

# **LAW REVIEW 13097**

## **July 2013**

### **What Is a “Title 38 Employee?”**

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

**1.1.1.8—USERRA applies to Federal Government**

**1.2—USERRA forbids discrimination**

**1.4—USERRA enforcement**

**1.8—Relationship between USERRA and other laws/policies**

**Q: I work for the United States Department of Veterans Affairs (VA) as a physician, and I have worked for the VA for several years. I am also a physician in the Medical Corps of the Army Reserve. Several times in recent years, I have been involuntarily called to active duty by the Army, and on other occasions I have gone on active duty voluntarily. I have had bitter disputes with my civilian VA supervisors about my Army Reserve activities—they continually harass me about my military service and try to pressure me to quit the Army Reserve.**

**Recently, the VA fired me. The personnel office told me that I cannot appeal to the “MSPB” because I am a “title 38” employee rather than a “title 5” employee. What is the MSPB? What is a title 38 employee? Is it true that I have no appeal rights concerning the firing?**

**A:** The MSPB is the Merit Systems Protection Board, a quasi-judicial federal agency created by the Civil Service Reform Act of 1978 (CSRA). The CSRA split the former Civil Service Commission (CSC)<sup>1</sup> into three agencies. The Office of Personnel Management (OPM) inherited the CSC’s multifarious administrative functions and most of the employees and budget. The MSPB inherited the CSC’s adjudicative functions, and it gained new adjudicative functions under federal statutes enacted after 1978. The Office of Special Counsel (OSC) inherited the investigative and prosecutorial functions of the CSC.

The MSPB has three Members, each of whom is appointed by the President with Senate confirmation. The MSPB has its headquarters here in Washington and has regional offices all over the country. Administrative Judges (AJs) at the regional offices hear and adjudicate cases. The AJ conducts a hearing, which is almost as formal as a trial in federal court. The AJ makes findings of fact and conclusions of law. The losing party at the AJ level can appeal to the MSPB

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<sup>1</sup> The CSC dates from the late 19<sup>th</sup> Century. It was established in order to eliminate the “spoils system” in federal employment and to institute a “merit system” whereby federal employees would be selected, trained, supervised, and (when necessary) disciplined or removed based on merit principles, rather than political considerations.

itself. The final decision of the MSPB can be appealed to the United States Court of Appeals for the Federal Circuit.<sup>2</sup>

“Title 5” and “title 38” refer to two of the 49 titles (broad subject areas) of the United States Code (U.S.C.). Title 5 relates to federal civilian employment, while title 38 relates to benefits for veterans. The vast majority of federal employees, including most VA employees, are “title 5” employees. Section 7401 of title 38 (38 U.S.C. 7401) provides that the VA may appoint physicians and certain other professionals without regard to general civil service laws and regulations, and these employees are referred to as “title 38” employees.

When a non-probationary<sup>3</sup> title 5 employee is fired or suspended without pay for 15 days or more, he or she can appeal to the MSPB. Hearing these appeals constitutes the great bulk of the MSPB caseload. While the vast majority of firings and suspensions are affirmed, the MSPB can and does award relief to fired or suspended employees who can show that the firing or suspension was unlawful or fundamentally unfair.

A title 38 employee cannot appeal a firing or suspension to the MSPB, except in the most unusual circumstances. If the fired or suspended employee is claiming that the firing or suspension violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), such a claim can be made in and adjudicated by the MSPB, in accordance with section 4324 of USERRA, 38 U.S.C. 4324. That section provides as follows:

**“(a)**

**(1)** A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

**(2)**

**(A)** If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

**(B)** Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

**(i)** make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

**(ii)** notify such person in writing of such decision.

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<sup>2</sup> The Federal Circuit is a specialized federal appellate court that sits here in Washington and has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from MSPB decisions.

<sup>3</sup> Federal employees in the first year of their federal civilian employment are considered probationary and are generally precluded from appealing firings and suspensions without pay to the MSPB.

**(b)** A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

**(1)** has chosen not to apply to the Secretary for assistance under section 4322(a);

**(2)** has received a notification from the Secretary under section 4322(e);

**(3)** has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

**(4)** has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

**(c)**

**(1)** The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

**(2)** If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

**(3)** Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

**(4)** If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

**(d)**

**(1)** A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

**(2)** Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.”

38 U.S.C. 4324.

As I explained in Law Review 104<sup>4</sup> and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally

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<sup>4</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 919 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a

enacted in 1940, as part of the Selective Training and Service Act (STSA).<sup>5</sup> USERRA applies to essentially all employers in this country, including the Federal Government, the states and their political subdivisions (counties, cities, school districts, etc.), and private employers, regardless of size.<sup>6</sup>

In accordance with section 4323 of USERRA (38 U.S.C. 4323), a USERRA case against a state or local government or private employer can be initiated in United States District Court—in any district where the employer maintains a place of business. In accordance with section 4324, a USERRA case against a federal agency (as employer) can only be brought in the MSPB.

You can contest the lawfulness of your firing by filing an MSPB appeal alleging that the VA violated section 4311 of USERRA by firing you. Section 4311 provides as follows:

**“(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

**(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person

**(1)** has taken an action to enforce a protection afforded any person under this chapter,

**(2)** has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

**(3)** has assisted or otherwise participated in an investigation under this chapter, or

**(4)** has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

**(c)** An employer shall be considered to have engaged in actions prohibited—

**(1)** under subsection (a), if the person’s membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer’s action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

**(2)** under subsection (b), if the person’s

**(A)** action to enforce a protection afforded any person under this chapter,

**(B)** testimony or making of a statement in or in connection with any proceeding under this chapter,

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detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012, and we have already added another 97 so far in 2013.

<sup>5</sup> The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

<sup>6</sup> Only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations like the World Bank and the United Nations (on diplomatic immunity grounds) are exempt from USERRA enforcement.

(C) assistance or other participation in an investigation under this chapter, or  
(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.  
(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311 (emphasis supplied).

To prevail in your USERRA case in the MSPB, you must establish by a preponderance of the evidence that your membership in the Army Reserve, your performance of service (which necessitates absences from your civilian job and perhaps inconveniences your civilian employer), and/or your obligation to perform future service were *a motivating factor* in the VA's decision to fire you. You need not prove that your military service and obligations were *the sole reason* that you were fired.

A motivating factor is a reason that was considered, even if there were other reasons. Let us imagine the VA decision-maker being asked, at the moment of decision, for the reasons you were fired, and the decision-maker answering truthfully and citing 15 reasons, one of which was your Army Reserve service. In that situation, your Army Reserve service was *a motivating factor* in the decision to fire you.

You need not have a "smoking gun" or an admission by a VA official that your Army Reserve service motivated the firing. You can prove your case by circumstantial as well as direct evidence. One factor that is critical in many section 4311 cases is *proximity in time* between your exercise of USERRA rights and the employer decision to take an adverse personnel action, such as a firing. For example, if the decision to fire you was made shortly after you returned from a period of military service or shortly after you gave notice of an upcoming period of service, that proximity in time could go a long way in helping you prove your case.

If you prove that your Army Reserve service was a motivating factor in the employer's decision to fire you, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to *prove* (not just say) that you would have been fired anyway, even in the absence of your Army Reserve service and obligation.

In making your case at the MSPB, you need to keep in mind that this is not a standard MSPB appeal case. Because you are a title 38 employee and not a title 5 employee, the MSPB does not have general jurisdiction to review the fairness and appropriateness of your firing. The MSPB will overturn the firing only if you can show that the firing violated USERRA—that the firing was motivated at least in part by your Army Reserve service.