

LAW REVIEW 1087

USERRA Forbids Discrimination in Initial Employment

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

1.1.1.8—USERRA Applicability to Federal Government

1.2—USERRA-Discrimination Prohibited

1.4—USERRA Enforcement

***Arroyo v. United States Postal Service*, Docket No. DC-4324-10-0407-I-1 (Merit Systems Protection Board October 16, 2010).**

This case is another great victory for enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) by the Office of Special Counsel (OSC). In announcing this result, Associate Special Counsel William E. Reukauf said: "OSC is committed to ensuring that the Federal Government serves as a 'model employer' under USERRA, as Congress intended. We are pleased that we were able to achieve a positive result for Mr. Arroyo, and we will continue to do the same for other veterans whose rights have been violated."

OSC is an independent investigative and prosecutorial agency created by the Civil Service Reform Act of 1978 (CSRA). Its principal mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices, especially retaliation for whistle blowing. USERRA, enacted in 1994 to replace a 1940 law, expanded the OSC's mission to include enforcement of USERRA with respect to federal executive agencies, as employers, by representing USERRA claimants in cases before the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency also created by the CSRA.

MSPB cases go to an Administrative Judge (AJ) of the MSPB, who conducts a trial and reaches findings of fact and conclusions of law. The losing party can appeal to the MSPB itself, which sits here in Washington. The MSPB has three Members, each of whom is appointed by the President with Senate confirmation. The MSPB's decision can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in Washington.

Felix J. Arroyo served on active duty in the Army from July 1998 until December 2005, when he was honorably discharged after service that included service as a Special Agent for the Army's Criminal Investigation Division. In January 2004, in anticipation of his upcoming release from active duty, he applied for a Postal Inspector position with the Postal Inspection Service of the United States Postal Service (USPS). In his application, he indicated that he was on active duty in the Army and would be available to begin work for the USPS upon his release from active duty.

Arroyo was found qualified for the position, and on March 16, 2005 the USPS appointed him a Postal Inspector, effective April 16, 2005, when he was to begin Basic Inspector Training Class 2005-01. Arroyo had believed that the Army would release him early, in time for him to attend this class, but the early release was not forthcoming, probably because of the ongoing national emergency created by the terrorist attacks of September 2001 and the invasion of Iraq in March 2003.

When it became clear that Arroyo could not attend the April 16 class, the USPS wrote to him on April 5, 2005. The letter frankly acknowledged that the USPS was withdrawing the job offer *because* Arroyo was not available to start on April 16 and that his unavailability was *because* of his Army obligations. AJ Daniel Madden Turbitt concluded that withdrawing the job offer violated section 4311(a) of USERRA, 38 U.S.C. 4311(a).

Arroyo is very similar to *McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006), both as to the underlying facts and as to the outcome. Mr. McLain was leaving active duty when he applied for a position

on a local police force in Somerville, Massachusetts. His release from active duty was delayed, and he missed the start date of the police academy class for which he was scheduled. The city then canceled its job offer, and McLain sued. The court held that withdrawing the job offer violated section 4311 of USERRA.

It is not yet clear whether the USPS will appeal the AJ's decision to the MSPB itself. We will keep the readers informed of developments.