

LAW REVIEW¹ 22038

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Good News: The MSPB Finally Has a Quorum.

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

Good news! As of 3/3/2022, the Merit Systems Protection Board (MSPB) has a quorum—two of the three positions are filled by Presidential nominees who have been confirmed by the Senate. The MSPB can now act on appeals from decisions made by the Administrative Judges (AJs) of the MSPB. For more than five years, from 1/7/2017 until 3/3/2022, the MSPB did not have a quorum and could not act on petitions to review AJ decisions.

The MSPB has three positions, two of which are currently filled. The Board has a Chair and a Vice Chair, who are to be of the President's political party, and a Member, who is to be of the

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

other major party. The three members must be nominated by the President and confirmed by the Senate, and they serve staggered seven-year terms. When the seven-year term of a confirmed member expires, the member can serve an overtime period of up to one year or until a new member is nominated and confirmed, whichever occurs first.

The last time that the MSPB had a full complement was during the Obama Administration. The Vice Chair, nominated by President Obama and confirmed by the Senate, left office in 2015. The Chair, also nominated by President Obama and confirmed by the Senate, left office on 1/7/2017, when her seven-year term and her one-year overtime period expired. That left one Republican Member. His seven-year term expired in March 2018 and his one-year overtime period in March 2019. For almost three years, the MSPB was without members, but the work of the Board continued.

President Trump nominated three highly-qualified persons for the three MSPB vacancies, but the Senate never acted on those nominations during President Trump's term in office. After he was inaugurated on 1/20/2021, President Biden nominated three different highly qualified persons for the three vacancies. He nominated Cathy Harris to be Chair, Raymond Limon to be Vice Chair, and Tristan Leavitt to be the Member.

On 3/2/2022, the Senate confirmed the nominations of Raymond Limon and Tristan Leavitt, and they were sworn in on 3/3/2022. The nomination of Cathy Harris is still pending in the Senate.

The quorum for the MSPB to act on petitions for review of MSPB AJ decisions is two confirmed members, and the Board now has a quorum. If Limon and Leavitt split 1-1 on a case, that will amount to an affirmation of the AJ's decision, and the AJ's decision will become the decision of the MSPB.

The MSPB is a quasi-judicial executive agency of the Federal Government. The Board adjudicates claims that Federal agencies, as employers, have violated many Federal laws. One of those laws is the Uniformed Services Employment and Reemployment Rights Act (USERRA). The MSPB adjudicates claims that Federal executive agencies, as employers, have violated USERRA.³ Those claims can be made by Federal employees, former Federal employees, and unsuccessful applicants for Federal employment.

All MSPB cases, including MSPB USERRA cases, start before an AJ of the MSPB. The losing party at the AJ level, either the individual petitioner or the Federal agency respondent, can appeal the AJ's decision to the MSPB itself. If the individual petitioner loses at the MSPB level, he or she

³ See 38 U.S.C. § 4324.

can appeal the unfavorable MSPB decision to the United States Court of Appeals for the Federal Circuit, but the Federal agency cannot appeal from the MSPB to the Federal Circuit.⁴

If the individual petitioner loses at the AJ level, he or she can wait 35 days, and then the decision of the AJ becomes the decision of the MSPB, and the petitioner can appeal to the Federal Circuit.⁵

Now that the MSPB has a quorum (two confirmed members), it can start reviewing AJ decisions that have been appealed to the Board itself, but the two members (hopefully joined soon by a third) will likely concentrate first on the backlog of more than 4,000 pending cases, before reviewing any new cases.

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This article is one of 2,000-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight⁶ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and

⁴ See 38 U.S.C. § 4324(d)(1); 5 U.S.C. § 7703.

⁵ See Law Review 21027 (April 2021).

⁶ Congress recently established the United States Space Force as the 8th uniformed service.

eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁷

Here is a link to the notice on the MSPB website:

https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_4_2022.pdf

UPDATE—5/26/2022

On 5/25/2022, the Senate voted 48-46 to confirm the nomination of Ms. Cathy A. Harris to be the Chair of the Merit Systems Protection Board (MSPB). The Board is now back up to full strength for the first time since 2015.

⁷ You can also donate on-line at our website, www.roa.org.