

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 68

Docket No. PH-3443-06-0392-I-1

**David D. Miller,
Appellant,**

v.

**United States Postal Service,
Agency.**

March 7, 2007

David D. Miller, Lock Haven, Pennsylvania, pro se.

Lori L. Markle, Esquire, Philadelphia, Pennsylvania, 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 (ID) dismissing this appeal for failure to state a claim upon which relief may be granted. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and DISMISS this 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 interpreted it as providing 15 calendar days of leave each year, rather than 15 workdays, 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, an employee of the United States Postal Service (USPS), filed an appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). He asserted that he has been a member of the Pennsylvania Army National Guard (PANG) since 1976, and that, from January 22, 1986, to the present, his employing agency has charged him leave for his absence on nonworkdays in violation of the *Butterbaugh* holding. Initial Appeal File (IAF), Tabs 1, 5. He also alleged that this action “improperly reduce[ed] [his] annual leave.” IAF, Tab 1 at 3.

¶4 The agency filed a motion to dismiss the appeal for failure to state a claim upon which relief may be granted. IAF, Tab 6. Although the appellant waived a hearing on his Board appeal form, he later filed an apparent timely request for a hearing and stated that he had wanted a hearing when he filed his appeal but had mistakenly checked the wrong box on the appeal form. IAF, Tabs 1, 2, 5.

¶5 Without holding the appellant’s requested hearing, the administrative judge (AJ) issued an ID finding that the Board has USERRA jurisdiction over this appeal but dismissing it for failure to state a claim upon which relief may be granted based on his finding that, as a Postal Service employee, the appellant is not covered by the military leave provisions of 5 U.S.C. § 6323. IAF, Tab 9, ID at 1, 3-4.

¶6 The appellant has filed a timely petition for review (PFR), arguing, inter alia, that the AJ erred in dismissing his appeal without allowing him the opportunity to complete discovery and to establish that Postal Service employees are entitled to a remedy regarding military leave usage under USERRA. Petition for Review File (PFRF), Tab 1. The agency has not responded to the PFR.

ANALYSIS

Scope of the Board's Authority

¶7 Under USERRA, the Board has jurisdiction over an appellant's claim that, as a result of the agency's improper administration of military leave under 5 U.S.C. § 6323, he was denied a benefit of employment in violation of 38 U.S.C. § 4311(a) by being forced to use annual leave or leave without pay (LWOP) in order to fulfill his military obligations. In such a case, the Board has the authority to order compensation for the resulting lost wages or benefits. 38 U.S.C. § 4324(c); *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160, ¶¶ 11-14 (2006).

¶8 5 U.S.C. § 6323(a)(1) states as follows:

[A]n **employee as defined by section 2105 of this title** or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave . . . for active duty . . . or engaging in field or coast defense training . . . as a Reserve of the armed forces or member of the National Guard

(Emphasis added). Under 5 U.S.C. § 2105(e), an employee of the USPS is specifically excluded from the term "employee" for purposes of title 5, "[e]xcept as otherwise provided by law." As the AJ correctly noted, Congress has not extended coverage of 5 U.S.C. § 6323 to USPS employees. *Johnson v. U.S. Postal Service*, 56 M.S.P.R. 22, 24 (1992); ID at 3. Therefore, the AJ correctly found that the appellant is not entitled to military leave under 5 U.S.C. § 6323(a)(1).

¶9 The agency concedes and the record shows, however, that during the relevant time period in this appeal the agency had a policy in effect for the administration of paid military leave for its employees under Part 517 of its Employee and Labor Relations Manual (ELM). IAF, Tab 1, October 28, 2005 letter from Labor Relations Specialist Mary Hercules (Hercules letter), Tab 6, agency's motion to dismiss at 5. That policy states as follows:

517.41 General Allowance

Eligible full-time . . . employees receive credit for paid military leave as follows:

- a. *Full-time employees other than D.C. National Guard* – 15 calendar days (120 hours) each fiscal year.

ELM, Section 517.41.

¶10 In addition, under Section 517.53 of the ELM, which was deleted in 2002,¹ the agency's policy was to charge employees military leave for nonworkdays falling within a period of absence for active duty. IAF, Tab 1, Hercules letter at 2. That section stated as follows:

517.53 Leave Charge for Nonworkdays

Nonworkdays falling within a period of absence for active duty are charged against the paid military leave allowed full-time employees during the fiscal year, but nonworkdays falling at the end of an active duty period are not charged. This does not apply to the general allowance for part-time employees. Nonworkdays are charged during continuous active duty periods, even when mixed or other leave is taken or when paid military leave is taken intermittently.

ELM, Section 517.53; IAF, Tab 1, Hercules letter, Tab 6, agency's motion to dismiss at 5 n.2.

¹ The record as currently developed is unclear as to when the agency changed the policy set forth in ELM Section 517.53. While the agency's motion to dismiss states that the policy was in effect until July 2002, the Hercules letter states that the agency changed its policy when Section 517.53 was eliminated via Postal Bulletin 22072 dated March 21, 2002. IAF, Tab 1, Hercules letter at 2, Tab 6, agency's motion to dismiss at 5 n.2.

¶11 The Board will enforce employee rights derived from agency rules, regulations, procedures, and negotiated collective bargaining agreements. *Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997); *Dwyer v. U.S. Postal Service*, 32 M.S.P.R. 181, 185 (1987). We shall do so here with regard to the appellant's entitlement to military leave under the agency's ELM. The fact that the appellant in this case is not covered by 5 U.S.C. § 6323, but instead is covered by an agency rule, does not affect our authority to consider this case under USERRA. *See Pratt v. Department of Transportation*, 103 M.S.P.R. 111, ¶ 10 (2006); *see also Plezia v. Department of Veterans Affairs*, 102 M.S.P.R. 125, ¶ 10 (2006) (the Board has authority to consider a *Butterbaugh*-type USERRA claim brought by an employee who is not covered by 5 U.S.C. § 6323 where the employee is covered by an agency rule that confers a military leave benefit similar to section 6323).

Merits of the Appellant's Claim

¶12 To obtain relief under USERRA, the appellant must show that, as a result of the agency's improper administration of military leave, he was forced to use annual leave or LWOP in order to fulfill his military duty. *See Dombrowski*, 102 M.S.P.R. 160, ¶¶ 11-14. The AJ found that the records the appellant submitted in support of his claim were "wholly fragmentary in nature" and did not confirm how long he served in the PANG, nor did they show that the appellant actually used any annual leave because the agency improperly charged him with military leave on nonworkdays. ID at 3.

¶13 Although this appeal cannot proceed without such specific information, we find that the appellant did state a claim upon which relief may be granted. An appeal within the Board's jurisdiction may be properly dismissed for failure to state a claim if the appellant cannot obtain effective relief before the Board even if his allegations are accepted as true. *Kennedy v. Department of the Air Force*, 102 M.S.P.R. 524, ¶ 7 (2006); *Young v. Federal Mediation & Conciliation Service*, 93 M.S.P.R. 99, ¶ 5 (2002), *aff'd*, 66 F. App'x 858 (Fed. Cir. 2003). In

appraising the sufficiency of an appeal, the Board follows the accepted rule that an action should not be dismissed for failure to state a claim unless it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief. *Kennedy*, 102 M.S.P.R. 524, ¶ 7. Taking as true the allegations in the appellant's petition for appeal, we note that it is not beyond doubt that the appellant could not prove such a set of facts.

¶14 Indeed, it appears that the appellant was attempting to obtain the necessary evidence at the time his appeal was dismissed. As the AJ noted, the appellant had requested that he be allowed to engage in discovery in order to prove his allegation that he was required to use annual leave instead of the military leave which had been improperly charged against him. ID at 3. The record also indicates that the appellant served a discovery request upon the agency, but the agency's representative notified the appellant that he would not be receiving any of the discovery he had requested because the agency intended to file a motion to dismiss the appeal.² IAF, Tab 4.

¶15 Further, the record indicates that on August 11, 2006, three days before the AJ issued the ID, the appellant served a request upon the Defense Finance and Accounting Service (DFAS), in which he asked for copies of all of his leave and earnings statements for his periods of annual military training from 1985 through 2006. IAF, Tab 8. On August 11, 2006, the appellant also sent the AJ a copy of this request, along with a letter informing the AJ that he was gathering his leave and earning statements to document the exact days on which the agency charged him annual leave for nonworkdays. *Id.*

² Shortly thereafter, the agency filed a motion to dismiss for failure to state a claim upon which relief may be granted, as well as a motion to stay both discovery and the requirement to provide an agency file pending a decision on the dismissal motion. IAF, Tab 6. The AJ then advised the parties that he would decide the question of jurisdiction before addressing any other issues. IAF, Tab 7 at 2.

¶16 It appears that the appellant was unable, before the ID was issued, to obtain information regarding the leave he took and the exact dates and duration of his absences for military duty. The record does not indicate that the appellant had received any documents from DFAS before the AJ issued the ID. In addition, it appears that the appellant never received any of the documents he requested in discovery from the agency.

¶17 Under these circumstances, we find it appropriate to dismiss this appeal without prejudice to its refiling so that the appellant can have additional time in which to obtain the evidence he seeks in support of his appeal. *See Schoeny v. Department of Veterans Affairs*, 102 M.S.P.R. 498, ¶¶ 9-10 (2006); *Garcia v. Department of State*, 101 M.S.P.R. 172, ¶¶ 20-21 (2006). We also find that imposition of a deadline by which the appeal must be refiled is not warranted in this case. Not only is there no deadline for filing a USERRA appeal in the first instance, 5 C.F.R. § 1208.12, but an appropriate deadline would be difficult to establish here in light of the uncertainty as to the length of time that would be needed to obtain documents and other information from DFAS and the agency. Moreover, the appellant may conclude, on review of the evidence he eventually obtains, that he no longer wishes to pursue his appeal. *See Schoeny*, 102 M.S.P.R. 498, ¶ 10; *Garcia*, 101 M.S.P.R. 172, ¶ 21.

¶18 Finally, we note that the pro se appellant states on review that the AJ “never gave [him] a chance to argue” his claim and that he “can argue in length to prove” his claim. PFRF, Tab 1 at 1. The appellant is apparently challenging the AJ’s dismissal of this appeal without the hearing requested by the appellant. IAF, Tab 5; ID at 1. If the appellant refiles his appeal and again requests a hearing, the AJ 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; where discretion to grant a hearing exists, the AJ 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), *aff'd*, 82 F. App'x 42 (Fed. Cir. 2003).

ORDER

¶19 Accordingly, we DISMISS this appeal without prejudice to refiling at a later date. If the appellant still wishes to pursue the claim at issue in this appeal after receiving the documents and other information he has sought, he may refile this appeal with the Board's Northeastern Regional Office.

¶20 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:

/s/

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