *vacated and remanded*, [636 F.3d 1353](#) (Fed. Cir. 2011). The appellant once more appealed to the Federal Circuit, which vacated the Board's decision, and found that the appellant had not abandoned his civilian career. *Erickson v. U.S. Postal Service*, [636 F.3d 1353](#), 1357-59 (Fed. Cir. 2011) (*Erickson II*). The court remanded the case for further proceedings on the appellant's USERRA discrimination claim. *Id.* at 1359. The Board subsequently remanded the case to the Atlanta Regional Office for further proceedings consistent with the court's decision.

¶7 On December 14, 2012, the administrative judge issued an initial decision granting the appellant's request for corrective action under USERRA. *Erickson v. U.S. Postal Service*, MSPB Docket No. AT-3443-07-0016-M-5, Remand Appeal File (RAF), Tab 18, Initial Decision. He ordered the agency to cancel the removal, restore the appellant retroactive to the date of the removal, and compensate the appellant for any loss of wages or benefits suffered as a result of the agency's action. *Id.* at 4. The administrative judge further directed that, in the event either party filed a petition for review, the agency should provide

interim relief in accordance with [5 U.S.C. § 7701\(b\)\(2\)\(A\)](#), effective as of the date of the initial decision. *Id.* at 4-5.

¶8 On January 8, 2013, in advance of its petition for review, the agency filed a “Motion for Leave to File Motion to Stay Order of Interim Relief.” Petition for Review (PFR) File, Tab 1. The appellant filed an opposition to the agency’s motion. PFR File, Tab 2. Subsequently, on January 18, 2013, the agency filed a petition for review of the December 14, 2012 initial decision. PFR File, Tab 3. In its petition, the agency argued, *inter alia*, that ordering the appellant’s reinstatement contravened the court’s finding that the appellant was not entitled to reemployment, and also exceeded the Board’s authority under USERRA. *Id.* With regard to interim relief, the agency stated that compliance with the interim relief order would have “significant adverse consequences,” and that it would “file any required certification and/or provide interim relief ordered by the Board upon its ruling on the motion to stay.” *Id.* at 4-5. The appellant responded to the agency’s petition for review and moved to dismiss the petition for failure to comply with the interim relief order. PFR File, Tab 5.

ANALYSIS

The agency’s motion for a stay of interim relief is denied.

¶9 Under [5 U.S.C. § 7701\(b\)\(2\)\(A\)](#), an appellant who obtains relief in an initial decision is entitled to the relief provided in the decision effective upon the making of the decision and remaining in effect pending the outcome of the petition for review, unless the administrative judge determines that granting such relief is not appropriate. The statute further provides that an employing agency may decline to return the appellant to his or her place of employment pending the outcome of the petition for review if it determines that the presence or return of the employee would be unduly disruptive to the work environment. [5 U.S.C. § 7701\(b\)\(2\)\(A\)\(ii\)](#). In that event, the appellant must receive pay, compensation,

and all other benefits as terms or conditions of employment during the period pending the outcome of any petition for review. [5 U.S.C. § 7701\(b\)\(2\)\(B\)](#).

¶10 The agency may challenge the propriety of an interim relief order on petition for review. *Armstrong v. Department of Justice*, [107 M.S.P.R. 375](#), ¶ 11 (2007). However, neither statute, nor the Board's regulations, contemplate that the Board may stay interim relief or entertain an agency's motion for such a stay. *Vesser v. Office of Personnel Management*, [57 M.S.P.R. 648](#), 650 n.1 (1993), *rev'd on other grounds*, [29 F.3d 600](#) (Fed. Cir. 1994).³ Accordingly, we DENY the agency's motion.

The appellant's motion to dismiss the agency's petition is denied.

¶11 If an agency files a petition or cross petition for review and has not provided the interim relief ordered, the appellant may request dismissal of the agency's petition. [5 C.F.R. § 1201.116\(d\)](#). Here, by its own admission, the agency has not complied with the interim relief order, and it has also failed to provide the certification of compliance required under [5 C.F.R. § 1201.116\(a\)](#). Under these circumstances, the Board has discretion to dismiss the agency's petition pursuant to [5 C.F.R. § 1201.116\(e\)](#), but is not required to do so.

¶12 Although neither party has raised the issue, we note there is an unresolved question as to whether interim relief under [5 U.S.C. § 7701\(b\)\(2\)](#) is available in USERRA cases. *See Garcia v. Department of State*, [106 M.S.P.R. 583](#), ¶¶ 6-8 (2007); *Fahrenbacher v. Department of the Navy*, [85 M.S.P.R. 500](#), ¶ 10 n.2 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, [240 F.3d 1009](#) (Fed. Cir. 2001). In light of that uncertainty, which we do not presently resolve, we

³ In *Anderson v. U.S. Postal Service*, [64 M.S.P.R. 233](#), 237-38 (1994), *vacated in part sub nom. Flaherty v. U.S. Postal Service*, [68 M.S.P.R. 36](#) (1995), the Board noted that it had issued a nonprecedential order staying interim relief in one of the consolidated appeals. Because the Board found the interim relief issues were moot, it did not decide the propriety of that order.

find it appropriate to deny the appellant's motion to dismiss the agency's petition. Because the issuance of this decision terminates the interim relief period, the agency's objections to the interim relief order are now moot. *Garcia*, [106 M.S.P.R. 583](#), ¶ 7.

The appellant is entitled to reinstatement and lost wages and benefits as a remedy for the agency's violation of [38 U.S.C. § 4311](#).

¶13 The applicable remedial provision of USERRA, [38 U.S.C. § 4324\(c\)\(2\)](#), provides as follows:

If the Board determines that a Federal executive agency or the Office of Personnel Management [OPM] has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

It is undisputed that when the agency removed the appellant based on his use of military leave, it failed to comply with section 4311, which is a provision of USERRA relating to "employment."⁴ We are therefore required by statute to enter an order requiring the agency to (1) comply with section 4311, and (2) compensate the appellant for any loss of wages or benefits suffered as a result of the wrongful removal action.

¶14 In order to bring itself into compliance with section 4311, the agency must necessarily cancel the removal action it took in violation of that section. The purpose of a Board order canceling an adverse personnel action is to place the

⁴ The agency misquotes the statute as providing a remedy for violations of USERRA provisions "relating to the employment *and* reemployment" of an individual. PFR File, Tab 3 at 17 (emphasis supplied). The statute in fact reads "employment *or* reemployment." [38 U.S.C. § 4324\(c\)\(2\)](#) (emphasis supplied). Hence, it is unnecessary for the appellant to demonstrate a violation of his reemployment rights in order to obtain relief under USERRA. See *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1151 (Fed. Cir. 1999) ("the word 'or' unambiguously signifies alternatives").

appellant as nearly as possible in the status quo ante. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). The effect of cancellation is to render the unlawful action null and void. *Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 258 (1980). Thus, as the administrative judge correctly found, the Board must order the appellant's restoration as of the effective date of the removal.⁵

¶15 The appellant's *reinstatement* is not precluded by our reviewing court's finding that his *reemployment* rights under section 4312 were not violated. Compliance with section 4311 requires reinstatement in this matter, which is separate from reemployment rights pursuant to section 4312. We therefore conclude the appellant's failure to timely apply for reemployment subsequent to December 31, 2005, has no bearing on the remedy for the agency's earlier violation of section 4311.

¶16 We further find the appellant's post-removal military service does not limit the period of time for which the appellant must be reinstated. While the agency was not required to hold the appellant's job for him indefinitely, it is undisputed that the appellant's nonexempted military absences did not exceed the 5-year limit at the time of his removal. *Erickson I*, 571 F.3d at 1369-70. Furthermore, had the appellant completed only the military orders in effect at the time of his removal and not reenlisted, his nonexempted absences would still fall short of the 5-year limit, leaving his employment rights under USERRA intact. *Erickson v. U.S. Postal Service*, MSPB Docket No. AT-3443-07-0016-I-1, Initial Appeal File, Tab 3, Subtab 4I. Neither the court, nor the Board, has concluded that the appellant would have reenlisted had he not been improperly removed. In fact, the appellant has averred in an affidavit that he reenlisted to mitigate the damage

⁵ Contrary to the agency's assertions on petition for review, we find the administrative judge's ruling was well-reasoned and entirely consistent with Board regulations.

caused by the agency's unlawful removal action. RAF, Tab 14, ¶ 5. Moreover, we cannot conclude that, had the appellant not been unlawfully removed, his employment with the agency was bound to have ended at some later date, thereby curtailing the time for which he is entitled to reinstatement. *Cf. Sink v. Department of Energy*, [110 M.S.P.R. 153](#), ¶¶ 21-22 (2008) (where the appellant involuntarily retired in the face of his impending removal for failure to accept a directed reassignment, the appropriate relief was to restore the appellant and provide back pay and benefits from the date of his retirement until the date he would otherwise have likely been separated from service).

¶17 The appellant is also entitled under section 4324(c)(2) to lost wages and benefits suffered as a result of the agency's violation of section 4311. As guidance to the parties, we note that the general provisions of the Back Pay Act do not control the remedy that appellants may receive should they succeed on the merits of their USERRA claims. *Lee v. Department of Justice*, [99 M.S.P.R. 256](#), ¶ 25 (2005). Because a service member is expected to exercise reasonable diligence to mitigate economic damages suffered as a result of an employer's violation of USERRA, the award of lost wages and benefits must be offset by the amount the appellant should have reasonably earned during the relevant period.⁶ *See* 70 Fed. Reg. 75246-01, 75257; *cf. Graham v. Hall-McMillen Co., Inc.*, [925 F. Supp. 437](#), 446 (N.D. Miss. 1996) (interpreting parallel remedial provision of the Veterans' Reemployment Rights Act).

⁶ By contrast, the Back Pay Act does not require that a back pay award be offset by what an employee should have reasonably earned during the relevant period; rather, [5 U.S.C. § 5596](#) requires only that an award of back pay be offset by amounts actually earned by the employee through other employment during the period at issue. *Schultz v. U.S. Postal Service*, [89 M.S.P.R. 123](#), ¶ 8 n.5 (2001).

ORDER

¶18 We ORDER the agency to cancel the removal action and restore the appellant retroactive to the date of his removal. *See Kerr*, [726 F.2d 730](#). The agency must complete this action no later than 20 days after the date of this decision.

¶19 We also ORDER the agency to pay the appellant the correct amount of wages and benefits lost as a result of the removal action, as required under [38 U.S.C. § 4324\(c\)\(2\)](#). We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶20 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶21 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶22 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all

documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶23 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\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.