LAW REVIEW[1] 16006
January 2016

New Appellate Case on Veterans' Preference

By Cheri L. Cannon[2] & Captain Samuel F. Wright, JAGC, USN (Ret.)[3]

1.8—Relationship between USERRA and other laws/policies
8.0—Veterans' preference

***Dean v. Department of Labor*, 808 F.3d 497 (Fed. Cir. 2015).**

During World War II, Congress enacted several important laws to show our nation's gratitude to those who were serving or would in the future serve our country in the military and to assist veterans in their transition from active service to civilian life. One of those World War II era

[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]Cheri L. Cannon, Esq. is a partner at Tully Rinckey PLLC. She concentrates her practice in federal sector labor and employment law. She received her BA from the University of California Santa Barbara and her JD from Georgetown University Law Center (GULC). She has two decades of experience in the Federal Government, including extensive experience as a senior attorney and member of the Senior Executive Service. Among other senior federal positions, she was the chief counsel to the chairman of the Merit Systems Protection Board.

[3]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.

laws is the Veterans' Preference Act (VPA). Under the VPA, a veteran of wartime[4] military service qualifies for a five-point veterans' preference, and a disabled veteran qualifies for ten points. The VPA is based on a model of federal employment that is rare today. When Congress enacted the VPA in 1944, the usual way of getting a federal job was by taking a written examination, with a numerical score, to which five points or ten points could be easily added. Today, such examinations are unusual, and federal agencies routinely flout the VPA and usually get away with it due to issues such as the difficulties with mathematical scoring.

Congress enacted the Veterans Employment Opportunities Act (VEOA) to provide an enforcement mechanism for VPA claims. If you believe that a federal agency has violated your VPA rights with respect to initial hiring or a promotion opportunity, you must file a written complaint within 60 days with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency is required to investigate your complaint. If DOL-VETS finds your complaint to have merit, it is required to make "reasonable efforts" (whatever that means) to get the federal agency to comply with the law. But the DOL-VETS determination is not binding on the agency. Federal agencies can and usually do tell DOL-VETS to "pound sand."

If DOL-VETS fails to resolve your VPA complaint, you must then bring your own action at the Merit Systems Protection Board (MSPB). The DOL-VETS determination in your favor is not binding and not even admissible. You must prove your case, without reference to the DOL-VETS findings. Yes, this is a screwy enforcement mechanism, but this is what Congress has enacted in the VEOA.

As to the case in point, David Dean is a veteran and is unarguably entitled to the five-point preference. He applied for a "Recent Graduate Wage & Hour Specialist" position at the United States Department of Labor (DOL), but was not selected. Under this "Recent Graduate" program established by a presidential executive order, an applicant needs to have received a degree or certificate from a qualifying educational institution within the last two years, or within the last six years for certain veterans. Dean was not considered for the position because he received his degree more than six years before he applied for the position at issue.

After filing a VEOA complaint with DOL-VETS and waiting for that agency to investigate, Dean filed a complaint with the MSPB, asserting that DOL had violated his VPA rights. Dean brought this action at MSPB on a *pro se* basis, meaning that he acted as his own attorney. We certainly do not recommend proceeding on a *pro se* basis as these issues quickly become complicated and emotions can get the best of even the most stoic *pro se* litigant. Abraham Lincoln once said,

---

[4]For purposes of the VPA, we as a nation have been considered to be in "wartime" since August 2, 1990, when President George H.W. Bush declared a national emergency, based on the Iraqi invasion and occupation of Kuwait. That national emergency has not been terminated by any subsequent President, but it will be terminated someday. When our nation is at "peace," a veteran must serve in a campaign or expedition to qualify for the five point veterans' preference.

"A man who represents himself has a fool for a client." And the law is much more complicated today than it was during Lincoln's lifetime.

The MSPB ruled against Dean, both on jurisdictional grounds and on the merits. Dean filed a *pro se* appeal with the Federal Circuit. The three-judge panel of the Federal Circuit held (contrary to the MSPB) that the MSPB did have jurisdiction over Dean's complaint, but the panel affirmed on the merits the MSPB determination that Dean's VPA rights were not violated.

In this case was the issue of two of the types of federal service most commonly entered. The federal civil service consists of, amongst others, the "competitive service" and the "excepted service."[5] The competitive service consists of those employees holding positions that are filled by competitive examinations with numerical scores. The excepted service consists of those employees holding positions for which the Office of Personnel Management (OPM) has decided to dispense with the competitive examination. Attorneys in the federal service are one of the most prevalent types of excepted service employees for instance. In recent decades, the "exception" has largely swallowed the "general rule" and most federal jobs are in the excepted service.

The VPA applies to both the competitive service and the excepted service, but the application is much more meaningful in the case of the competitive service, when there is an examination and an objective numerical score is used to rate and rank applicants. For example, Mary Jones is a veteran and is entitled to the five-point preference. She took the exam and scored 89. Joe Smith, who is not a veteran, scored 90 and had the highest score that cycle. Mary's 89 beats Joe's 90 when the five veterans' preference points are added.

Now let's do an example in the excepted service. Mary's veterans' preference is a "plus factor." But if the agency wants to hire Joe they just say "we considered Mary's veteran status as a plus factor, but that plus factor was overcome by Joe's substantially better qualifications." Federal hiring officials make a mockery of veterans' preference by falsely claiming to have given "due consideration" to the "plus factor" When they really did not do so at all.

Section 3302 of title 5 of the United States Code provides:

> The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—
> (1) *necessary exceptions of positions from the competitive service;* and
> (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title.[6]

Section 3308 provides:

---

[5]There are also other kinds of appointments such as senior executive, non-career and the like, which were not at issue in this opinion.

[6]5 U.S.C. § 3302 (emphasis supplied).

> The Office of Personnel Management or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Office decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Office shall make the reasons for its decision under this section a part of its public records.[7]

Under the VEOA, redress through the MSPB is limited to violations by Agencies "under any statute or regulation *relating to veterans' preference.*"[8] In *Dean*, the MSPB held that: "By establishing competitive-service hiring as the norm, section 3302(1) is intrinsically connected to veterans' preference rights in that it ensures that such rights are not circumvented or ignored." This means that section 3302(1) is a statute that relates to veterans' preference and the MSPB has jurisdiction under section 3330a(a)(1)(A). The Federal Circuit panel upheld this MSPB holding.

The Federal Circuit panel decision includes the following paragraphs:

> The government next argues that the context and structure of the VEOA bolster its position, noting that the VEOA defines the term "veterans' preference requirement" and "expressly identifie[s] a list of the statutes and types of regulations that qualify as a 'veterans' preference requirement' for purposes of the VEOA." Appellee's Br. 14; *see* VEOA § 6, 112 Stat. 3182, 3187-88 (codified at 5 U.S.C. § 2302(e)(1)). Because § 3302(1) is not included in that list of "veterans' preference requirements," the government argues that it is not a statute "relating to veterans' preference." This argument is not persuasive.
>
> The phrase "relating to veterans' preference" in § 3330a is broader in scope on its face than a "veterans' preference requirement" as defined in § 2302(e)(1). Nothing in the text of § 3330a or the VEOA suggests that a "statute . . . relating to veterans' preference" is limited to a "veterans' preference requirement" as defined in § 2302(e)(1). To the contrary, § 2302(e)(1) specifically defines "veterans' preference requirement" for the purpose of § 2302 only. 5 U.S.C. § 2302(e)(1) ("For the purpose of this section, the term 'veterans' preference requirement' means any of the following provisions of law . . . ."). Congress used broader language in § 3330a ("relating to veterans' preference") to delimit the scope of complaints that could be brought by preference-eligible veterans under the VEOA.
>
> While we agree that statutes "relating to veterans' preference" may include the statutes enumerated in § 2302(e)(1), we do not find it appropriate to restrict the scope of statutes "relating to veterans' preference" under § 3330a to only the "veterans'

[7] 5 U.S.C. § 3308.
[8] 5 U.S.C. § 3330a(a)(1)(A) (emphasis supplied).

> preference requirements" enumerated in § 2302(e)(1). *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (recognizing "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" (internal quotation marks omitted)); *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1389 (Fed. Cir. 2013) ("A cardinal doctrine of statutory interpretation is the presumption that Congress's 'use of different terms within related statutes generally implies that different meanings were intended.'" (quoting 2A Norman Singer, *Statutes and Statutory Construction* § 46.06 (7th ed. 2007))). Congress could have listed the statutes "relating to veterans' preference" for the purpose of § 3330a—just as it listed the "veterans' preference requirements" for the purpose of § 2302—but it did not do so. The government's attempt to limit the scope of § 3330a to the "veterans' preference requirements" of § 2302 is inconsistent with broader language used by Congress in § 3330a.

Section 3308 of title 5 forbids OPM to establish an educational degree requirement for eligibility for a federal position, except in limited circumstances. Dean argued that the eligibility criteria for the “Recent Graduate” program amounted to an unlawful degree requirement. The MSPB held that section 3308 is not a statute that “relates to veterans’ preference” and that the MSPB had no jurisdiction to adjudicate this part of Dean’s case. As appellee in the Federal Circuit, DOL argued for this jurisdictional holding, but the Federal Circuit panel overruled the MSPB on this issue. Reaching the merits of Dean’s complaint, the panel agreed with the MSPB that the eligibility criteria for the “Recent Graduate” program were not unlawful.

Dean was not successful in his action on his particular case, but he did manage to bring about some good law on the broad interpretation of MSPB jurisdiction in veterans’ preference cases. There are a few things to note: First, except in extremely limited circumstances, veterans’ preference applies only to hiring actions. It does not protect you from removal for misconduct or performance or exempt the veteran from other actions the federal government takes with respect to its employees. It is a leg up for hiring, nothing more.

As well, do not confuse the VPA and VEOA with the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA applies to almost all employers, including the Federal Government, the states, the political subdivisions of states, and private employers. Section 4311 of USERRA makes it unlawful for an employer to discriminate in employment (including initial employment) based on an individual’s membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service. Section 4311 does not require employers to grant *preferences* to employees or applicants based on past or present service, but section 4311 does not outlaw such preferences. USERRA also accords the right to *reemployment* with accrued seniority and pension credit to a person who leaves a job for service and who meets the USERRA eligibility conditions.