

## Appellate Review of MSPB Decisions on USERRA

By CAPT Samuel F. Wright, JAGC, USNR\*

Our federal court system consists of three levels. At the trial level, there are 93 United States District Courts. (Most districts have more than one sitting judge.) Each state has at least one district, and most of the larger states have two or more.

Appeals from Federal District Courts go to the United States Court of Appeals for the appropriate circuit. There are 11 numbered circuits plus the District of Columbia Circuit. Of course, the pinnacle of our federal court system is the United States Supreme Court.

The 11 numbered circuits and the District of Columbia Circuit have *geographical* jurisdictions. For example, Virginia is in the Fourth Circuit. An appeal from the United States District Court for the Eastern District of Virginia goes to the United States Court of Appeals for the Fourth Circuit, in Richmond, Virginia.

In addition to the 11 numbered circuits and the District of Columbia Circuit, there is one other federal appellate court—at the same level, but with a different kind of jurisdiction. That court is called the United States Court of Appeals for the Federal Circuit. That court's jurisdiction is described by subject matter, rather than by geography.

Congress created the Federal Circuit in 1982, merging the former Court of Claims and the Court of Customs and Patent Appeals. The Federal Circuit's jurisdiction includes the review of final decisions of the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency created by the Civil Service Reform Act of 1978. The MSPB decides USERRA cases involving federal executive agencies as employers, and the MSPB decides many other kinds of cases involving federal employees.

The Federal Circuit is not shy about reversing the MSPB in re-employment rights cases, if the MSPB does not construe this statute liberally, for veterans, as Congress intended and the Supreme Court has commanded.

I invite the reader's attention to *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993). In that case, the Federal Circuit overruled an MSPB decision for the Department of Veterans Affairs and against a veteran.

Henry P. Nichols was the GS-13 "Chief, Chaplain Services" at the Brockton/West Roxbury VA Medical Center. Nichols gave advance notice and left his civilian job to serve a three-year active duty tour in the Air Force, from February 1989 to February 1992.

After Nichols left, the department appointed another chaplain (Walsh) to the position on a permanent basis. In October 1991, four months before his scheduled release from active duty, Nichols wrote to the department to inform it of his intention to leave active duty in February 1992 and to seek restoration to his position at Brockton, Massachusetts.

The Federal Circuit rejected the department's arguments that it was not required to displace Walsh in order to re-employ Nichols. "The department first argues that, in this case, Nichols' former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him."

When he returned from active duty, Nichols was re-employed at the VA facility in Brockton, Massachusetts, but not in the "chief" position that he had held previously. The Federal Circuit rejected the department's argument that Nichols' new position was of "like status" to his former position. "The board [MSPB] erred in its conclusion that the status of Nichols' new position is like that of his former one. The Chief position is one with clear responsibilities. The incumbent is responsible for supervising and managing a staff of chaplains in their 'regular chaplain duties.' These regular duties are well defined by precedent and guidelines developed over time. In contrast, Nichols' current position carries a broad variety of new responsibilities that are nebulously defined, mostly because of the unique and untested nature of the position itself. Therefore, while, as Chief, Nichols was in a position of clearly understood responsibility and objectives and was familiar with the criteria by which his success was to be judged, his new position lacks any such predictability, and success, or what will be perceived as success, is difficult if not impossible for him to ascertain."

Very recently, the Federal Circuit reversed the MSPB on another USERRA issue. The MSPB had held that appellant and USERRA claimant John E. Kirkendall was not entitled to a hearing before an administrative judge of the MSPB because, in the MSPB's view, there was "no material issue of fact." The Federal Circuit did not mince words in reversing the MSPB on this point. "The board's reasoning defies common sense and contradicts its own regulations. First, the vast majority of cases heard by the board, and subject to Section 7701, are 'appeals' of employment decisions, disciplinary or

otherwise, made in the first instance by an agency. ... These cases do not involve a lower tribunal, such as a district court, yet they clearly involve an initial decision maker distinct from the board. In the same way, USERRA claims originate when an agency makes an employment decision (e.g., refuses to hire a veteran). Regardless of the fact that Section 4324 [of USERRA] uses the term 'complaint,' these employment decisions are then appealed to the board for review. More troubling, however, is the board's interpretation of Sections 4324 and 7701 as providing less procedural protection to veterans who have potentially been victimized than to employees who have been discharged for misconduct. To the contrary, this reasoning is a gross misinterpretation of the purpose of USERRA. For these reasons, section 7701 applies to USERRA cases. Consequently, veterans pursuing USERRA claims before the board are entitled to a hearing." *Kirkendall v. Department of the Army*, 2005 U.S. App. Lexis 11927 (Fed. Cir. June 22, 2005).

It would appear, based on these and other cases, that the veteran claiming rights under USERRA has a reliable friend in the Federal Circuit, but not necessarily in the MSPB. If you lose a USERRA case at the MSPB, you should seriously consider appealing to the Federal Circuit, because that court is not shy about reversing the MSPB.

*\*Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.*