M-01607

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 244

Docket No. DA-3443-05-0283-I-1

Jeffery M. Pratt,
Appellant,

v.

Department of Transportation,
Agency.

August 11, 2006

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

Eric E. Anderson, Esquire, Fort Worth, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision granting the appellant's request for corrective action. For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

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 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 accounts for absences on non-workdays (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 accounts 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 Federal Aviation Administration (FAA), asserted below that he had been a member of the U.S. Army Reserve "from at least 1990 to 2001," and that his employing agency charged his military leave account for his absence on non-workdays in violation of the *Butterbaugh* holding. Initial Appeal File (IAF), Tab 1. He also alleged that this action caused him to "use annual, sick, or leave without pay to perform military duties . . . ." *Id*.

¶4 The administrative judge issued an initial decision granting the appellant's request for corrective action, finding that the agency improperly charged his military leave account on 16 non-workdays, and ordering the agency to correct its records accordingly. IAF, Tab 16, Initial Decision (ID).

¶5 The agency has filed a timely petition for review. Petition for Review File (PFRF), Tab 1. The appellant has not responded to the petition for review.

ANALYSIS

Scope of the Board's Authority

¶6 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). The agency argues on review, as it did below, that on April 1, 1996, the FAA became exempt from the military leave provisions of 5 U.S.C. § 6323.

¶7 In 1995, Congress enacted the Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347, 1995 U.S.C.C.A.N. (109 Stat.) 436, 460, *amended by* Continuing Appropriations, 1996, § 1, 1996 U.S.C.C.A.N. (110 Stat.) 876

(1996 Act), directing the agency, the Federal Aviation Administration, to "develop and implement . . . a personnel management system . . . that addresses the unique demands on the agency's workforce." *Id.*, sec. 347(a) (codified, as amended, at 49 U.S.C. § 40122(g)(1)). The Act further provided as follows:

> (b) The provisions of title 5, United States Code, shall not apply to the new personnel management system developed and implemented pursuant to subsection (a), with the exception of –
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> (1) section 2302(b), relating to whistleblower protection;
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> (2) sections 3308-3320, relating to veterans' preference;
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> (3) chapter 71, relating to labor-management relations;
>
> (4) section 7204, relating to antidiscrimination;
>
> (5) chapter 73, relating to suitability, security, and conduct;
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> (6) chapter 81, relating to compensation for work injury;
>
> (7) chapters 83-85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage.
>
> (c) This section shall take effect on April 1, 1996.

Pub. L. No. 104-50, § 347(b), (c) (codified, as amended, 49 U.S.C. § 40122(g)(2), (4)).

¶8 In 2000, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 2000 U.S.C.C.A.N. (114 Stat.) 61. Section 307 (a) of the Act revised 49 U.S.C. § 40122(g) by adding the following additional exception to the general inapplicability of title 5 to the FAA: "sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board." Since section 6323 is not one of the title 5 sections enumerated in either Act, the agency is correct in arguing that the appellant has no entitlement to leave under 5 U.S.C. § 6323(a)(1).

¶9 Despite the fact that the agency is not covered by 5 U.S.C. § 6323, the appellant asserts a viable claim under USERRA. The agency concedes that it had an internal rule in effect from April 1, 1996 until it was amended on April 1, 2005, for the administration of military leave under its Absence and Leave Order 3600.4. PFRF, Tab 1, Ex. D.[1] That rule was similar to 5 U.S.C. § 6323, and provided as follows:

> COMPUTATION OF MILITARY LEAVE. Military leave of absence with pay is limited to a maximum of 15 calendar days in any calendar year, regardless of the number of training periods within a calendar year. Military leave may be taken intermittently, a day at a time, or as otherwise directed under orders by competent military authority.
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> (a) Computation.
>
> (1) Military leave is computed on a calendar day basis. Non-workdays and

> holidays falling within a period of absence on military training days are to be charged-against the 15 calendar days allowed, except that non-workdays at the beginning or end of the period of military duty will not be charged to military leave. . . .

Paragraph 57(A)(1), Absence and Leave Order 3600.4 (citations omitted); *see* 49 U.S.C. § 40122(g)(1) ("[T]he Administrator [of the FAA] shall develop and implement . . . a personnel system . . . . Such a new system shall . . . provide for greater flexibility in the hiring, training, compensation, and location of personnel.").

¶10 The agency's own official guidance makes clear that it interprets the version of Absence and Leave Order 3600.4 in effect from 1996 until 2005, which called for charging employees' military leave accounts for absences on non-workdays, as having been invalidated by the *Butterbaugh* decision. *See* IAF, Tab 10, Subtab 4D. An agency's interpretation of its own rules is ordinarily entitled to deference, *see Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 15 (2005), and under the circumstances presented here we have no reason to question the agency's interpretation of its military leave rule. We note that the agency's interpretation of its rule is consistent with how the court in *Butterbaugh* interpreted 5 U.S.C. § 6323. 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 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).

¶11 On review, the agency further contends that the administrative judge erred in finding that the Barring Act of 1940 does not limit the appellant's claims. PFRF, Tab 1. This contention lacks merit. 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 in USERRA appeals. *See Lee v. Department of Justice*, 99 M.S.P.R. 256, ¶¶ 10-25 (2005).

¶12 The agency also argues that under its military leave policy, the appellant is limited to a 6-year time period for presenting his claim for improperly charged leave. PFRF, Tab 1. We disagree. Although the appellant's substantive right not to have his military leave account charged for absences on non-workdays is based on the agency's internal rule, his cause of action before the Merit Systems Protection Board is based on USERRA, 38 U.S.C. §§ 4311

& 4324. USERRA does not contain any limitations period for asserting a claim before the Merit Systems Protection Board. *Harper v. Department of the Navy*, 101 M.S.P.R. 166, ¶ 7 (2006). The agency's statutory exemption from certain civil service rules, described above, allows the agency to deviate from various portions of Title 5, but USERRA is not part of Title 5. The agency does not cite any authority allowing it to set a limitations period for an employee's assertion of a USERRA claim under 38 U.S.C. §§ 4311 & 4324, and we know of none.

¶13 The administrative judge concluded that the appellant cannot recover for any lost benefits or wages based on overcharging of military leave prior to the effective date of USERRA, October 13, 1994. ID at 2. After the administrative judge issued the initial decision, however, the Board held that it has authority to adjudicate a claim, such as the one raised here, that is based on actions prohibited prior to the enactment of USERRA. *Garcia v. Department of State*, 101 M.S.P.R. 172 (2006).

¶14 The administrative judge advised the appellant, prior to the issuance of the initial decision, of her finding that he would not be entitled to corrective action in connection with his pre-USERRA claims. IAF, Tabs 3, 6. The appellant responded to those orders by challenging the administrative judge's finding and submitting a U.S. Army Human Resources Command chronological statement of retirement points and various military orders that include his pre-USERRA participation in reserve duties. IAF, Tab 9. The appellant, however, provided no specific evidence regarding the nature or amount of leave he took regarding his pre-USERRA claims. We therefore find that, because the appellant challenged the administrative judge's erroneous finding regarding his pre-USERRA claims but has provided no probative evidence to support his claims, he has not shown that he was harmed by the erroneous finding. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

Merits of the Appellant's Claims

¶15 It is undisputed that the appellant's regular work schedule in his civilian position with the agency was Monday through Friday. IAF, Tab 9 at 3. The appellant submitted an affidavit averring that his military leave account was charged on the following days when he was not scheduled to work: Saturday and Sunday, June 24 and 25, 1995;[2] Saturday and Sunday, June 22 and 23, 1996; Saturday and Sunday, June 21 and 22, 1997; Saturday and Sunday, June 28 and 29, 1997; Saturday and Sunday, July 5 and 6, 1997; Saturday and

Sunday, July 12 and 13, 1997; Saturday and Sunday, July 11 and 12, 1998; and Saturday and Sunday, June 10 and 11, 2000. IAF, Tab 12, Ex. D; ID at 5. The agency responded, conceding that the appellant was improperly charged military leave for June 10 and 11, 2000, but asserting that, for the other dates identified, any recovery is time barred by law or policy. The agency did not dispute that the appellant was improperly charged military leave on those dates and did not provide relevant time and attendance records to refute the appellant's sworn affidavit. IAF, Tab 15; ID at 5.

¶16 It is well settled that sworn statements that are not rebutted are competent evidence of the matters asserted therein. *See Melendez v. Department of Veterans Affairs*, 73 M.S.P.R. 1, 4 (1996); *Truitt v. Department of the Navy*, 45 M.S.P.R. 344, 347 (1990). We therefore concur in the administrative judge's finding that, based on the appellant's affidavit, he was improperly charged with military leave on the dates specified in his affidavit. ID at 5.

¶17 However, the Board lacks the authority to order compliance with the military leave law. Rather, the appellant may obtain relief under USERRA only if he shows 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 duties. *See Dombrowski*, 102 M.S.P.R. 160, ¶¶ 11-14. The administrative judge did not advise the appellant that he was required to make such a showing, and the appellant has not identified any specific dates on which he was forced to use annual leave or LWOP in lieu of military leave. We therefore find it appropriate to remand the case for further adjudication. *See Jordan v. U.S. Postal Service*, 90 M.S.P.R. 525, ¶ 12 (2002) (the administrative judge must correctly inform an appellant of the applicable burdens and methods of proof in a petition for remedial action under USERRA), *aff'd*, 82 F. App'x 42 (Fed. Cir. 2003).

ORDER

¶18 We remand this case for further proceedings consistent with this Opinion and Order. The administrative judge shall inform the appellant of his burden of proof, and provide the parties with a further opportunity to conduct discovery. The appellant shall be provided with the opportunity to identify specific dates on which he was forced to use annual leave or LWOP as a result of the agency's improper administration of military leave, and the agency shall be afforded an opportunity to respond to the appellant's allegations. Unless the appellant waives a hearing, the administrative judge shall exercise her discretion to determine whether a hearing should be held, and make appropriate findings in support of her determination. Finally, she shall adjudicate the merits of the appellant's USERRA claim

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under the proper standard and issue a new initial decision. See Jordan, 90 M.S.P.R. 525, ¶ 13.

FOR THE BOARD:

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

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[1] The agency submitted a copy of its Absence and Leave Order 3600.4 for the first time with its petition for review. PFRF, Tab 1, Ex. D. Ordinarily the Board will not consider evidence submitted for the first time on review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The agency did, however, submit below a copy of its Policy Bulletin #34, Changes to Computation of Military Leave, which revised paragraph 57, Computation of Military Leave, of Order 3600.4. IAF, Tab 10, Subtab 4d. In submitting the revised language below, the agency implicitly provided the language of paragraph 57, and under the circumstances we will consider the additional document. *See also Sonneborn v. Department of Defense*, 80 M.S.P.R. 215, ¶ 4 (1998) (even if an agency does not establish that documents submitted for the first time on review were previously unavailable, the Board has the discretion to consider those documents if they implicate the Board's authority to consider a claim).

[2] As noted above, the agency became exempt from the military leave statute, 5 U.S.C. § 6323, on April 1, 1996. Thus, on these two days, the appellant was covered by section 6323.