

## Court Orders Hearings for Veterans on Employment Complaints

A recent federal appeals court ruling held that veterans who allege discrimination in government employment because of their military service are legally entitled to a hearing.

In *Kirkendall v. Department of the Army*, the Federal Circuit Court of Appeals ruled that these veterans have a statutory right to a hearing from the Merit Systems Protection Board. That right comes from the Uniformed Services Employment and

Reemployment Rights Act, a law that protects veterans from discrimination resulting from their military service. In its decision, the court criticized the manner in which MSPB has denied hearings with no explanation.

"Until now, it has been the board's practice to grant hearings as a matter of administrative grace, or deny one at its convenience," wrote Haldane Robert Mayer, a judge for the appeals court. "But it must administer the law as Congress wrote it. The board's consistent misapplication of the law can neither be used to defend its practice; nor to justify what Congress did not intend."

The ruling is "a great win for veterans that will have a huge impact in helping to prove the unspoken truth that while people claim to support the troops, if those troops leave their civilian jobs to fight in the war against terrorism for extended periods of time, they are often subjected to unlawful treatment upon their return," said Mathew Tully, the founding partner of the New York law firm Tully, Rinckey & Associates.

Tully has represented hundreds of current and former federal employees in similar cases, though he did not represent John Kirkendall.

The case dates back to 1999 when Kirkendall, a disabled veteran with organic brain syndrome, a general disease in which a physical disorder causes decreased mental function, applied for a position as a supervisory equipment specialist with the Army at Fort Bragg, N.C. Kirkendall's service and resulting disability entitled him to a 10-point preference for the position.

But in early 2000, the Army found that Kirkendall's application lacked sufficient detail on his experience and rated him ineligible for the position, offering it to another 10-point preference eligible veteran.

Kirkendall filed several complaints with the Army contesting his ineligibility, but all of them were denied. He then filed a complaint with the Labor Department, which also rejected his claim because it was not filed within 60 days of the Army's alleged violation as required by law. In 2002, Kirkendall appealed to the MSPB.

The MSPB administrative judge dismissed Kirkendall's claim on the grounds that it was untimely and that the Army selected another qualified and 10-point eligible veteran for the

position. Kirkendall then appealed the board's decision to the federal circuit court.

According to a judge advocate in the Naval Reserve, who spoke under the condition of anonymity, many of the cases brought before the MSPB are pro se, meaning the claimants represent themselves without a lawyer. The source said MSPB often views these cases as less serious, and as a result, not worthy of a hearing.

Tully said the appeals court decision offers a "huge advantage" to veterans who cannot afford legal representation, especially because it allows veterans the ability to cross-examine their supervisors. He said the newly established right to cross-examine will make it much easier for veterans to win discrimination cases.

Tully also said he hopes the ruling will encourage more training for federal managers on USERRA law. He said many federal managers are trained solely on Equal Employment Opportunity law and very little on USERRA, though the penalties for denying rights under both laws are almost equally harsh.

"There doesn't seem to be any system in place in the federal government about USERRA," Tully said. "The publicity [from] this case will help educate people about its importance."