

**UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION  
BOARD ATLANTA REGIONAL OFFICE**

RICHARD ERICKSON,  
Appellant,  
v.  
UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
AT-3443-07-0016-M-5  
DATE: December 14, 2012

Mathew B. Tully, Esquire, Washington, D.C., for the appellant.  
Jeffrey L. Sheldon, Esquire, Tampa, Florida, for the agency.

**INITIAL DECISION**

On February 28, 2011, the Federal Circuit remanded for a second time this Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) discrimination claim for further processing to the Board. *Erickson v. U.S. Postal Service (Erickson II)*, 636 F.3d 1353 (Fed. Cir. 2011). Subsequently, the Board remanded the appeal to the Atlanta Regional Office for further processing. Remand Appeal File AT-3443-07-0016-M-3 (RAF M-3), Tab 1. After several dismissals without prejudice at the request of one or the other party, the appeal was refiled and scheduled for hearing on September 13, 2012. The parties then filed a joint motion to withdraw the request for a hearing and to submit affidavits and briefs in lieu thereof. RAF M-5, Tab 10. With minor exceptions relating to dates, the joint motion was granted and a briefing schedule was established. RAF M-5, Tab 11. The record closed on September 14, 2012. *Id.*

**ISSUE** Whether the appellant is entitled to reinstatement as a remedy under the antidiscrimination provisions of section 4311 of USERRA as a result of the court's holding that he is not entitled to reemployment rights under section 4312.

**ANALYSIS AND FINDINGS**

**1. General Background**

The facts of this appeal were set forth in the Court's prior two opinions in this case. *Erickson v. U.S. Postal Service (Erickson I)*, 571 F.3d 1364 (Fed. Cir. 2009) and *Erickson II*. An abbreviated set of facts follows. The appellant began working for the Postal Service in 1988. During the time he was employed by the Postal Service he was a member of the National Guard. Due to his military commitment, the appellant worked for the Postal Service for no more than four days between 1996 and 2000. The Postal Service removed the appellant from his position effective April 7, 2000, for excessive use of military leave. The appellant

subsequently re-enlisted with the National Guard and remained on active military duty until December 31, 2005.

On September 28, 2006, nine months after the end of his military duty, the appellant filed an appeal with the Board alleging that the agency violated his USERRA rights by removing him from his position in 2000 based upon his military service. After a lengthy litigation and appeal process before the administrative judge, the Board, and the court, the Federal Circuit issued its opinion in *Erickson I* on July 15, 2009, holding that the appellant failed to make a timely application for reemployment under USERRA under 38 U.S.C. § 4312 but remanded the case to the Board for determination whether he waived his other USERRA rights by abandoning his civilian career to pursue one in the military. On remand, the full Board concluded that the appellant had waived his USERRA rights and abandoned his career with the Postal Service. The appellant again appealed to the Federal Circuit. In *Erickson II*, the court vacated the Board's determination that the appellant abandoned his career with the Postal Service in favor of a career in the military, and remanded to the Board for further proceedings on the appellant's USERRA discrimination claim under 38 U.S.C. § 4311. Subsequently, the Board remanded the case to the Atlanta Regional Office for further proceedings consistent with the court's decision.

## **2. Discussion**

In *Erickson II*, the Federal Circuit vacated and remanded this case with the instructions: We therefore vacate the Board's determination that Mr. Erickson abandoned his civilian career in favor of a career in military service, and remand to the Board for further proceedings on Mr. Erickson's USERRA discrimination claim. 636 F.3d at 1359. The Board then remanded "this case to the Atlanta Regional Office for further proceedings consistent with the court's decision." RAF M-2, Tab 2. A determination that the appellant had failed to make a timely application for reemployment under section 4313 has been made by the Board and the Federal Circuit. *Erickson I*, 571 F.3d at 1370-71. Because the appellant failed to make a timely application, the agency did not violate the appellant's reemployment rights under USERRA. *Id.*

Additionally, a determination that the agency action removing the appellant based on his use of military leave constituted unlawful discrimination under section 4311 has already been made in the affirmative by the Federal Circuit and subsequently adopted by the Board. *Erickson I*, 571 F.3d at 1368-70; *Erickson v. U.S. Postal Service*, 113 M.S.P.R. 41, 44 (2010). When the Board adopted the Federal Circuit's determination that the agency's action constituted unlawful discrimination, however, the Board denied the appellant's request for relief under USERRA because it found the appellant had abandoned his civilian position in favor of a position in the military, and thereby waived his USERRA employment rights. 113 M.S.P.R. at 44-45, ¶¶ 3-4. On appeal, the Federal Circuit then vacated the Board's determination that the appellant abandoned his civilian career in favor of a career in the military service. 636 F.3d at 1359. Even though the appellant did

not have reemployment rights under section 4312, he is still entitled not to be discriminated against under section 4311(a). When an agency violates section 4311(a), the appellant is entitled to the relief set forth in section 4324(c)(2), which provides: If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

Therefore, because the Federal Circuit found that the agency violated the nondiscrimination provision of USERRA when it removed the appellant from his position with the agency, the appellant is entitled to the relief provided for under section 4324(c)(2).<sup>1</sup> **DECISION** The appellant's request for relief under USERRA is granted. **ORDER**

<sup>1</sup> Other than the relief set forth below, what other specific relief (lost wages and benefits) the appellant is entitled to would be the subject matter of a separate compliance proceeding.

**I ORDER** the agency to cancel the removal, reinstate the appellant retroactive to the date of removal, and to compensate the appellant for any loss of wages or benefits suffered no later than 60 calendar days after the date this initial decision becomes final. **I ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of lost wages and benefits due and to provide all necessary information requested by the agency to help it comply. If there is a dispute about the amount of lost wages and benefits due, **I ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount. **I ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office. For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. **I ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. **INTERIM RELIEF**

If a petition for review is filed by either party, **I ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief

order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: \_\_\_\_\_/S/\_\_\_\_\_

Garry Wade Klein Administrative Judge

### **NOTICE TO APPELLANT**

This initial decision will become final on **January 18, 2013** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

### **BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with: The Clerk of the Board Merit Systems Protection Board 1615 M Street, NW. Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to

prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with: The United States Court of Appeals for the Federal Circuit 717 Madison Place, NW. Washington, DC 20439 You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). 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. **ATTORNEY FEES**

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law. **ENFORCEMENT** If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency. Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

**NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.