

Trilogy of New Rulings Affects Federal Employees

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The Merit Systems Protection Board (MSPB) recently rendered three precedent-setting decisions that affect federal employees and military Reservists. The decisions involve federal employees who filed an appeal for reimbursement of military leave improperly charged on their nonwork days under *Butterbaugh v. Department of Justice* (336 F.3d 1332, Fed. Cir. 2003), but the decisions could have an effect on all USERRA claims before the MSPB.

The board ruled Feb. 27 in *Garcia v. Department of State*, (2006 MSPB 29, Docket No. DC-3443-05-0216-I-1), that federal employees who are also members of the military Reserves are now entitled to relief prior to the enactment of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Previously, the board had ruled that employees were entitled to relief as far back as Oct. 13, 1994, but they had not ruled on pre-1994 jurisdiction. The State Department had previously argued that federal employees were allowed relief for only six years prior to the date on which they filed their appeal, in accordance with the Back Pay Act and the Barring Act of 1940. However, on July 15, 2005, the MSPB held that neither of those acts applied to USERRA claims, and therefore there was no time limit for filing a claim under USERRA (see *Lee v. Department of Justice*, MSPB, Docket No. SF-3443-05-0162-I-1). Next, the State Department tried to limit the claim to USERRA's 1994 enactment date. However, the board held that if the action would have violated a law in effect before USERRA, the employee could recover damages under USERRA.

The *Garcia* decision not only allows federal employees to seek relief for lost military leave days as far back as 1980, it also allows federal employees more time to produce documentation to support their claims. The decision is extremely important to federal employees who have destroyed their military and civilian documentation. The administrative law judges are now required to allow appellants ample time to locate and produce documentation to support their claims.

The next significant ruling involved the four-year statute of limitations of 28 U.S. Code §1658. That law as amended in 1998 states that, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." In *Harper v. Department of the Navy*, 2006 MSPB 30, the Navy claimed the appellant's case should be dismissed as it was outside the statute of limitations period. The administrative law judge held that the statute did not apply, and the Navy filed an appeal. On Feb. 27, the MSPB held that Congress did not intend for this 1998 amendment to apply to USERRA claims as it was enacted more than four years after USERRA was enacted. To date, the board has repeatedly held that no statute of limitations applies to USERRA claims.

The third significant ruling involved attorney's fees. The Board held that an appellant seeking attorney's fees need not show that he or she is a "prevailing party," nor do the fees need to be warranted in the "interest of justice" (*Jacobsen v. Department of Justice*, 2006 MSPB 26, Docket No. DC-3443-05-0092-A-1). After winning an appeal, the appellant's representative filed a petition for attorney's fees under 38 U.S.C. §4324(c)(4), the USERRA attorney fee provision.

The administrative law judge denied the request for attorney's fees, ruling that 5 U.S.C. §7701(g)(1) applied to petitions for attorney's fees and were not warranted because appellant had failed to satisfy the "prevailing party" and "interests of justice" criteria. The MSPB ruled, however, that the provisions of 38 U.S.C. §4324(c)(4) applied. Instead of a prevailing party requirement, that section says the board must have issued an "order" requiring the agency to correct its violations under USERRA. The board also found no basis for an interest of justice requirement in 38 U.S.C. §4324 and therefore remanded the case to the administrative judge to determine whether and how much in attorney fees should be awarded to the Reservist.

If you are a federal employee and also a military Reservist, you are entitled to relief for military leave that you were charged on your nonwork days during your active duty training periods. You may file a claim under USERRA and are entitled to relief as far back as 1980. As long as you were a federal employee and a military Reservist at the same time and you feel that you were charged military leave on your nonwork days while fulfilling your military obligations, you may file a claim. In addition, there are no time limits for filing your appeal.

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