

MSPB Has Jurisdiction Over Claim Alleging USPS Improperly Charged Leave, Board Says

A U.S. Postal Service employee and National Guard member who alleged that USPS improperly charged him military leave for non-workdays during periods of service beginning in January 1980 can file a claim under the Uniformed Services Employment and Reemployment Rights Act, the Merit Systems Protection Board ruled March 7 in a decision that some observers believe could open the door to thousands of such claims against USPS (*Miller v. Postal Service*, MSPB, No. PH-3443-06-0392-I-1, 3/7/07).

Although the Postal Service is excluded from the federal military leave law at 5 U.S.C. § 6323, USPS during the relevant time period had a policy in effect allowing paid military leave for its employees, the board found, reversing an administrative judge's ruling that the board did not have jurisdiction over David Miller's military leave claim. The Postal Service dropped the policy in 2002, the board noted.

"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," the board wrote.

Finding that Miller stated a claim under USERRA but did not provide sufficient evidence to pursue it at this time, MSPB dismissed the claim without prejudice, noting that USPS refused Miller's discovery request because it intended to file a motion to dismiss for failure to state a claim. Miller also requested records from the Defense Finance and Accounting Service before the AJ issued the initial decision, the board noted.

"It appears that the appellant was unable, before the ID was issued, to obtain information regarding the leave he took and the exact dates and duration of his absences for military duty. The record does not indicate that the appellant had received any documents from DFAS before the AJ issued the ID. In addition, it appears that the appellant never received any of the documents he requested in discovery from the agency," the board wrote.

100,000 May Be Affected. Mathew B. Tully, an attorney with Tully, Rinckey & Associates in Albany, N.Y., told BNA March 30 that his law firm, which specializes in federal military leave claims, has estimated that more than 100,000 current and former postal employees who served in the military reserves or National Guard may have been improperly charged military leave from 1980 until USPS abandoned its military leave policy.

The firm already is preparing military leave claims on behalf of approximately 1,000 current and former USPS employees, Tully added. "We're ready to go and will be swamping MSPB over the next three to four months with USPS cases" alleging USERRA violations, he said.

The board's ruling is the latest in a series of holdings regarding federal employees' eligibility for reimbursement of military leave improperly deducted from their pay checks due to an Office of Personnel Management policy in effect from 1980 until 2000 under which the 15

days of military leave to which federal employees are entitled was calculated on a calendar day basis rather than a work day basis. As a result of this policy, employees fulfilling their military service obligations had weekends and holidays counted toward the 15 days of military leave and in some cases had to use annual leave to make up the difference.

In *Butterbaugh v. Justice Dep't*, 336 F.3d 1332 (Fed. Cir. 2003), the U.S. Court of Appeals for the Federal Circuit opened the door for such claims by ruling that, contrary to the OPM policy, federal employees should be charged for 15 workdays per year for military leave rather than 15 calendar days (41 GERR 798, 8/5/03).

Then, MSPB in *Garcia v. State Dep't*, 101 M.S.P.R. 172 (2006), ruled that federal employees in the military reserves going back to as early as 1980 who were improperly charged military leave by their employing agencies for non-workdays were eligible to file military leave claims (44 GERR 298, 3/14/06). Previously, the board had ruled in *Lee v. Justice Dep't*, 99 M.S.P.R. 256 (2005), that the cut-off date for actions leading to valid military leave claims was Oct. 13, 1994, when USERRA was enacted.

Most recently, the Federal Circuit, sitting en banc, ruled in *Kirkendall v. Army*, No. 05-3077 (Fed. Cir. 3/7/07), that those claiming violations of USERRA have an automatic right to an MSPB hearing (see related report in this issue).

Chairman Neil A.G. McPhie, Vice Chairman Mary M. Rose, and Member Barbara J. Sapin issued the opinion. Miller appeared pro se.

Lori L. Markle of Philadelphia represented the agency.