

Federal Commissioned Officers Now USERRA-Protected

MSPB ruling extends protections from service-based discriminations

In a milestone ruling the U.S. Merit Systems Protection Board (MSPB) ruled that under certain circumstances some federal commissioned officers could qualify for anti-discrimination protections provided by the Uniformed Services Employment and Reemployment Rights Act (USERRA). The decision supplies federal commissioned officers with the ammunition to make a legal case if they believe they have been discriminated against by a federal employer because of their uniformed service. In the case, *Gjovik v Dept of Health and Human Services*

, Nathan Gjovik served as an engineer for 22 years in the Commissioned Corps of the Public Health Service (PHS). Gjovik accused the U.S. Department of Health and Human Services (HHS) of violating USERRA by denying him of two promotions, transferring him to an undesirable location, subjecting him to a hostile work environment and constructive removal. "Commissioned Corps officers' protections against discrimination in the federal workplace have suffered because of their connection to the armed forces, even though it takes a presidential order for them to become militarized. Finally, with the ruling, they can go on the offensive when a federal employer discriminates against them because of their uniformed service" said Lisa M. Windsor a retired Army colonel and JAG attorney who is of counsel to Tully Rinckey PLLC. In 2004 The U.S. 4th

Circuit Court of Appeals ruled that PHS officers are considered officers on active duty and therefore exempt from anti-discrimination statutes, such as those established, under Title VII of the Civil Rights Act and the age Discrimination in Employment Act. Even though one MSPB member said "common sense dictates" commissioned officers and military officers should be viewed similarly in this case, a loophole in USERRA affords the law's anti-discrimination protections to the former but not the latter. Windsor urged career members of the uniformed service to consult with a military law attorney immediately if they believe their employer has discriminated against them.