

Federal Commissioned Officers Score Protections Against Discrimination

By Mathew B. Tully

Federal commissioned officers, who seven years ago saw their protections against discrimination severely curbed, can now go on the offensive thanks to recent decision from the U.S. Merit Systems Protection Board (MSPB)

. Due to a loophole in federal law, federal commissioned officers can be added to the list of employees agencies cannot discriminate against because of their uniformed service.

In a landmark ruling, the MSPB

on Sept. 30 extended the anti-discrimination provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA)

to a career uniformed service officer who alleged his federal employer subjected him to discrimination on the basis of his uniformed service. In *Gjovik v. Dept. of Health and Human Services*

, the board rejected an attempt by the U.S. Department of Health and Human Services (HHS) to have the USERRA

claim dismissed on lack of jurisdiction grounds. The board returned the case to an MSPB administrative judge.

The case involved Nathan Gjovik, who for 22 years served as an engineer in the Commissioned Corps of the Public Health Service (PHS). Even though Gjovik lacked creditable PHS civil service or military service, he accused HHS of violating USERRA

by allegedly denying him of two promotions, transferring him to an undesirable location in South Dakota, and subjecting him to a hostile work environment. He also accused the agency of constructive removal.

USERRA

is traditionally known to prohibit employers from denying military service members the benefits of employment because of their uniformed duty. The goal of the law is commonly understood to curb the negative impacts uniformed service could have on civilian employment. As such, HHS argued that individuals still serving when a personnel action is taken are not covered by the law. As a member of the Commissioned Corps, HHS said Gjovik was neither a civilian employee nor someone appointed under civil service laws.

What makes Gjovik

interesting is the unique status of Commissioned Corps officers, who can be turned into

military officers through an order from the president. The Corps is a uniformed service of 6,500 of public health professionals tasked with health promotion, disease prevention and health science research. As the board noted, neither it nor its reviewing court, the U.S. Federal Circuit Court of Appeals, have decided whether the MSPB

has jurisdiction over such cases involving a Commissioned Corps career uniformed service member with a USERRA

claim against an employing agency. Another unique aspect of Gjovik

is that it concerns a complaint relating to discrimination, not employment.

As MSPB

member Mary M. Rose noted in her concurring opinion, military officers cannot file USERRA

complaints against their military employers. While “[c]ommon sense dictates” that the two types of officers should be viewed similarly by the board, Rose said “Congress...left a loophole in the statute that excludes military officers, but not Commissioned Corps officers, from bringing USERRA

appeals under these circumstances.”

In 2004, the U.S. 4th

Circuit Court of Appeals ruled in Hedin, v. Thompson

that, for the purposes of anti-discrimination laws, PHS officers must be deemed officers on active military duty. They, therefore, are exempt from anti-discrimination laws such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. While Gjovik

does not extend to Corps officers these laws’ protections against discrimination on the basis of race

, color

, sex

, ethnicity

, religion

, or age

, it does provide them with a basis for challenging at least one type of discrimination.

Career members of the uniformed service whose employer have subjected to discrimination because of their uniformed service should immediately contact a military law attorney who can help them assert their USERRA

rights.