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Logjam at MSPB Continues

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.4—USERRA enforcement

Q: In Law Review 17114 (November 2017) and Law Review 18017 (February 2018), you reported that the Merit Systems Protection Board (MSPB) has ground to a halt because only one of the three MSPB positions is currently filled by a member who has been appointed by the President and confirmed by the Senate and at least two members are needed to decide a case. Has that problem been resolved?

A: No, the problem has not been resolved. President Trump has made nominations for all three vacancies,[3] but the Senate has not yet acted on the nominations and will not act during the remaining days of the 115th Congress (2017-18). It will be necessary for the President to nominate these three individuals again at the start of the 116th Congress (January 2019). We will keep the readers informed of progress on this important issue.

The MSPB was created by the Civil Service Reform Act of 1978, and the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 added important new responsibilities to the MSPB, concerning enforcement of USERRA against federal executive agencies as employers.[4] All MSPB cases, including USERRA cases, begin before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. The AJ's decision becomes the decision of the MSPB unless either party

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[1] Please see www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, 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 1400 of the articles.

[2] BA, 1973, Northwestern University; JD, 1976, University of Houston; LLM, 1980, Georgetown University. I served in the Navy and Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and for six years (June 2009 through May 2015) I was employed by ROA as the Director of the Service Members Law Center. Since my paid ROA employment ended, I have continued writing new "Law Review" articles as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3] The one remaining member completed his five-year term 3/1/2018. The MSPB's organic law provides that a member who has been confirmed by the Senate can remain in office for up to one year after the expiration of his or her term, if no replacement has been nominated and confirmed. If the Senate fails to act on nominations by 3/1/2019 the MSPB will have no members.

[4] See section 4324 of USERRA, 38 U.S.C. 4324.

(the individual appellant or the federal agency) files a timely appeal with the MSPB itself. The appellant, but not the agency, can appeal the final MSPB decision to the United States Court of Appeals for the Federal Circuit.[5]

The MSPB has a Chairman, a Vice-Chairman, and a Member. The Chairman and Vice-Chairman must be members of the same political party as the President, and the Member must be of the other major political party. President Trump has nominated Dennis Dean Kirk of Virginia for Chairman, Andrew F. Mauz of Ohio for Vice-Chairman, and Julia Akins Clark of Maryland for Member. When the Senate confirms these three individuals, hopefully in January 2019, the MSPB will start addressing the considerable backlog of appeals that has accumulated since January 2017, when the MSPB lost its quorum.

For further information, please see the MSPB website.[6]

[5] The Federal Circuit is a federal appellate court that sits in Washington, DC and has nationwide jurisdiction as to certain kinds of cases, including appeals of MSPB decisions.
[6] *See* www.mspb.gov.