

LAW REVIEW 761

(November 2007)

1.19: USERRA Enforcement

8.0-Veterans' Preference

37 Years Young

Veterans' Preference Act requires a federal agency to waive maximum age rule.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Robert P. Isabella v. Department of State, Merit Systems Protection Board Aug. 10, 2007.

Robert P. Isabella is a major in the Army Reserve and a member of ROA. In June 2004 he applied for a position as a special agent in the Diplomatic Security Service, part of the U.S. State Department. A State Department rule requires that a special agent not have attained his or her 37th birthday at the time of commencement of service, and MAJ Isabella's 37th birthday was Nov. 8, 2004.

When he applied for the position, MAJ Isabella asked if it were feasible to complete the application process before his upcoming 37th birthday. The State Department personnel officer handling his application initially told him it was feasible for him to complete the application process and report for training before his 37th birthday. After the personnel officer became aware of MAJ Isabella's membership in the Army Reserve, he quickly changed his tune about the feasibility of completing the application process before MAJ Isabella's 37th birthday.

MAJ Isabella testified, under oath, as follows on this issue: "[H]e [the personnel officer] stated that it [completing the application process before the 37th birthday] could be done in the time available when he was under the impression that I had separated from active duty. Indeed, he even stated that I could buy back retirement years from my military service. After he learned that I had a Reserve affiliation rather than separating from the military, ... he stated in a manner that I did not perceive as favorable: 'Oh, you're a Reservist.' He then changed his mind and said that it could not be done."

After MAJ Isabella filed his application, the State Department waited more than two months to start processing it and then dismissed the application as moot. State claimed that the earliest that MAJ Isabella could possibly start, if he were to be accepted, would be Nov. 15, 2004, eight days past his 37th birthday. MAJ Isabella filed a formal complaint with the Merit Systems Protection Board (MSPB), asserting that the State Department had violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Preference Act (VPA).

As I explained in Law Review 189, the MSPB is a quasi-judicial federal agency that adjudicates various kinds of cases involving federal employees and federal agencies, as employers. The MSPB has three members, appointed by the president with Senate confirmation. A case is heard initially by MSPB Administrative Judge (AJ), with appeal to the MSPB itself. Final decisions of the MSPB can be appealed to the U.S. Court of Appeals for the Federal Circuit.

The AJ ruled against MAJ Isabella, and he appealed to the MSPB. The State Department tried to minimize the significance of the statement "Oh, you're a Reservist" that MAJ Isabella attributed to the personnel officer, but the State Department did not offer testimony denying that the personnel officer had made the statement. The MSPB held that "a statement subscribed as true under penalty of perjury, if uncontested, proves the facts it asserts." The Board cited *Woodall v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 271, 273 (1986).

As I explained in Law Review 0721, the VPA is a federal statute enacted in 1944. It provides certain veterans an advantage in securing federal jobs-five points for veterans who participated in campaigns or expeditions while on active duty, and 10 points for seriously disabled veterans. Another section of the VPA [5 U.S.C. 3312(a)(1)] requires federal agencies to waive maximum age rules for preference-eligible applicants unless the maximum age rule is *essential* to the performance of the duties of the position. The MSPB held that this requirement applied to the selection of special agents for the Diplomatic Security Service, and the MSPB rejected the State Department's argument that the age-37 rule was essential.