

Vet Rights Strengthened in Fed Job Disputes

A federal appeals court ruling could make it easier for federal employees to pursue cases against the government alleging job discrimination based on their military service.

Any veteran who requests a hearing from the Merit Systems Protection Board has a right to have one, the U.S. Court of Appeals for the Federal Circuit ruled March 7. That's a sharp departure from previous practice, when the board could deny a hearing with no explanation.

"Until now, it has been the board's practice to grant a hearing as a matter of administrative grace, or deny one at its convenience," wrote Circuit Judge Haldane Robert Mayer. "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."

In the complicated decision, seven judges ruled veterans have a right to a hearing before MSPB, while six judges dissented. But the seven in the majority were split over their reasoning.

Mayer and four other judges ruled that veterans have a statutory right to an MSPB hearing through the Uniformed Services Employment and Reemployment Rights Act. Two other judges said the right to a hearing lies not in that law, but in the MSPB's own regulations.

The Justice Department, which is representing the MSPB in the case, could appeal the decision to the Supreme Court. The MSPB is still reviewing the decision and hasn't decided whether to alter the board's operations in response, MSPB General Counsel Chad Cowan said.

The case, *John E. Kirkendall v. the Department of the Army*, started when Kirkendall, a 100 percent disabled veteran who suffers from organic brain syndrome, was denied a job he had applied for at Fort Bragg, N.C., in January 2000. He filed several complaints with the Army, which were denied.

He filed a formal complaint with the Labor Department, claiming violation of his veterans' preference rights and discrimination based on his disability. On Nov. 29, 2001, Labor rejected the complaint because it was not filed within 60 days of the alleged violation.

In June 2002, Kirkendall appealed to MSPB. The administrative judge for the board dismissed the appeal for "failure to state a claim," and on the grounds that the board had no authority to decide whether the Labor Department should have waived the 60-day deadline.

The administrative judge also said Kirkendall didn't meet the 15-day deadline for filing a claim with the board after the Labor Department made its ruling.

But the federal appeals court ruled that these deadlines are not so fixed that they can't be waived if there is a sound reason to do so.

Kirkendall's attorneys, of Gibson, Dunn & Crutcher LLP, could not immediately be reached for comment. They provided free legal representation to Kirkendall at the request of the court.

Mathew Tully, an attorney who specializes in providing free legal assistance to federal employees with claims related to their military service, said the ruling is huge because it “now guarantees everybody who files will get a hearing.”

“A lot of people who didn’t know how to work the system had their cases thrown out summarily,” he said. “Now the federal circuit has said you have a right to a hearing, and can call witnesses. If they know they have a right to a hearing, maybe veterans will take action.”