

Veterans' preference imperiled

Federal Circuit to weigh in on a bedrock of U.S. employment law

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Raymond Marshall's 21 years in the Army undoubtedly steeled him for many of life's obstacles but probably not for his now five-year tour of duty in the legal arena for enforcing his right to get a federal job.

The retired lieutenant colonel is the central figure in a court challenge whose outcome, veterans' groups and litigators contend, could mean the survival or practical end to veterans' preference — a bedrock of federal employment law for more than 60 years.

Marshall's odyssey began in 2004, when he applied and interviewed for a budget analyst position within the Department of Health and Human Services (HHS). What happened next — in summary — is this:

Despite receiving the highest numerical rating, he was passed over for a lower-scoring applicant. HHS passed over him without getting legally required consent from the U.S. Office of Personnel Management. Marshall filed a complaint; an administrative law judge and the Merit Systems Protection Board found a violation of his right to compete with his veterans' preference. The agency conceded it would have hired Marshall but for its violation.

The administrative judge ordered retroactive reinstatement and compensation for lost wages or benefits. But the board, acting on HHS' appeal, ordered the agency in 2007 to "reconstruct the hiring" for the budget analyst job. HHS did so and ultimately decided it would hire no one. In 2008, the board found HHS in compliance with its order. Relying on two appellate court decisions, it said "an agency's decision not to fill a position does not violate the veteran's rights" under a 1998 law that gives veterans a mechanism for enforcing their preference rights.

The board dismissed Marshall's enforcement petition. The U.S. Court of Appeals for the Federal Circuit in August will hear his challenge to the "reconstruction" process — frequently used by the board as the remedy under the 1998 Veterans Employment Opportunities Act (VEOA).

Andrew Dhuey, a patent attorney in Berkeley, Calif., who is Marshall's pro bono counsel, said that allowing an agency to "immunize" its earlier violation of veterans' preference laws by deciding to hire no one in an after-the-fact reconstruction process "would make recovery under veterans' preference laws impossible."

Ten military and veterans' organizations are supporting Marshall's appeal. Their counsel, Michael Kator of Washington's Kator, Parks & Weiser, who also represents another veteran in a separate case challenging the reconstruction process, said the board has interpreted the VEOA's remedial provisions "so as to render them essentially meaningless."

Retired Capt. Samuel Wright, director of the Servicemembers Law Center of the Reserve Officers Association, echoed the sentiments of Kator and a number of veterans' lawyers and others, calling the Veterans Preference Act of 1944 "largely a dead letter," and the 1998 law designed to give it enforcement teeth "almost useless."

OUTDATED FRAMEWORK

Veterans' preference laws, and the 1944 act itself, are part of an outdated employment framework, said Meg Bartley, senior staff attorney with the National Veterans Legal Services Program.

"The law is defective because it is embedded in a competitive hiring system that is not used that often anymore," she said. "That whole problem is compounded by the way courts have interpreted the law unfavorably for veterans."

Steven Herrick, who practices federal employment law as managing partner of the Washington office of Tully Rinckey, agreed, saying that veterans' preferences were created for those taking competitive civil service exams. "It was a very simple matter of adding five or 10 points to the veteran's score," he said. "The applicants were then ranked and selected by very objective criteria. Now the competitive service has gone by the wayside, and many positions are in the 'excepted' service, which involves subjective criteria. The five- or 10-point preference doesn't fit very well. This requires a legislative solution."

Federal agencies have created alternative routes into the competitive service, added Bartley, such as special programs like the former Outstanding Scholar Program, which make a veteran's rank or rating potentially meaningless. In 2006, the Merit Systems Protection Board found that the scholar program, after operating for many years, violated veterans' preference.

Besides the impact of an outdated legal framework, veterans also face a complicated enforcement procedure when they believe their preference rights have been violated, said Herrick and Kator, and they often face it without a lawyer.

The 1998 VEOA was intended to give veterans an effective, user-friendly means to enforce their preference rights. Vets first must file a complaint with the Department of Labor within a finite time period, said Herrick, adding, "A lot of vets don't get to the department in time and they are locked out."

The department's division handling the complaints has investigative authority but no enforcement authority if it finds the complaint has merit. "They have to jawbone with the offending agency, and in the overwhelming number of cases, the agency says, 'Sorry, we're not interested in settling,'" Herrick said. "The department writes to the vet and says, 'You can go to the Merit Systems Protection Board.' The veteran looks at the board's rules and regulations and really has no idea of how to go about this, or doesn't have the time or money."

Many complaints never reach the board level, and when they do, veterans often go pro se, which may be one reason why they fare so poorly, he said.

Statistics on appeals paint a grim picture. In 2007, a House Veterans Affairs subcommittee asked the board for the number of appeals under the 1998 VEOA and how often veterans won relief.

The board reported that, in 2006, it received 92 VEOA appeals. Relief was granted in five cases and an additional 12 cases were settled. In 2007, it received 90 VEOA appeals. Relief was

granted in one case and four cases were settled. "From the view of a practitioner on the veteran's side, those statistics are both horrifying and not surprising," said Herrick.

The board's general counsel, Chad Bungard, said, "I think overall the veterans do quite well. A lot of the folks bring claims where veterans' preference isn't given by law. You get a lot of claims appealed that lack merit simply because they don't understand the law."

Bungard said the board's decision holding that the Outstanding Scholar Program could not be used as a hiring method to avoid the competitive hiring exam was "huge," benefitting an enormous number of veterans. "I think overall the board has been quite favorable to veterans," he said. "The numbers by themselves are quite deceiving."

DECONSTRUCTING RECONSTRUCTION

Marshall's appeal, said Dhuey and Kator, will be the first time the Federal Circuit considers head-on whether the board's reconstruction process is a proper interpretation of the VEOA's remedy provision.

The law states: "If the Merit Systems Protection Board...determines that an agency has violated a right described in section 3330a, the Board...shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved."

Dhuey and Kator argue that the board's reconstruction jurisprudence is contrary to the plain words of the statute, which directs the board to order compliance and compensation; that it improperly makes the violating agency the de facto fact-finder on the question of whether its actions caused the veteran to suffer losses; and that it adds substantial procedural delay that is inconsistent with Congress' intent in the VEOA.

Deputy Assistant Attorney General Michael Hertz, representing HHS, primarily makes procedural arguments, including waiver and judicial estoppel, to defend the board's decision. On the reconstruction issue, the government contends that the law's command that the board "shall order the agency to comply" with veterans' preference provisions "evinces Congress' intent that preference eligible veterans receive the benefits of a proper selection by having the offending agencies forced to follow the correct procedures."

The reconstruction remedy, the government argues, "does accord veterans with their full rights" under veteran-preference laws.

But Dhuey countered, "They don't say how it is any veteran could ever recover if this decision stands. That's a huge omission. There is no response to our argument that the statute has been eviscerated."

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