



April 28, 2014

William D. Spencer  
Clerk of the Board  
Merit Systems Protection Board  
1615 M Street NW  
Washington, DC 20419

Re: Postal Service Comments – MSPB's April 3, 2014 Notice of Proposed Rulemaking

Mr. Spencer:

The U.S. Postal Service submits this comment in response to the Merit Systems Protection Board's April 3, 2014 Notice of Proposed Rulemaking, in which the Board invited public comment on its proposed revision of 5 C.F.R. part 1201. In general, the Postal Service supports the Board's effort to update its regulations and clarify the requirements for establishing jurisdiction over claims and appeals.

Nevertheless, the Postal Service is concerned with the proposed revision's treatment of claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301–35. The Postal Service previously raised these concerns in its response to the Board's November 8, 2013 Notice of Proposed Rulemaking. As the Board's latest revision does not address those concerns, the Postal Service reiterates them here.

The Postal Service understands the latest revision to assign USERRA retaliation and discrimination claims to proposed section 1201.57, while assigning USERRA reemployment claims to proposed section 1201.56. Proposed section 1201.56(a)(3) states that it "does not apply to . . . appeal[s] under [USERRA] in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311." On the other hand, proposed section 1201.57(a)(3) states that it applies to "appeal[s] under [USERRA] in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311." These sections clearly assign USERRA retaliation and discrimination claims to section 1201.57, which requires claimants to prove matters of jurisdiction by non-frivolous allegations. The sections do not, however, explicitly mention USERRA reemployment claims under 38 U.S.C. §§ 4312, 4313, and 4315. Therefore, by implication, they leave those claims to section 1201.56(b), which requires claimants to prove "issues of jurisdiction" by a preponderance of the evidence.<sup>1</sup> This differentiation among USERRA claims is inconsistent with the Board's precedent. Currently, the Board treats all such claims alike for jurisdictional purposes. It permits claimants to establish jurisdiction through non-frivolous allegations, regardless of whether they allege a failure to reemploy, discrimination based on military service, or retaliation based on protected activity.<sup>2</sup>

<sup>1</sup> See *Belhumeur v. Department of Transp.*, 104 M.S.P.R. 408, 410 (2007) ("Under the maxim of statutory interpretation *expressio unius est exclusio alterius*, where, as here, a statute enumerates certain exceptions to a general rule, other unenumerated exceptions are excluded.")

<sup>2</sup> Compare *Silva v. Department of Homeland Sec.*, 112 M.S.P.R. 362, 370 (2009) (failure to reemploy), and *Groom v. Department of the Army*, 82 M.S.P.R. 221, 225 (1999) (same), with *Davison v. Department of Veterans Affairs*, 115

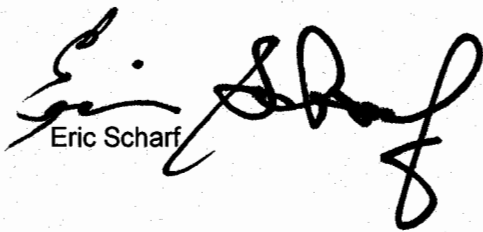
The proposed revision, however, would subject reemployment claims to a different burden of proof than discrimination and retaliation claims.

The Board has not stated that it means to depart from its precedent in this manner, nor has it articulated any basis for doing so. No such basis is apparent in the governing statute. Title 38, section 4324 of the United States Code—which grants the Board jurisdiction over USERRA claims against federal agencies—does not distinguish between claims under § 4311 and those under §§ 4312, 4313, and 4315.<sup>3</sup> Rather, the statute indicates that the Board should treat all such claims alike. It directs the Board to grant relief to a complainant if the Board determines that the agency “has not complied with the provisions of [USERRA] relating to the *employment or reemployment* of [the complainant] by the agency.”<sup>4</sup> Similarly, the Federal Circuit has implied that the Board should not distinguish between different types of USERRA claims, holding that the Board “*shall* adjudicate all USERRA claims brought before it” and “*must* administer the law as Congress wrote it.”<sup>5</sup>

Accordingly, the Postal Service urges the Board to amend its proposed revision to treat all USERRA claims alike for jurisdictional purposes. Alternatively, it encourages the Board to explain its decision to treat such claims differently. It also asks the Board to explain how the revision will affect 5 C.F.R. part 1208, subpart B, which currently governs USERRA appeals before the Board.

We appreciate the opportunity to comment on these matters.

Sincerely,

  
Eric Scharf

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M.S.P.R. 640, 646 (2011) (retaliation), and *Hammond v. Department of Veterans Affairs*, 98 M.S.P.R. 359, 361 (2005) (discrimination).

<sup>3</sup> See 38 U.S.C. § 4324(c)(1) (“The Merit Systems Protection Board shall adjudicate *any* [USERRA] complaint brought before the Board . . . .”) (emphasis added).

<sup>4</sup> 38 U.S.C. § 4324(c)(2).

<sup>5</sup> *Kirkendall v. Department of Army*, 479 F.3d 830, 844 (Fed. Cir. 2007) (emphasis in original) (holding that the Board could not, as a matter of administrative practice, deny USERRA claimants statutorily mandated hearings).