

LAW REVIEW 747

(September 2007)

CATEGORY: USERRA—Other Laws

Russell v. Equal Employment Opportunity Commission

By MAJ Mathew B. Tully, NYARNG

Many Reservists who are protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA) are also members of collective bargaining units in their civilian employment. Innate to membership in a collective bargaining unit is the relegation of negotiation of employment rights and benefits to labor union leaders. These negotiated rights can seemingly overlap and resemble rights Congress has already afforded to employees and Reservists.

But what happens to the Reservist and employee when the statutory rights seem to be in conflict with rights their union leaders have won on their behalf? And if they are in conflict, what are a Reservist's options? Does he bring his complaint to his union? Can he bring it to the Merit Systems Protection Board (MSPB), an adjudicatory body which decides many issues like this? Or do his options lie in both arenas? How do USERRA and a collective bargaining agreement (CBA) coincide?

In *Russell v. Equal Employment Opportunity Commission*, 2006 MSPB 319 (2006), the MSPB addressed this issue. The claimant was a federal trial attorney for the Equal Employment Opportunity Commission (EEOC) in Jackson, Miss., who served on active duty with the U.S. Army. Upon her return from active duty, she was reassigned by EEOC to Birmingham, Ala. The claimant alleged that the agency transferred her to the new office in retaliation for her active military duty and violated the CBA and federal law. She filed both a CBA grievance and an MSPB appeal.

To better understand the relationship between USERRA and CBAs, one must understand the background of both. First, the Civil Service Reform Act of 1978, 5 U.S.C. § 7121, provides that any CBA should include procedures for the settlement of grievances and, further, that any CBA could exclude any matter from the application of the grievance procedures which are provided for in the agreement. As a practical matter, this meant that a grievance covered by a CBA could not be brought before the MSPB even if it pertained to a subject matter over which the Board normally had adjudicatory powers. The only exceptions were with respect to specific exclusions in the CBA or within the statute, i.e., whistleblower retaliation. Second, USERRA was enacted in 1994 and superseded any state law, contract, agreement, policy, plan, practice, or other matter that reduced, limited, or eliminated in any manner any right or benefit provided in USERRA, including the creation of any additional prerequisites to the exercise of any rights (see 38 U.S.C. 4302). The MSPB was named one of the forums in which USERRA appeal could be brought.

On the one hand, the typical CBA states that the sole proper place to file a grievance is with the union through negotiated procedures. On the other hand, USERRA provides that claimants asserting USERRA violations can file with the MSPB. Can the union negotiate away an employee's right to utilize a congressionally granted option? The MSPB ruled no.

A CBA can neither limit a veteran's federally mandated substantive right of reemployment following military duty nor is it the only forum to which a complaint can be brought. Congress intended that the protections under USERRA override any contract or agreement (see 38 U.S.C. 4302). A CBA logically falls into the category of contract or agreement. Thus, union representatives cannot waive for an employee his individual rights as delineated in USERRA. In essence, a person suing pursuant to USERRA is not suing as an employee, like fellow union members covered by the CBA, but rather he or she is suing as a veteran, a person for whom the federal government created special laws. Collective bargaining leadership cannot negotiate to limit these federal, individual rights. Consequently, federal civilian employees and collective bargaining unit members who are Reservists have every right to bring their claim to an adjudicatory body outside of procedures set forth by the collective bargaining unit.

MAJ Tully, a founding partner of Tully, Rinckey, & Associates, P.L.L.C., in Albany, N.Y. (www.fedattorney.com) is a field artillery officer with the New York Army National Guard Field Artillery and an Operation Iraqi Freedom III veteran. He specializes in handling USERRA cases for federal employees.