UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 29

Docket No. DC-3443-05-0216-I-1

Marc A. Garcia,

Appellant,

v.

Department of State,

Agency.

February 27, 2006

Gregory T. Rinckey, Esquire, Albany, New York, for the appellant.

Thomas H. Alphin, Jr., Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision denying his request for corrective action. For the reasons stated below, we GRANT the petition, VACATE the initial decision, and DISMISS the appellant's appeal without prejudice to its refiling.

BACKGROUND

¶2 Under 5 U.S.C. § 6323, federal employees are to be given up to 15 days of paid leave a year to attend training sessions required of them as members of military reserves or the National Guard. Until this section was amended in 2000,

the Office of Personnel Management (OPM) interpreted this provision as providing 15 calendar days of leave each year, rather than 15 work days, and federal agencies therefore followed the practice of charging employees military leave for absences on nonworkdays (e.g., weekends and holidays), when those days fell within a period of absence for military training. *See Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1333-34 (Fed. Cir. 2003). In *Butterbaugh*, however, the U.S. Court of Appeals for the Federal Circuit held that, even before the 2000 amendment, agencies were not entitled to charge employees military leave for days when they would not otherwise have been required to work. *Id.* at 1343.

¶3 The appellant in this case asserted below that he had been a member of the uniformed service "from at least 1987 to 2001," and that his employing agency, in violation of the *Butterbaugh* holding stated above, charged him military leave for his absence on nonworkdays. Appeal File, Tab 1 at 1. He also alleged that this action caused him "to use annual, sick, or leave without pay to perform military duty . . . ." *Id.*

¶4 After acknowledging receipt of the appeal, the administrative judge to whom the appeal was assigned issued an order in which she referred to the appeal as one filed under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4333. Appeal File, Tab 3 at 2. She also stated in that order that an appellant was not entitled under USERRA to relief for any violation that occurred before enactment of that legislation on October 13, 1994; she ordered the appellant to submit a statement identifying, inter alia, the dates on which he allegedly was improperly charged military leave; and she ordered the agency to file any evidence in its possession that would show whether the appellant had been charged military leave on days when he was not scheduled to work. *Id.* at 2-3. In a subsequent order, she directed the parties to exchange and file any additional evidence regarding the appellant's entitlement to military leave, to file argument regarding the time period for which the appellant

might claim relief, and to attempt to reach agreement on and file stipulations concerning relevant facts on which they agreed. Appeal File, Tab 6 at 1.

¶5 The parties filed responses to the orders mentioned above, and the administrative judge subsequently issued an initial decision denying the appellant's request for corrective action. *Id.*, Tabs 4, 5, 9, 10, 11. In her decision, the administrative judge found that the appellant was not entitled to relief for actions taken prior to the enactment of USERRA because that legislation was not retroactive. Initial Decision at 2-3, Appeal File, Tab 11. She also found that, although he would be entitled to relief for actions taken after that enactment, there was no basis for ordering corrective action because the appellant had failed to submit evidence and argument showing that he had been charged military leave on nonworkdays in violation of USERRA. *Id.* at 2-5.

¶6 The appellant has filed a timely petition for review, asserting that he "was claiming violations of statutes in effect before USERRA," and arguing that the Board has the authority to "hear claims without regard to when the violation took place." Petition for Review (PFR) Form, Block 5, PFR File, Tab 1. He also asks that, if his claims cannot be heard at this time, his appeal be dismissed so that he can refile it "when I obtain specific information." *Id.*, Block 7. The agency has filed a timely response in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

Scope of the Board's Authority to Order Corrective Action

¶7 We see no error in the administrative judge's implicit finding that the Board had jurisdiction over this appeal under USERRA, or in her finding that the Board had authority to order corrective action for the improper administration of military leave following the enactment of USERRA. *See* Initial Decision at 2-3; *Lee v. Department of Justice*, 99 M.S.P.R. 256, ¶ 9 (2005) (order reversing administrative judge's interim ruling on extent of relief) (finding Board jurisdiction, under USERRA, over the appellants' claim that their agencies

improperly administered military leave under 5 U.S.C. § 6323(a), causing them to use annual leave, sick leave or leave without pay to perform military service).[1] For the reasons stated below, however, we do not concur in the administrative judge's finding that the Board could not order relief for such violations if they occurred prior to the enactment of USERRA.

¶8 In *Williams v. Department of the Army*, 83 M.S.P.R. 109 (1999), the Board noted that Congress had amended USERRA by enacting the Veterans Programs Enhancement Act of 1998 (VPEA), Pub. L. No. 105-368, 1998 U.S.C.C.A.N. (112 Stat.) 3315, and that the VPEA had authorized the Board to adjudicate complaints brought before it under USERRA procedures "without regard as to whether the complaint accrued before, on, or after October 13, 1994." *Williams*, 83 M.S.P.R. 109, ¶ 7 (quoting 38 U.S.C. § 4324(c), as it was amended by the VPEA). It also held that this amendment gave it the authority to hear and adjudicate claims arising under USERRA's predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VRRA), Pub. L. No. 93-508, 888 Stat. (1578) 1818,[2] but did not authorize the Board to adjudicate claims of actions that were not prohibited prior to the passage of USERRA. *Id.*, ¶¶ 9-14.

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[1] The administrative judge suggested in her initial decision that the Board could not order corrective action for violations occurring after December 21, 2000, the date on which the amendment of 5 U.S.C. § 6323 mentioned above was enacted. *See* Initial Decision at 2-3; Consolidated Appropriations Act, 2001, Pub. L. No. 105-554, 2000 U.S.C.C.A.N. (114 Stat.) 2763. As indicated above, that amendment led OPM to change its position that military leave could be charged for nonworkdays. Although this change would appear to reduce the number of occasions that would form a basis for ordering corrective action under *Butterbaugh*, we know of no reason for holding that the Board would not be able to order corrective action for violations of military leave rights after it was made. Nothing in the initial decision or elsewhere in the record, however, indicates that this error affected the administrative judge's consideration of the appellant's claims.

[2] As its abbreviation suggests, VRRA is also known as the Veterans' Reemployment Rights Act. *See Williams*, 83 M.S.P.R. 109, ¶ 8.

¶9 The administrative judge in the present case, in addressing those of the appellant's claims that arose after the enactment of USERRA, relied on *Williams*. Initial Decision at 3. She also noted that the Board had held in that case that VRRA authorized the Board to adjudicate claims that an employing agency had failed to restore an individual properly following military service, and to adjudicate appeals of involuntary separations during the first year following a veterans readjustment appointment. *Id.*; *see Williams*, 83 M.S.P.R. 109, ¶ 8. She asserted further, however, that the Board "was not authorized to adjudicate other denials of rights under VRRA," and that the appellant had not otherwise shown that his military leave claim was appealable to the Board under that act. Initial Decision at 3.

¶10 The Board did not hold in *Williams* that VPEA authorized the Board to adjudicate, under USERRA, only claims over which it already had jurisdiction. Under such an interpretation, the VPEA language quoted above would be meaningless. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing other decisions for the "cardinal principle of statutory construction" that a statute should be construed, if possible, to give meaning to every clause and word). The Board held instead that VPEA "clearly extend[ed] the Board's authority to adjudicate cases that [were] based on *events* which happened before" the enactment of USERRA, and that it authorized the Board to adjudicate claims based on actions that, although not appealable to it previously, were prohibited prior to the enactment of USERRA. *Williams*, 83 M.S.P.R. 109, ¶¶ 9-10 (emphasis in the original). The issue before us therefore is not whether claims such as those raised here were appealable to the Board prior to the enactment of USERRA, but whether they were prohibited prior to that enactment.

¶11 Prior to the enactment of USERRA, a statutory provision enacted as part of VRRA in 1974 prohibited agencies from "den[ying] hiring, retention in employment, or any promotions or *other incident or advantage of employment* because of any obligation as a member of a Reserve component of the Armed

Forces." *Williams*, 83 M.S.P.R. 109, ¶ 5 & n.1 (citing and quoting a provision that was codified prior to 1994 at 38 U.S.C. § 2021(b)(3)) (emphasis supplied). The term "incident or advantage" has been construed, in this context, as a benefit generally "granted to all employees in the workplace," and it has been found to include matters such as holiday pay. *Allen v. U.S. Postal Service*, 142 F.3d 1444, 1446 (Fed. Cir. 1998) (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), and *Waltermyer v. Aluminum Co. of Am.*, 804 F.2d 821, 824-25 (3d Cir. 1986)). Annual and sick leave are benefits generally granted to all employees in the work place, and we see no basis for finding that basic pay for one's job is any less covered by the provision quoted above than holiday pay. Furthermore, in *Butterbaugh*, the court held that the government's longstanding method for charging military leave for non-workdays was a "denial of a benefit of employment." 336 F.3d at 1343.

¶12 We also note that legislative history described in *Williams* indicates that enactment of VRRA was motivated in part by a case involving circumstances somewhat similar to those alleged here. That is, it indicates that, according to statements of a VRRA cosponsor during floor debate, the case of an employee who was denied military leave and charged with absence without leave for time he spent in military training was the basis for the legislation. *See Williams*, 83 M.S.P.R. 109, ¶ 12.

¶13 Finally, the U.S. Supreme Court has held that VRRA provisions, like those of other statutes enacted for the benefit of employees who have served in the uniformed services, are to be liberally construed for the benefit of those employees. *See Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

¶14 The finding that the claim at issue in this case was prohibited under VRRA compels the conclusion that the Board has jurisdiction over the claim under USERRA, even though the claim predates the enactment of USERRA. This does not mean, however, that there can be no time-barred defense to such a claim. The legislative history of both VRRA and USERRA indicates that Congress intended

for claims under both of these statutes to be subject to the equitable doctrine of laches rather than to any statutory limitations period. Thus, the Senate Report accompanying VRRA states:

> There is also added a provision at the end of this section which reaffirms and reflects more clearly the congressional intent that legal proceedings under this chapter shall be governed by equity principles of law, specifically by barring the application of State statutes of limitations to any such proceeding. Congress, in 1940, omitted any reference to the application of any time-barred defense in cases arising under this law, in part to insure the application of a policy of keeping enforcement rights available to returned veterans as uniform as possible throughout the country. The equity doctrine of laches accomplishes this purpose as nearly as possible.

S. Rep. No. 907, 93d Cong., 2d Sess. 111 (1974).

¶15 The USERRA House Report makes specific reference to the portion of the VRRA Senate Report cited above and further states:

> Section 4322(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitation shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1056-1057 (6th Cir. 1983).

H.R. Rep. 103-65(I), 39, 103d Cong., 1st Sess. (1993, 1994).

¶16 The *Stevens* decision, cited in the USERRA House Report, presented "the specific issue of whether any private right of action under the Veteran's Preference Act, as made applicable to United States employees in 5 U.S.C. § 3551, is subject to temporal limitations upon when suit can be brought." *Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1048 (6th Cir. 1983). The court rejected the trial judge's application of a Tennessee statute of limitations by analogy and concluded that:

> . . . no state or federal statute of limitations applies to implied causes of action arising under 5 U.S.C. § 3551. Instead, Stevens' claim for relief, whether it normally would be equitable or legal, is governed by the traditional equitable doctrine of laches: "In its traditional equitable form, laches comprises two elements: inexcusable delay

> by the plaintiff in bringing suit and prejudice to the defendant resulting from that delay."

Id. at 1056 (citations omitted).

¶17 The legislative history of VRRA and USERRA makes it clear that since 1940, Congress has never imposed limitation periods on the adjudication of claims under these statutes and has intended that the equitable doctrine of laches be applied to such claims. That practice appears to have continued with a recent amendment to USERRA. As part of the Veterans' Programs Enhancement Act (VPEA), Congress amended USERRA to provide that the Board should adjudicate USERRA claims without regard to whether the complaint accrued before, on, or after the enactment of USERRA. Pub. L. No. 105-368, § 213(a), *codified at* 38 U.S.C. § 4324(c)(1) (effective November 10, 1998).[3] In keeping with the Congressional intent expressed in the legislative history, and with the spirit of the 1998 amendment to USERRA, we find that the only time-barred defense to claims such as the one at issue here is that of laches.

¶18 For the reasons stated above, we find that an agency's improper charging of military leave, which an employee was entitled to receive in connection with absences for purposes of reserve training, was prohibited by VRRA prior to USERRA's enactment. The Board therefore has jurisdiction under USERRA, as amended by VPEA, to adjudicate allegations of such improper leave charging, even if they concern military leave denials predating the enactment of USERRA. Accordingly, we find that the administrative judge in this case erred in finding

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[3] See *Harper v. Department of the Navy*, MSPB Docket No. DC-3443-05-0263-I-1 (Opinion and Order, Feb. 27, 2006), where the Board discusses this amendment in support of the finding that the 4-year limitations period at 28 U.S.C. § 1658 does not apply to a USERRA claim asserted against a federal agency under 38 U.S.C. § 4324.

that the Board could not order relief for the improper charging of any military leave to which the appellant was entitled prior to USERRA's enactment.[4]

Merits of the Appellant's Claims

¶19 As noted above, the administrative judge found, with respect to the claims arising after the enactment of USERRA, that the appellant had failed to submit evidence and argument showing that the agency had charged him military leave for nonworkdays when he was performing military training duties. The appellant has not challenged this finding, and we see no error in it. Moreover, although the administrative judge did not specifically relate her finding to the appellant's claims arising before USERRA's enactment, they are equally applicable to those claims. Although the appellant has submitted military orders related to dates on which he was ordered to perform active duty, Appeal File, Tab 10, Ex. B, he has provided no specific evidence regarding the nature or amount of leave he took on any of those occasions. Instead, he has made a general statement that he "was forced to use annual leave in order to fulfill my military obligations during the time period of 1987-2001," *id.*, Ex. C, and, through his attorney, he has presented argument speculating about the possible effect of actions the agency may have taken and decisions he might have made with respect to his leave, *e.g.*, Appeal File, Tab 10 at 14-15 ("the appellant may have wanted to use annual leave in lieu of military leave," and, "assuming the appellant" elected to use annual leave for part of his military absence, "he would have rolled over [fewer days of] military leave into the next . . . year" than he would have if the agency had not charged him military leave for nonworkdays).

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[4] The Board has held that neither the Back Pay Act, 5 U.S.C. § 5596, nor the Barring Act of 1940, 31 U.S.C. § 3702, limits the Board's authority to order compensation for violations that are the subject of USERRA appeals. *Lee*, 99 M.S.P.R. 256, ¶¶ 10-25. The fact that the claims of the appellant in this appeal date back as far as 1987 therefore does not preclude issuance of an order for corrective relief in connection with any of those claims.

¶20 The record indicates, however, that the appellant was trying, before the record closed below, to obtain information he needed in order to substantiate his claim, and that he was unable to do so within the time period allowed by the administrative judge. That is, the appellant submitted a letter from the Defense Finance and Accounting Service (DFAS) indicating that he had requested records related to his military service, that DFAS had asked him to provide further information to enable it to respond to the request, and that, even after that organization received the information, it might require some time to produce copies of the requested records. Appeal File, Tab 12; *see id.*, Tab 7 (the appellant's "Motion for a Subpoena," in which he sought records from DFAS). The record also includes a letter in which the appellant's employing agency indicated that it had been unable to identify the dates of the appellant's absences for military duty, and in which it expressly stated that it did not oppose the appellant's efforts to obtain more evidence. *Id.*, Tab 9 at 3, 5. We note further that the appellant's prehearing submission included a motion for an extension of time. *Id.*, Tab 10 at 15. While the motion did not specifically refer to the need for additional time to obtain DFAS records or other information, and while its more specific references concern the need for time for the parties to discuss stipulations and settlement, the appellant described the purpose of the extension more broadly, i.e., as "an extension of time in order to reach a resolution." *Id.*, Tab 10 at 15.

¶21 Under the circumstances described above,[5] we find that dismissal of the appellant's appeal without prejudice to its refiling is appropriate. *See Burton v. Department of the Army*, 96 M.S.P.R. 350, ¶ 4 (2004) (the Board found no error in the administrative judge's dismissal of the appeal without prejudice in order to allow the appellant time to obtain new counsel); *Milner v. Department of Justice*, 87 M.S.P.R. 660, ¶ 13 (2001) (indicating that a case may be dismissed without prejudice in order to avoid a lengthy or indefinite continuance). We also find that imposition of a deadline by which the appeal must be refiled is not warranted in this case. Not only would an appropriate deadline be difficult to establish in light of uncertainty regarding the length of time that would be needed to obtain documents and other information from DFAS and the agency that is a party to the case, but the appellant may conclude, on review of the evidence he obtains or in light of any settlement offer he may receive from the agency, that he no longer wishes to pursue his appeal.

¶22 Finally, we note that the appellant states that he was denied the right to a hearing at which he could have submitted evidence and called witnesses to support his claims. PFR Form, Block 2. The record indicates that the appellant requested a hearing in his appeal, and that the administrative judge stated, in an order she issued shortly after receipt of the appeal, that an appellant did not have

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[5] The administrative judge advised the appellant, before he submitted the documents, statement, and argument mentioned above, of her finding that he would not be entitled to corrective action in connection with pre-USERRA claims. These instructions are inconsistent with our holding that the Board has the authority to order corrective action in connection with such claims. We note, however, that the appellant responded by challenging the administrative judge's finding, and by including military orders related to his pre-USERRA training among the documents he subsequently submitted. Appeal File, Tab 3 at 2; *id.*, Tab 10. Furthermore, although the administrative judge's order directing the parties to submit evidence regarding alleged violations referred to a time period ending with the 2000 amendment, *id.*, Tab 6 at 1, the response mentioned above also included assertions and documents related to military service after the amendment was enacted. *Id.*, Tab 6 at 1; *id.*, Tab 10. Our disposition of this appeal therefore is not based on these statements by the administrative judge.

the right to a hearing in a USERRA appeal. Appeal File, Tab 1 at 1; *id.*, Tab 3 at 3. This statement is consistent with Board regulations and precedent. If the appellant refiles his appeal and again requests a hearing, the administrative judge may also consider the Board's other holdings regarding hearings in USERRA cases. *See, e.g., Jordan v. U.S. Postal Service*, 90 M.S.P.R. 525, ¶ 9 (2002) (denial of a request for a hearing may be improper even when a hearing is discretionary, as in a USERRA case, if material facts are in dispute); *id.* (where discretion to grant a hearing exists, the administrative judge should expressly rule on whether the appellant has demonstrated entitlement to a hearing, or whether the matter can be decided on the basis of the written record).

ORDER

¶23 The appeal is DISMISSED without prejudice. If the appellant still wishes to pursue the claim at issue in this appeal after receiving the documents and other information he has sought, and after engaging in further settlement discussions with the agency, he may refile this appeal with the Board's Washington Regional Office.

¶24 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this Opinion and Order was sent today to each of the following:

Certified Mail	Gregory T. Rinckey, Esq. Tully, Rinckey & Associates, P.L.L.C. 3 Wembley Court Albany, NY 12205
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