

LAW REVIEW 827

(June 2008)

CATEGORY: 1.12-Escalator Principle

Returning Veterans & NSPS: DoD's National Security Personnel System generates USERRA complaints.

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The Department of Defense (DoD) has put in place a new personnel system that affords performance-based pay raises to its civilian employees. Yet several DoD employees who are Citizen Warriors and have returned to their positions after serving on active duty say the way the system is being implemented has violated their reemployment rights.

Under the National Security Personnel System (NSPS), a DoD employee's annual pay raise is based in part on his or her annual performance evaluation for the previous year. However, some employees were called to active duty before the NSPS was enacted and were not granted performance-based pay raises upon reemployment because they had performed no duties for DoD since NSPS was enacted. When DoD implemented the NSPS, it gave no consideration to how the new system would apply to DoD civilian employees who had been called to active duty while under the old system and who would return to work under NSPS.

LtGen Dennis M. McCarthy, USMC (Ret.), ROA's executive director, brought this issue to the attention of DoD officials, and they responded quickly and effectively to his concerns. DoD officials have stated that the mobilized Reserve Component member who returns to DoD civilian employment and who did not complete the minimum period of civilian service during the NSPS rating period will receive, as an evaluation for that period, a rating based on the employee's last NSPS rating or the modal rating received by other employees in the peer group, whichever is more favorable to the returning employee. If a DoD civilian employee completes enough civilian service during the rating period to be rated, the employee's performance objectives (on which the rating is based) will be adjusted to recognize that the employee was not present for work for the entire rating period.

In NSPS or any other personnel system, a returning veteran who meets the Uniformed Services Employment and Reemployment Rights Act (USERRA) eligibility criteria is entitled, upon reemployment, to the rate of pay he or she would have achieved, with reasonable certainty, if he or she had remained continuously employed. At a minimum, the returning veteran should receive, for the period away from work for service, the pay raise that goes with performance in the median range of the performance scale.

The rate of pay upon reemployment is hugely important because it exponentially affects all future pay raises. Let us assume Joe Smith returns to work on Jan. 1, 2009, at an annual salary of \$60,000; but if Mr. Smith had not been called to the colors in 200708, his 2009 salary would have been \$62,000. Let us assume he works 20 more years before retiring, and that each year he receives a 4 percent pay raise. Over the 20-year period, the \$2,000 loss in 2009 salary costs Mr. Smith \$64,081.94.

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). (Please see Law Review 0803 at www.roa.org/law_review for a comprehensive discussion of the *Fishgold* case.) Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current statute.

The returning veteran who meets the USERRA eligibility criteria and is reemployed is entitled to a promotion, pay raise, or other benefit if it is *reasonably certain* he or she would have received the promotion, pay raise, or benefit if he or she had remained continuously employed in the civilian job. "A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. *The employee does not have to establish that he or she would have received the benefit as an absolute*

certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.” 20 C.F.R. 1002.213 (emphasis supplied).

“If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, *merit increases*, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee’s own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. *For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed.*” 20 C.F.R. 1002.236(a) (emphasis supplied).

DoD is committed to ensuring that the DoD employee who has been called to the colors will not suffer in his or her performance evaluation or pay raise because of uniformed service.