

LAW REVIEW¹ 19098

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Logjam at the MSPB—When Will it ever End?

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[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

Q: In Law Review 17114 (November 2017), Law Review 18017 (February 2018), and Law Review 18096 (September 2018), you addressed the problems created by the lack of a quorum on the Merit Systems Protection Board (MSPB). Has that problem been resolved?

A: No. That problem has only gotten worse. I invite your attention to the MSPB website, where the following set of “frequently asked questions” appears:

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.

1. How are the 3 Board members appointed?

Board members are nominated by the President and confirmed by the Senate. The Chairman is separately nominated by the President and confirmed by the Senate. The Vice Chairman is designated by the President. The Board members serve 7-year staggered terms. See 5 U.S.C. §§ 1201 and 1202; 5 C.F.R. § 1200.2.

The Board currently has no sitting members. Prior to March 1, 2019, the Board operated for over two years without a quorum. Board members Anne M. Wagner and Susan Tsui Grundmann left on March 1, 2015, and January 6, 2017, respectively. Board Member Mark A. Robbins, who served most recently as Vice Chairman of the Board, served as the sole Board member from January 7, 2017, through February 28, 2019, when his statutory term ended.

2. What is the impact of a lack of quorum and Board members on MSPB operations?

As to the executive leadership of the Board, MSPB General Counsel Tristan Leavitt has assumed the responsibilities for the executive and administrative functions vested in the Chairman in accordance with MSPB's continuity of operations plan.

As to the adjudicatory authorities of the Board, because there are no Board members, the Board is unable to issue final decisions on petitions for review. See generally 5 U.S.C. § 1204(a); 5 C.F.R. § 1200.3.

3. Can administrative judges (AJs) issue initial decisions when there is a lack of Board quorum or Board members?

Yes, AJs may and have continued to issue initial decisions since the lack of quorum began, pursuant to longstanding delegated authority. If neither party files a petition for review to the MSPB, the AJ's decision will become the final decision of the Board and may be appealed to an appropriate court or tribunal. See 5 U.S.C. § 7703. If either party files a petition for review to the MSPB, a Board decision cannot be issued until a quorum of at least two Board members is restored.

4. Can the Board issue decisions on petitions for review without a quorum or Board members?

Petitions for review received before January 7, 2017, and for which the voting process was not completed before the Board lost a quorum, cannot be issued until a quorum is restored.

Petitions for review received after January 7, 2017, have been acknowledged by the Office of the Clerk of the Board and processed according to current Board procedures. However, the Board cannot issue decisions on these petitions until a quorum is restored. General information about

the number of pending petitions for review since the lack of quorum began is available in the e-FOIA Reading Room of MSPB's website.

5. Can the Board issue decisions on requests to withdraw petitions for review?

Yes. Pursuant to the May 11, 2018 Policy Regarding Clerk's Authority to Grant Requests to Withdraw Petitions for Review, and the Board's 2011 Manual on Organization Functions and Delegations of Authority, the Clerk of the Board may exercise its delegated adjudicatory authority to "grant a withdrawal of a petition for review when requested by a petitioner."

6. How are appellants advised of their administrative appellate review or judicial options during the period in which there are no sitting Board members?

A party's administrative and/or judicial appeal rights will continue to be listed at the end of every initial decision. If the appellant, the agency, or both file a petition for review, it will be acknowledged and processed by the Board, as explained above. The petition for review filing deadlines will not be tolled (i.e., stopped) during any lack of quorum. This means that parties to a case who wish to file a petition for review must do so within 35 days of issuance of the initial decision, as required by the Board's adjudicatory regulations at 5 C.F.R. § 1201.114. However, the Board cannot issue a decision until a quorum is restored by the nomination and confirmation of at least two Board members.

If neither party to a case files a petition for review, the AJ's initial decision will become the final decision of the Board. An appellant may choose to exercise his or her review rights, which may include an appeal to the U.S. Court of Appeals for the Federal Circuit, U.S. District Court, an appropriate circuit court of appeal, or the Equal Employment Opportunity Commission, depending on the type of appeal and claims raised. See 5 U.S.C. § 7703.

The parties are informed of the current Board lack of quorum and members in initial decisions, and in acknowledgment notices issued by the Office of the Clerk of the Board, if either or both parties file a petition for review with the Board.

7. When does the Board anticipate having a quorum restored?

While it is not possible to determine exactly when the quorum will be restored, two nominations (to serve as Chairman and Member of the Board) are pending before the Senate. As explained in #1 above, after the President nominates Board members, they must be confirmed by the Senate before they can be sworn in as Board members.

8. Has the Board previously experienced a lack of quorum?

Yes. The Board was briefly without a quorum in 2003.

9. Has the Board previously experienced a lack of any sitting members?

No.

10. How will the parties know when a quorum is present?

We will post information on the MSPB website, issue a press release, and place an announcement on Twitter. We may communicate this information in other ways, as appropriate.

11. Is there a point of contact for other questions?

For further information, please contact the Office of the Clerk of the Board via email to mspb@mspb.gov or via phone at 202-653-7200. Additional information about the Board's organizational structure can be found on the website at www.mspb.gov, in its agency plans and annual reports, and in its current "Organization Functions and Delegations of Authority."

Q: I have a case pending at the MSPB. I won at the Administrative Judge level, and the agency appealed to the MSPB, in 2018. I am tired of waiting for justice. What can I do to expedite the reestablishment of a quorum on the MSPB?

A: President Trump has nominated Dennis Dean Kirk to be the Chairman of the MSPB, B. Chad Bungard to be Vice Chairman, and Julia Akins Clark to be the other Member. Please write to your two United States Senators and implore them to schedule a confirmation vote for these three nominees and to vote to confirm them. Ask your friends and relatives to do likewise. Readers: Please communicate with your United States Senators on this important issue.

Q: What is the backlog of cases at the MSPB awaiting the reestablishment of a quorum of members?

A: More than 2500 cases are pending and cannot be decided until the MSPB has at least two members confirmed by the Senate. If it is determined that the MSPB's Administrative Judges were unconstitutionally appointed, the backlog could be much greater.³

³ Please see Law Review 19098, the immediately preceding article in this "Law Review" series.