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Important 2018 Supreme Court Case on SEC ALJs— What Does it Mean for MSPB AJs?

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

1.1.1.8—USERRA applies to the Federal Government
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Lucia v. Securities & Exchange Commission,* 138 S. Ct. 2044 (2018).**

The Constitutional provision

The United States Constitution provides:

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1700 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. 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.

> He [the President] … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *officers of the United States,* whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such inferior Officers, as they [the Congress] think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[3]

For purposes of this provision, called the "Appointments Clause," there are three categories of federal employees and officials. The first, called "Officers of the United States," are appointed by the President and must be confirmed by the Senate. The second, called "inferior Officers," are appointed by the President, by a federal court, or by the Head of a Department of the Federal Government.[4] The third category, making up the great majority of federal employees, are "mere employees" who do not require appointment by a high-level official or court.

The Securities and Exchange Commission

The Stock Market Crash of 1929 quickly turned into the Great Depression. Congress enacted the Securities Exchange Act of 1934, creating the Securities & Exchange Commission (SEC), an independent federal agency that is responsible for enforcing that Act, the Securities Act of 1933, the Trust Indenture Act of 1940, the Investment Advisors Act of 1940, the Sarbanes-Oxley Act of 2002, and other statutes. The SEC has three missions:

a. Protect investors.
b. Maintain fair, orderly, and efficient markets.
c. Facilitate capital formation.

The SEC is led by five Commissioners, each of whom is appointed by the President with Senate confirmation. The term is five years and can be extended by an additional period of up to 18 months in case of a vacancy.

At the time the *Lucia* case arose, the SEC had five Administrative Law Judges (ALJs), and they were appointed by the SEC staff, not the Commissioners. The ALJs conduct hearings and make findings of fact and conclusions of law that can be appealed to the Commission itself. If the Commission decides not to hear a case, the ALJ's decision becomes the decision of the SEC.

The *Lucia* Case

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[3] United States Constitution, Article II, section 2, clause 2 (emphasis supplied). Yes, it is capitalized just that way, in the style of the late 18th Century.

[4] The Secretary of Defense is an example of a "Head of Department."

The SEC charged investment advisor Raymond Lucia and his firm with violating the Investment Advisors Act. The SEC assigned the case to Administrative Law Judge Cameron Elliott, one of five SEC ALJs who had been appointed by the SEC staff. Judge Elliott found Lucia guilty as charged, ordering him to pay a $300,000 civil penalty and barring him for life from participating in the securities industry. After the hearing, the SEC Commissioners ratified the appointment of Elliott and the other four SEC ALJs.

Lucia appealed to the SEC itself and then to the United States Court of Appeals for the District of Columbia Circuit, but both affirmed Judge Elliott's decision. Elliott applied to the Supreme Court for certiorari (discretionary review), which the Court granted because there was a conflicting decision in another circuit. The Court held:

a. The appointment of Elliott and the other four ALJs by the SEC staff violated the Appointments Clause of the United States Constitution.
b. The violation was not cured by the subsequent ratification of the appointment of Elliott and the other SEC ALJs by the Commission itself.
c. The appropriate remedy was a remand to the SEC, along with a commandment that, on remand, Lucia's case should be assigned to a different AlJ.

Justice Elena Kagan wrote the Opinion of the Court and was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito. The other four Justices concurred in the result and made various statutory and constitutional arguments. In her scholarly opinion, Justice Kagan wrote:

> The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, §2, cl. 2. And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. See Brief for Petitioners 15; Brief for United States 38; Brief for Court-Appointed *Amicus Curiae* 21. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. *Buckley v. Valeo,* 424 U.S. 1, 126 n. 162 (*per curiam*). For if that is true, the Appointments Clause cares not a whit about who named them. *See United States v. Germaine,* 99 U.S. 508, 510 (1879).
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> Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or

temporary" rather than "continuing and permanent." *Id.,* at 511-512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.,* at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U.S. at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments. See Brief for *Amicus Curiae* 14 (contending that an individual wields "significant authority" when he has "(i) the power to bind the government or private parties (ii) in her own name rather than in the name of a superior officer"); Reply Brief for United States 2 (countering that an individual wields that authority when he has "the power to bind the government or third parties on significant matters" or to undertake other "important and distinctively sovereign functions"). And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag v. Commissioner,* 501 U.S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court. *Id.,* at 873. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. See *id.,* at 871, n. 1 After conducting a 14-week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ's work as the opinion of the Tax Court. See *id.,* at 872. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court's STJs are officers, not mere eemployees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. See 501 U.S. at 881. They serve on an ongoing, rather than a "temporary [or] episodic[,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code. *Ibid.* The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. 501 U.S. at 881. In addressing that issue, the Government had

argued that STJs are employees, rather than officers, in all cases (like the one at issue) in which they could not "enter a final decision." *Ibid.* But the Court thought the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." *Ibid.* Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.,* at 881-2. And the Court observed that "[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion." *Id.,* at 882. That fact meant they were officers, even when their decisions were not final.

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. *See id.,* at 881. Indeed, everyone here—Lucia, the Government, and the *amicus*—agrees on that point. See Brief for Petitioners 21; Brief for United States 17-18, n. 3; Brief for *Amicus Curiae* 22, n. 7. Far from serving temporarily or episodically, SEC ALJs "receive[ ] a career appointment." 5 C.F.R. 930.204 (2018). And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag,* 501 U.S. at 881; see 5 U.S.C. 556-557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag,* 501 U.S. at 881. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. See *Butz,* 438 U.S. at 513. *Supra,* at 2. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." 501 U.S. at 881. More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. 17 C.F.R. 201.111(c), 200.14(a)(4). See 5 U.S.C. 556(c)(4). Second, the ALJs (like STJs) "conduct trials." 501 U.S. at 882. See 201.111(c). As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. 201.111(c); see sections. Third, the ALJs (like STJs) "rule on the admissibility of evidence." 501 U.S., at 882.; see sections 201.200.14(a)(1), (a)(7), *supra,* at 2. They thus critically shape the administrative record (as they also do when issuing document subpoenas). Seesection 201.111(b). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." 501 U.S., at 882. In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. See §201.180(a)(1). So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. 501 U. S., at 873, 111 S. Ct. 2631, 115 L. Ed. 2d 764; see *supra,* at 7. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. See §201.360(b); *supra,* at 2. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. See 501 U.S., at 882. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." ; see *supra,* at 2. That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

The *amicus* offers up two distinctions to support the opposite conclusion. His main argument relates to "the power to enforce compliance with discovery orders"—the fourth of *Freytag*'s listed functions. 501 U. S., at 882, 111 S. Ct. 2631, 115 L. Ed. 2d 764. The Tax Court's STJs, he states, had that power "because they had authority to punish contempt" (including discovery violations) through fines or imprisonment. Brief for *Amicus Curiae* 37; see *id.,* at 37, n. 10 (citing 26 U. S. C. §7456(c)). By contrast, he observes, the Commission's ALJs have less capacious power to sanction misconduct. The *amicus*'s secondary distinction involves how the Tax Court and Commission, respectively, review the factfinding of STJs and ALJs. The Tax Court's rules state that an STJ's findings of fact "shall be presumed" correct. Tax Court Rule 183(d). In comparison, the *amicus* notes, the SEC's regulations include no such deferential standard. See Brief for *Amicus Curiae* 10, 38, n. 11.

But those distinctions make no difference for officer status. To start with the *amicus*'s primary point, *Freytag* referenced only the general "power to enforce compliance with discovery orders," not any particular method of doing so. 501 U.S., at 882. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission's ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. See section 201.180(a)(1)(i); *supra,* at 9. Similarly, if the offender is an attorney, the ALJ can "[s]ummarily suspend" him from representing his client—not something the typical lawyer wants to invite. §201.180(a)(1)(ii). And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in

line. Contrary to the *amicus*'s view, all that is enough to satisfy *Freytag*'s fourth item (even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer).

And the *amicus*'s standard-of-review distinction fares just as badly. The *Freytag* Court never suggested that the deference given to STJs' factual findings mattered to its Appointments Clause analysis. Indeed, the relevant part of *Freytag* did not so much as mention the subject (even though it came up at oral argument, see Tr. Of Oral Arg. 33-41). And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. The Commission has repeatedly stated, as it did below, that its ALJs are in the "best position to make findings of fact" and "resolve any conflicts in the evidence." App. to Pet. for Cert. 241a (quoting *In re Nasdaq Stock Market, LLC*, SEC Release No. 57741, 2008 SEC LEXIS 957 (Apr. 30, 2008)). (That was why the SEC insisted that Judge Elliot make factual findings on all four allegations of Lucia's deception. See *supra,* at 3.) And when factfinding derives from credibility judgments, as it frequently does, acceptance is near-automatic. Recognizing ALJs' "personal experience with the witnesses," the Commission adopts their "credibility finding[s] absent overwhelming evidence to the contrary." App. to Pet. for Cert. 241a; *In re Clawson*, SEC Release No. 48143, 56 S.E.C. 584, 2003 SEC LEXIS 1598 (July 9, 2003). That practice erases the constitutional line the *amicus* proposes to draw.

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. See *supra,* at 5. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder* v. *United States*, 515 U. S. 177, 182-183, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188, 115 S. Ct. 2031, 132 L. Ed. 2d 136. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[5]

The Merit Systems Protection Board

On its website, the Merit Systems Protection Board (MSPB) describes itself as follows:

> The Merit Systems Protection Board is an independent, quasi judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. TheCSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board.
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> The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel (OSC) which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although originally established as an office of the Board, the OSC now functions independently as a prosecutor of cases before the Board. (In July 1989, the Office of Special Counsel became an independent Executive branch agency.)
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> For an explanation of your rights as a Federal employee, and for an in-depth review of the Board's jurisdiction and adjudication process, please review the MSPB publication, An Introduction to the MSPB.
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> The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. More about MSPB can obtained from MSPB's Strategic Plan . MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.

[5] *Lucia,* 138 S. Ct. at 2051-56.

A federal employee *who has completed the initial year of federal civilian employment* and who has been fired or suspended without pay for 15 days or more can appeal the firing or suspension to the MSPB.[6] Hearing appeals of firings and suspensions, from federal employees or former employees who have completed the initial year of federal employment, constitutes the bulk of the work of the MSPB. Prior to 1978, the bulk of the adjudicatory work of the CSC was adjudicating appeals of firings and suspensions of federal employees who had completed their initial probationary periods.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[7] and President Bill Clinton signed it on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA applied to the Federal Government, as an employer, but the VRRA lacked a specific enforcement mechanism with respect to federal agencies as employers. If a federal employee could otherwise bring his or her claim to the MSPB or the CSC (prior to 1978), but MSPB or CSC would adjudicate the VRRA claim, but if the VRRA claimant had no appeal right to the MSPB or CSC there was no remedy for a VRRA violation by a federal agency as employer.

One of the big improvements made in 1994 was to provide a specific enforcement mechanism for USERRA claims against federal executive agencies as employers. Section 4324 of USERRA provides:

> § 4324. Enforcement of rights with respect to Federal executive agencies
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> - **(a)**
>   - **(1)** A person who receives from the Secretary 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--

[6] 5 U.S.C. 7511(a)(1)(A).
[7] See footnote 2.

        - **(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.

- **(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.[8]

USERRA (enacted in 1994) did not create the MSPB—that agency was created 16 years earlier (1978) by the CSRA. But USERRA greatly expanded the jurisdiction, authority, and responsibility of the MSPB, to include adjudicating claims that federal executive agencies (as employers) have violated USERRA and awarding appropriate relief in cases where violations have been found.

The MSPB's jurisdiction under section 4324 of USERRA is not limited to cases that are otherwise appealable to the MSPB, because the fired employee had completed the initial year of federal civilian employment before the firing. USERRA provides a workable enforcement mechanism for all persons who claim and can establish that a federal executive agency has violated USERRA. This includes persons (like you) who cannot otherwise get to the MSPB because they have not completed the initial year of federal civilian employment. This also includes employees, former employees, and unsuccessful applicants for employment with non-appropriated fund instrumentalities (NAFIs) of the Federal Government.[9]

The MSPB also has jurisdiction in a case where a federal executive agency is the joint employer of a person who is directly employed by a federal contractor and where the federal agency as joint employer has violated USERRA.[10]

Brigadier General (BG) Michael J. Silva, USAR (a life member of ROA and later ROA's National President) was the named appellant in the case of *Silva v. Department of Homeland Security*.[11] From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, BG Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.
In May 2006, BG Silva was called to active duty and deployed to Iraq. He was released from active duty in August 2007, and he made a timely application for reemployment with SPS and

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[8] 38 U.S.C. 4324.
[9] By far the largest NAFI is the Army & Air Force Exchange Service (AAFES). Prior to the enactment of USERRA in 1994, AAFES routinely flouted the VRRA, knowing that there was no remedy available for persons whose VRRA rights were violated by AAFES. Please see Law Review 15064 (July 2015).
[10] *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (Merit Systems Protection Board September 23, 2009). I discuss this case in detail in Law Review 0953 (October 2009).
[11] See footnote 7.

DHS. Although he met the eligibility criteria for reemployment under USERRA,[12] he was not reemployed.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS from its obligation to reemploy Mr. Silva.[13] In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this was apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value.

As I explained in Law Review 154 (December 2004), and as the Department of Labor (DOL) USERRA regulations provide,[14] it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation, and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense-he was not a federal civilian employee.

In accordance with MSPB rules, Mr. Silva's case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. On

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[12] As I have explained in Law Review 15116 (December 2015) and other articles, a person must meet five simple conditions to have the right to reemployment under USERRA. The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the person's limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military and must have made a timely application for reemployment after release from service. It is clear beyond any question that Mr. Silva met these five conditions in August 2007.

[13] *See Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

[14] 20 C.F.R. 1002.37.

September 23, 2009, the MSPB agreed with OSC and found that it had jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. On remand, the case settled. DHS made a substantial payment (of an undisclosed amount) to Mr. Silva to settle his claim against DHS.

Title 5 of the United States Code provides as follows concerning MSPB proceedings:

> The Board [MSPB] may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title *or other employee of the Board designated to hear such cases,* except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party and to the Office of Personnel Management.[15]

Applying the *Lucia* precedent to the MSPB

The MSPB employees who hear and decide cases, subject to appeal to the Board itself, are attorneys and are called "administrative judges" or "AJs." They are recruited, selected, and hired in the same way that federal civil service employees generally are recruited, selected, and hired. They are not appointed by the head of the agency—the MSPB Members themselves, acting collectively. The functions and powers of AJs at the MSPB are comparable to those of the SEC ALJs and the Tax Court Special Trial Judges (STJs). The way that MSPB AJs are selected and appointed is unconstitutional. A federal employee or former federal employee who lost a case decided by an unconstitutionally appointed AJ is entitled to a new hearing before a different administrative judge who has been constitutionally appointed.[16]

[15] 5 U.S.C. 7701(b)(1) (emphasis supplied).

[16] The party must have preserved the error by objecting at the AJ level, by appeal to the MSPB itself, and by appeal to the United States Court of Appeals for the Federal Circuit.