

LAW REVIEW¹ 11003

The MSPB Is Finally Catching On

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

1.1.1.8—USERRA Applicability to Federal Government

1.4—USERRA Enforcement

8.0—Veterans’ Preference

Dean v. Office of Personnel Management, 2010 MSPB 213 (Merit Systems Protection Board Nov. 2, 2010).

In a front-page article dated Dec. 26, 2010, the *Washington Post* reported that, partly as a result of this case, the President will eliminate the Federal Career Intern Program (FCIP). The *Post* reported: “President Obama plans to issue an executive order, perhaps as early as this week, ending a federal internship program that critics say circumvents proper hiring practices. Since it began in 2001, the Federal Career Intern Program has been used to hire more than 100,000 people—few of them interns as traditionally understood ... The program has drawn fire from federal employee unions and from the government board that oversees federal hiring practices, which ruled in November that the program undermined the rights of veterans, in

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.

particular, who were seeking federal work.” Joe Davidson, “Obama plans to shut down federal internship program,” *Washington Post* Dec. 26, 2010, pages A1 and A6.

The Merit Systems Protection Board (MSPB) is a quasi-judicial federal agency created by the Civil Service Reform Act of 1978 (CSRA). The MSPB adjudicates cases involving disputes between federal civilian employees and federal agencies, as employers, under many different statutes. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) gave the MSPB jurisdiction to adjudicate claims that federal agencies had violated the reemployment rights of federal employees, former federal employees, and applicants for federal employment. The Veterans Employment Opportunities Act of 1998 (VEOA) gave the MSPB jurisdiction to adjudicate claims that federal agencies have violated the veterans preference rights of federal employees and applicants, under the Veterans Preference Act of 1944 (VPA).

The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. An MSPB case is heard initially by an Administrative Judge (AJ) of the MSPB. The AJ conducts a trial and then makes findings of fact and conclusions of law, and orders relief if appropriate. Either party may appeal to the MSPB itself, which sits here in Washington, DC.

The final MSPB decision can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions. The Federal Circuit has a long and distinguished history of reversing the MSPB for being insufficiently pro-veteran in USERRA and VEOA cases. Please see Law Reviews 67, 91, 151, 159, 189, 0614, 0637, 0722, 0726, 0729, 0747, 0752, 0755, 0764, 0826, 0826 Update, 0850, 0901, 0901 Update, 0904, 0921, 0927, 0937, 0958, and 1028. With two new members since January 2009, the MSPB finally seems to be catching on, and the *Dean* case is a good illustration of this favorable development.

I invite the readers’ attention to www.roa.org/law_review. You will find more than 750 articles, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which dates back to 1940. In its first case applying the VRRA, the Supreme Court held: “This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *See also Boone v. Lightner*, 319 U.S. 561, 575 (1943) (requiring similar liberal construction of the Soldiers’ and Sailors’ Civil Relief Act). The Federal Circuit has taken seriously the Supreme Court’s command to construe liberally laws enacted for the benefit of those who serve or have served in response to the nation’s call.

David Dean is a preference-eligible veteran with a 30% service-connected disability. He made a broad complaint that the Office of Personnel Management (OPM) and federal agencies generally use the FCIP to circumvent the VPA. Because FCIP vacancies are not generally posted

on “USA Jobs” or another website available to the general public, Dean and similarly situated veterans are unable to apply for those vacancies. Dean “alleged that federal agencies frequently post FCIP vacancy announcements on web sites that are accessible only to students and alumni of particular colleges, and that agencies send recruiters to college job fairs, who make appointments under FCIP ‘on the spot.’ The appellant [Dean] alleged that as a result of such practices he and other veterans are being shut out of job opportunities.”

In a unanimous decision, the three-member MSPB agreed with Dean’s claims and ordered OPM to reform the FCIP to bring it into compliance with the VPA and the VEOA. It appears that the Obama Administration is complying with this MSPB order by eliminating the FCIP altogether. We will keep the readers informed of new developments on this important issue.

Update – May 2022

On December 27, 2010, President Obama signed the Executive Order 13562 entitled “Recruiting and Hiring Student and Recent Graduates.”³ The effective date was March 1, 2011.⁴ The Executive Order authorized Pathways to, in part, replaced FCIP.⁵ Pathways consists of three components: Internship Program, Recent Graduate Program, and Presidential Management Fellows Programs.⁶ Access to each program depends on one’s current academic or professional status.⁷

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This article is one of 1800-plus “Law Review” articles available at <https://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.

³Exec. Order No. 13562, 3 C.R.F. 13563 (2010).

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷*See id.*

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.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002