LAW REVIEW[1] 09021
May 2009

Federal Circuit Again Reverses the MSPB for Ignoring Rights of Veterans

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

8.0—Veterans' Preference

***Gingery v. Department of Defense,* 550 F.3d 1347 (Fed. Cir. 2008).**

MAJ Mathew Tully, NYARNG, and I have reported in Law Reviews 189, 0614, 0722, 0726, 0729, and 0752 (all available at www.roa.org/page/lawcenter) that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has repeatedly reversed the Merit Systems Protection Board (MSPB) in cases under the Uniformed Services Employment and Reemployment Rights Act (USERRA) when the MSPB has failed to construe USERRA liberally for the benefit of those who leave civilian jobs to serve in our nation's armed forces, as Congress intended and the Supreme Court has commanded. ["This legislation is to be liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).] This most recent *Gingery* decision shows that the same

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

pattern applies to cases arising under the Veterans' Preference Act (VPA) and the Veterans' Employment Opportunities Act (VEOA).

The MSPB is a quasi-judicial federal agency. It adjudicates cases involving disputes between federal civilian employees and federal agencies (as employers) under many different federal laws, including USERRA, the VPA, and the VEOA. The Federal Circuit is a specialized federal appellate court located here in our nation's capital. It has nationwide jurisdiction as to certain kinds of appeals, including appeals from MSPB decisions.

The VPA is a federal law enacted in 1944. Under that law, a veteran who served in a campaign or expedition for which a medal was awarded receives a five-point preference in obtaining federal civilian employment. A veteran with a service-connected disability rated at 30 percent or greater receives a ten-point preference.

As I explained in Law Review 0850 (October 2008), the VEOA is an imperfect attempt by Congress to put some teeth into the VPA, which has become something of a dead letter in recent years. A veteran who claims that a federal agency has violated the VPA in the veteran's case may complain to the Veterans' Employment and Training Service of the U.S. Department of Labor (DOLVETS). The complaint to DOLVETS must be in writing and must be made within 60 days of the personnel action about which the veteran complains.

If DOLVETS finds the veteran's complaint to have merit, it so advises the veteran and the agency in writing and then makes "reasonable efforts" to persuade the federal agency to come into compliance. Federal agencies usually ignore DOLVETS' efforts, because there is nothing that DOLVETS can do if its "reasonable efforts" are not successful.

DOLVETS also investigates complaints that employers (federal, state, local, or private sector) have violated USERRA. If DOLVETS concludes that a federal agency has violated USERRA, DOLVETS refers the matter to the Office of Special Counsel (OSC). If OSC agrees that the agency violated USERRA, OSC can bring an action (on behalf of the aggrieved veteran) in the MSPB. See 38 U.S.C. 4324(a)(2). Congress should amend the VEOA to provide for a similar referral process for VPAVEOA cases. Under current law, if DOLVETS concludes that the VPA claim has merit but the federal agency employer has refused to come into compliance, the aggrieved veteran must retain private counsel to initiate an action in the MSPB.

Stephen W. Gingery is a veteran with a service-connected disability rated at 30 percent or more—he is entitled to the VPA ten-point preference. He applied for a position in the Defense Contract Audit Agency (DCAA) through the Federal Career Intern Program (FCIP). Individuals can be hired for career federal employment through "competitive service" (involving scored examinations) or through "excepted service." Federal law authorizes the president to "prescribe rules governing the competitive service" and those rules "shall provide, as conditions of good administration warrant, for ... necessary exceptions of positions from the competitive service." 5 U.S.C. 3302(1).

In recent decades, the "exceptions" of the excepted service have largely swallowed the "general rule" of the competitive service. In 2000, President Clinton created the FCIP by promulgating Executive Order 13,162, 65 Fed. Reg. 43,211 (July 6, 2000). The Executive Order delegated to the Office of Personnel Management (OPM) the responsibility for promulgating implementing regulations for the FCIP. Under the OPM regulations, a federal agency is permitted to use a "category rating" system instead of the more traditional "numerical rating" system. The regulations provide that "an agency must make its selection [hiring] from the highest available preference category, as long as at least three candidates remain in that category. When fewer than three candidates remain in the highest category, consideration may be expanded to include the next category." 5 C.F.R. 302.401(a).

When Mr. Gingery applied for a position at the DCAA, he found himself alone in Category 1, based on his ten-point preference as a disabled veteran. There were no candidates in Category 2 or Category 3, and there were six candidates in Category 4 (non-veterans). A review panel of DCAA supervisors did not recommend Mr. Gingery for a second interview, and the agency selected two candidates from Category 4.

When a federal agency chooses to pass over a preference-eligible veteran and select a non-veteran, it must follow certain passover procedures. Federal law requires that "if an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with [OPM] for passing over the preference eligible" and obtain OPM's permission for the passover. 5 U.S.C. 3318(b)(1).

If the preference-eligible individual being passed over has a service-connected disability rated at 30 percent or more (as in Mr. Gingery's case), "the authority shall at the same time it notifies [OPM] under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons thereof, and of his right to respond." 5 U.S.C. 3318(b)(2).

Under certain circumstances, the OPM authority to give permission for the passover of a preference-eligible veteran can be delegated to an official of the appointing agency. If the individual being passed over has a service-connected disability rated at 30 percent or more, the OPM approval authority cannot be delegated. 5 U.S.C. 3318(b)(4).

The requirements set forth above apply to appointments in the federal competitive service. For the excepted service, on the other hand, OPM has enacted a passover regulation that provides less procedural protection for the preference-eligible veteran. See 5 C.F.R. 302.401(b). Because the FCIP is part of the excepted service, DCAA did not comply with the more stringent requirements when passing over Mr. Gingery. DCAA did not notify Mr. Gingery that he was being passed over and give him the opportunity to respond, and a DCAA official (not OPM) gave DCAA permission to pass over Mr. Gingery.

Mr. Gingery made a timely complaint to DOLVETS. After DOLVETS failed to resolve the matter, Mr. Gingery made a timely appeal to the MSPB. The administrative judge of the MSPB found

that the greater procedural protections for passed over preference-eligible veterans did not apply in the excepted service. Mr. Gingery filed a timely appeal to the MSPB itself, which affirmed the judge's decision. Mr. Gingery then filed a timely appeal to the Federal Circuit.

The Federal Circuit reversed the MSPB, holding that Congress has required that the passover protections for preference-eligible veterans in the competitive service also apply to the excepted service, citing 5 U.S.C. 3320. The Federal Circuit invalidated the OPM regulation that held that the protective procedures applicable to the competitive service could be watered down in the excepted service. I hope that the Federal Circuit will continue to come down hard on federal agencies (including OPM and the MSPB) that flout the employment rights of veterans.

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