

LAW REVIEW¹ 09071

Federal Circuit Reserves the MSPB Yet Again – When Will They Ever Learn?

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

8.0—Veterans' Preference

Marshall v. Department of Health & Human Services, 587 F.3d 1310 (Fed. Cir. 2009).

A case decided earlier this month is just the latest example of the United States Court of Appeals for the Federal Circuit reversing the Merit Systems Protection Board (MSPB) in Veterans Employment Opportunities Act (VEOA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) cases when the MSPB is not sufficiently attuned to the requirement to construe these laws liberally for the benefit of those who serve or have served in our nation's armed forces. In Law Reviews 189 (Sept. 2005), 191 (Sept. 2005), 0614 (June 2006), 0722 (May 2007), 0729 (June 2007), 0747 (Sept. 2007), 0752 (Oct. 2007), 0755 (Oct. 2007), 0850 (Oct. 2008), 0901 (Jan. 2009), 0904 (Jan. 2009), and 0937 (Oct. 2009), Major Mathew Tully and I have summarized Federal Circuit cases reversing the MSPB for being

¹I 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.

²BA 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.

insufficiently pro-veteran in USERRA and VEOA cases. *Marshall v. Department of Health & Human Services* is the latest example of this phenomenon.

The Federal Circuit is a specialized federal appellate court here in our nation's capital. It is on the same level as the First through Eleventh Circuits and the District of Columbia Circuit, but it has a different sort of jurisdiction. While the other Courts of Appeals have geographical jurisdictions, the Federal Circuit has nationwide jurisdiction over certain kinds of cases, including appeals from final decisions of the Merit Systems Protection Board (MSPB).

The MSPB is a quasi-judicial federal executive agency created by the Civil Service Reform Act of 1978. The MSPB adjudicates cases involving federal employees, former federal employees, and applicants for federal employment who have disputes with federal executive agencies under many different laws, including the VEOA and USERRA. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. A case is heard initially by an Administrative Judge (AJ) of the MSPB, who conducts a hearing and makes findings of fact, conclusions of law, and a decision. The decision can be appealed to the MSPB itself, and the MSPB's decision can be appealed to the Federal Circuit.

In 2004, Raymond Marshall (a veteran rated 20% service-connected disabled) applied for a Budget Analyst GS-13 position at the Centers for Disease Control (CDC), an operating division of the Department of Health & Human Services (HHS). The CDC interviewed him and found him to be a "strong candidate" but did not select him, purportedly because of a hiring freeze. The CDC then wrongfully removed Mr. Marshall's name from the consideration list and selected Roberta Beach for the position. She was a non-veteran and was rated lower than Mr. Marshall. HHS failed to seek and obtain the permission of the Office of Personnel Management (OPM) before passing over a qualified veteran (Mr. Marshall) to hire a non-veteran (Ms. Beach), as required by 5 U.S.C. 3318(b)(1). To "remedy" the violation, HHS moved Ms. Beach into another position, "considered" Mr. Marshall for the position, and decided not to fill the position. The MSPB approved of this arrangement.

Mr. Marshall appealed the MSPB's decision to the Federal Circuit, and the court reversed and chastised the MSPB: "Section 3330c states that the MSPB 'shall order the agency to comply with [the violated] provisions.' 5 U.S.C. 3330c. The MSPB interpreted this language as requiring HHS to reconstruct the selection process. Although reconstruction may be an appropriate way to comply in situations where it is unknown whether a veteran would have been selected for a position, the record here is clear regarding what would have happened absent the violation. HHS would have selected Mr. Marshall for the Budget Analyst position. Thus, there is no need for a manufactured reconstruction process."

The Federal Circuit summarized its holding as follows: "We conclude that the MSPB abused its discretion in dismissing Mr. Marshall's petition for enforcement because the MSPB's decision was based on an erroneous interpretation of 5 U.S.C. 3330c. When an agency violates a veteran's preference rights during selection in the competitive service and when it is undisputed that the agency would have selected the veteran for the position sought but for the

violation, section 3330c requires the agency to offer the same—or, as near as possible, a substantially equivalent—position to the veteran. Under section 3330c, the veteran is also entitled to receive compensation for any loss of wages or benefits suffered by reason of veterans' preference rights violation involved. Accordingly, the final decision of the MSPB is reversed and remanded.”

Our nation is suffering the worst recession since the Great Depression, and the national unemployment rate has soared into double digits. For many reasons, including unlawful discrimination against those who have served in our armed forces and may be called back for further service, veterans under the age of 30 are suffering from an unemployment rate that is substantially higher than the rate for non-veterans in the same age cohort. Federal employment rolls are being expanded, and many current federal employees are reaching retirement age. The Federal Government is one of the very few major employers that is currently hiring. Accordingly, enforcement of veterans' preference in federal hiring is important, now more than ever.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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