

LAW REVIEW 17040¹

April 2017

With only one Remaining Member, the MSPB is Constrained

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Update on Sam Wright

1.4—USERRA enforcement

As I have explained in Law Review 17009 (February 2017) and other articles, the Merit Systems Protection Board (MSPB) has important responsibilities regarding enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA). A federal employee, former federal employee, or unsuccessful applicant for federal employment who claims that his or her USERRA rights were violated by a federal executive agency can file an appeal with the MSPB, and the MSPB will adjudicate the appeal.³ In the MSPB, the USERRA claimant can be represented by the United States Office of Special Counsel (OSC), or the claimant can retain private counsel. It is also possible for the claimant to represent himself or herself.

The MSPB is an independent, quasi-judicial agency in the Executive Branch of the Federal Government. It was created by the Civil Service Reform Act of 1978. USERRA, enacted in 1994, added to the MSPB's jurisdiction and responsibilities.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² 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. I have 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 more than 34 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 through ROA at (800) 809-9448, extension 730, or SWright@roa.org. Please understand that I am a volunteer, and I may not be able to respond the same day.

³ 38 U.S.C. 4324.

The MSPB has three Members—a Chairman, a Vice Chairman, and a Member. They are appointed by the President with Senate confirmation and serve staggered seven-year terms. Chairman Susan Tsui Grundmann resigned her position in January 2017. Her term expired in March 2016, and she was serving as a holdover.

The one remaining Member is Mark A. Robbins. He was appointed by President Obama in December 2011 and confirmed by the Senate in April 2012. His term expires in March 2018.⁴

The MSPB needs at least two Members to adjudicate cases and take other actions. I call upon President Trump to act swiftly in making appointments to the MSPB, and I call upon the Senate to act swiftly in confirming the President's appointees.

⁴ When a Member is appointed to fill a vacancy in an unexpired term, he or she serves only for the remainder of that unexpired term.