

## The MSPB Adjudicates Claims that Federal Executive Agencies Have Violated USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.1.1.8—USERRA applies to Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

**Q: I am a petty officer in the Coast Guard Reserve. I was hired by the United States Department of the Interior (DOI) and started work on October 1, 2014. For the next ten months, I got a lot of grief from my DOI supervisor about time off from work for Coast Guard Reserve training. In July 2015, I gave the supervisor written notice of my Coast Guard Reserve annual training (two weeks) in September 2015. Just three days later, I was notified that I had been fired, effective immediately. I protested that the firing was unfair and was in violation of my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I asked about appealing the firing. My supervisor and a person in the personnel office told me that because I had not been on the payroll as a federal civilian employee for a year, at the time of the firing, I cannot appeal the firing to the MSPB. What is the MSPB? Is it true that there is no appeal of the firing?**

**A:** The MSPB is the Merit Systems Protection Board, a quasi-judicial federal executive agency. It is true that (with certain minor exceptions not here pertinent) a probationary federal employee who has not yet completed the first year of federal civilian service cannot appeal a firing to the MSPB, but because you are claiming that the firing violated USERRA you can bring an action against the DOI in the MSPB, under section 4324 of USERRA, which provides as follows:

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,350 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright is the author or co-author of approximately 1,200 of the 1,350 "Law Review" articles at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). From June 2009 to May 2015, he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. During that time, he received and responded to more than 35,000 e-mail and telephone inquiries. He is no longer employed by ROA, but he is continuing the SMLC on a part-time, volunteer basis, as a member of ROA. He is available at [SWright@roa.org](mailto:SWright@roa.org) or (800) 809-9448, ext. 730. Please understand that Captain Wright is a volunteer, and he may not be able to respond to your e-mail or telephone call on the same day. Captain Wright received his BA from Northwestern University (1973), his JD (law degree) from the University of Houston (1976), and his LLM (advanced law degree) from Georgetown University (1980). He retired from the Navy Reserve Judge Advocate General's Corps in 2007.

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) *The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.*

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that

such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d) (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>3</sup>

### **Background on the MSPB**

For our nation's first century, staffing of the Federal Government relied upon the "spoils system—to the victor belong the spoils." The President appointed federal employees at all levels, and appointments were made to the supporters of the President and his political party. In 1881, Charles A. Guiteau (a disappointed federal office seeker) assassinated President James A. Garfield. As a result of that tragedy, as well as the increasing size and scope of the federal bureaucracy, Congress enacted the Pendleton Civil Service Reform Act in 1883, establishing the Civil Service Commission (CSC) and the principle that selection, assignment, promotion, and firing of federal employees should be based upon merit and efficiency, not the spoils system.

The CSC served our nation well for more than eight decades, but there was criticism that administration, investigation, prosecution, and adjudication functions were consolidated in the CSC, creating the appearance of conflict of interest and inconsistent roles. The Civil Service Reform Act of 1978 (CSRA) abolished the CSC and split its functions, staff, and assets into three agencies. The Office of Personnel Management (OPM) inherited the CSC's headquarters building and the great majority of the CSC's staff and assets and functions as the personnel office for the Executive Branch of the Federal Government.

The MSPB inherited the adjudication functions of the CSC. The Office of Special Counsel (OSC) inherited the investigation and prosecution functions. For the first decade of the MSPB's existence, OSC was a unit of the MSPB, but in 1989 the OSC became a separate agency within the Executive Branch of the Federal Government. OSC has important authorities and responsibilities under the CSRA, USERRA, and the Whistleblower Protection Act.

### **Background on USERRA**

In 1940, Congress enacted the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II. As part of the STSA, Congress enacted the Veterans' Reemployment Rights Act (VRRA), requiring the Federal

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<sup>3</sup> 38 U.S.C. 4324 (emphasis supplied).

Government and private employers<sup>4</sup> to reemploy those who left civilian jobs when they were drafted. In 1941, as part of the Service Extension Act, Congress amended the VRRRA to make it apply to voluntary enlistees as well as draftees.

On October 13, 1994, Congress enacted and President Bill Clinton signed into law Public Law 103-353 (USERRA), as a long-overdue rewrite of the VRRRA.<sup>5</sup> USERRA made major improvements in the VRRRA, especially with respect to enforcement of this law with respect to federal agencies as employers.

The VRRRA applied to the Federal Government, as a civilian employer, but it did not contain a specific enforcement mechanism whereby a person claiming reemployment rights against a federal agency might enforce those rights. If the person had a right to appeal to the CSC or later the MSPB, that agency would apply the VRRRA. But if the person did not have another basis for appealing the unfavorable personnel action (firing, failure to hire, failure to promote, etc.) the person had no way to enforce his or her VRRRA rights.

Section 7511 of title 5 of the United States Code defines “employee” for purposes of the right to appeal to the MSPB a firing or a suspension without pay of 15 days or more. Two alternative definitions are pertinent. First: “an individual in the competitive service (i) *who is not serving a probationary or trial period under an initial appointment.*”<sup>6</sup> Second: “an individual in the excepted service (other than a preference eligible)—*who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service.*”<sup>7</sup>

Because you were still in your first year of “probationary” federal civilian employment at the time you were fired, you do not have the general right to appeal the firing to the MSPB. Under section 4324 of USERRA, after 1994, you have the right to bring an action against the DOI in the MSPB, contending that you were denied “retention in employment” (you were fired) on the basis of your membership in a uniformed service (the Coast Guard Reserve in your case), application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service, in violation of section 4311 of USERRA.<sup>8</sup>

Prior to the enactment of USERRA in 1994, there were several categories of persons who had VRRRA claims against federal agencies but who had no way to enforce those rights. The most obvious example is your example—persons who could not appeal a firing to the MSPB because they were still within the initial year of federal civilian employment when fired, but there are other examples as well.

### ***Persons denied initial employment or promotion by a federal agency***

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<sup>4</sup> In 1974, Congress expanded the VRRRA to make it apply also to state and local governments, as employers.

<sup>5</sup> USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

<sup>6</sup> 5 U.S.C. 7511(a)(1)(A)(i) (emphasis supplied).

<sup>7</sup> 5 U.S.C. 7511(a)(1)(C)(i) (emphasis supplied).

<sup>8</sup> 38 U.S.C. 4311.

Section 2021(b)(3) of the VRRRA<sup>9</sup> made it unlawful for any employer (federal, state, local, or private sector) to deny a person retention in employment (to fire the person) or a promotion or incident or advantage of employment on the basis of the persons obligations as a member of a Reserve Component (RC) of the armed forces.<sup>10</sup> In 1986, Congress amended section 2021(b)(3) to outlaw discrimination *in hiring* as well. Thus, it was unlawful under the VRRRA for a federal agency (or any other employer) to deny initial hiring to a person on the grounds that he or she was an RC member, but there was no mechanism for enforcing this prohibition, in that the job applicant lacked an independent basis for invoking MSPB jurisdiction. Section 4324 of USERRA gives the MSPB the authority and responsibility to adjudicate these claims of denial of initial employment or denial of promotion, based on performance or obligation to perform uniformed service, even if the individual has no other basis to invoke MSPB jurisdiction.

### ***Employee of non-appropriated fund instrumentality***

The Army and Air Force Exchange Service (AAFES) is the largest non-appropriated fund instrumentality (NAFI), by far. Other NAFIs include the Navy Exchange, the Marine Corps Exchange, the Coast Guard Exchange, the VA Exchange (established by and supporting the Department of Veterans Affairs), and officers' clubs and similar entities on military bases at home and abroad.<sup>11</sup>

Under the VRRRA, prior to the 1994 enactment of USERRA, there was no way for a federal NAFI employee to enforce his or her reemployment rights, because the MSPB had no jurisdiction to hear appeals filed by NAFI employees. The 1994 enactment of USERRA closed this loophole with respect to USERRA enforcement.

I worked for the U.S. Department of Labor (DOL) as an attorney for a decade; this is when I developed the interest and expertise in the reemployment statute. Together with one other DOL attorney (Susan M. Webman) I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress in February 1991 and that became USERRA when Congress enacted it (with only a few changes) and President Bill Clinton signed it into law on October 13, 1994.

In the late 1980s, while I worked for DOL, the agency had a whole series of VRRRA cases with AAFES. We contacted the AAFES headquarters, and the AAFES management made it clear that they had no intention of complying with the VRRRA. Their attitude was that accommodating the military training schedules of National Guard and Reserve personnel was inconvenient, and DOL couldn't do anything about the decision of AAFES management to flout the VRRRA.

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<sup>9</sup> 38 U.S.C. 2021(b)(3) (1988 edition of the United States Code).

<sup>10</sup> There are seven Reserve Components: The Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

<sup>11</sup> I invite the reader's attention to Law Review 163 (March 2005), about an Army Reserve Major, mobilized and deployed to Iraq, who left a civilian job for the Community Support Association (CSA), a NAFI established at the United States Embassy in Germany. The elected officers of the CSA (career foreign service officers assigned to the Embassy) tried to wiggle out from under their USERRA obligations, but fortunately they were not successful.

I recall drafting a letter that Assistant Secretary of Labor (Veterans' Employment and Training) Donald Shasteen sent to Assistant Secretary of Defense (Reserve Affairs) Steve Duncan, alerting DOD to the problem of getting AAFES to comply with the VRRRA. Unfortunately, Assistant Secretary Duncan was unable to get AAFES to "get with the program."

When Ms. Webman and I drafted the product that later became USERRA, AAFES was very much on our minds. Our intent was that the new reemployment statute, and its enforcement mechanism, would most definitely apply to AAFES and other NAFIs. Section 4303 of USERRA defines 16 terms used in the statute. When a statute includes definitions, the statutory definitions control for purposes of that statute. USERRA's definition of "employer" includes "the federal government."<sup>12</sup> Section 4303 also defines that term, as follows: "The term 'federal government' includes any federal executive agency...."<sup>13</sup> Section 4303 also defines "federal executive agency" and the definition specifically includes "any nonappropriated fund instrumentality of the United States."<sup>14</sup>

USERRA's legislative history clearly buttresses the conclusion that Congress intended that AAFES and other NAFIs should be subject to USERRA. "It is the Committee's intent [House Veterans' Affairs Committee] that the definition of 'agency in the executive branch' include the United States Postal Service, *non-appropriated fund instrumentalities of the United States* (e.g., military exchanges and officers' clubs), and other specified entities. The intent is to give employees of these entities the same reemployment rights as those extended to other federal employees."<sup>15</sup>

Section 4324 of USERRA provides for enforcement of USERRA rights with respect to federal executive agencies. Since NAFIs fall within the statutory definition of "federal executive agency," it is clear beyond any reasonable dispute that NAFIs are subject to USERRA, and to the law's enforcement mechanism, just like any other federal executive agency.

I brought this matter to the attention of Brigadier General Keith Lee Thurgood, USAR, the commander of AAFES. He responded as follows: "Thanks for the history lesson, but I can't change what has happened in the past. What I can do is get this right for our great Citizen Soldiers going forward, and I am absolutely committed to that. As an Army Reservist myself, I am fully aware of USERRA and have worked many cases of this type for ESGR.<sup>16</sup> We'll get this right." General Thurgood also informed me that AAFES employs many National Guard and Reserve members and values the unique work and life experiences they bring to the organization.

**Employee of federal contractor, in circumstances where a federal executive agency qualifies as the "joint employer" of the individual and the federal agency has stood in the way of USERRA compliance**

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<sup>12</sup> 38 U.S.C. 4303(4)(A)(ii).

<sup>13</sup> 38 U.S.C. 4303(6).

<sup>14</sup> 38 U.S.C. 4303(5).

<sup>15</sup> House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2455 (emphasis supplied).

<sup>16</sup> ESGR is the DOD organization called Employer Support of the Guard and Reserve.

At the time we add this article to the website, Brigadier General Michael J. Silva is completing his two-year term as National President of ROA. I invite the reader's attention to *Silva v. Department of Homeland Security*.<sup>17</sup>

From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, General Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.

In May 2006, General Silva was called to active duty and deployed to Iraq. He was released from active duty in August 2007, and he made a timely application for reemployment with SPS and DHS. Although he met the eligibility criteria for reemployment under USERRA, he was not reemployed.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS and DHS from their obligation to reemploy Mr. Silva. In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this was apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value. I can certainly sympathize with SPS' predicament. USERRA required the company to reemploy Mr. Silva, but the DHS contract administrator threatened to terminate the contract if SPS did so. But customer preference can never be a defense to a violation of USERRA or any employment law. "We must violate USERRA because our customer insists that we do so" is indefensible.<sup>18</sup>

As I explained in Law Review 154,<sup>19</sup> and as the Department of Labor (DOL) USERRA regulations provide,<sup>20</sup> it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning

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<sup>17</sup> 2009 MSPB 189 (MSPB September 23, 2009). This is a published, precedential decision of the three-member MSPB. Yes, it is the same Michael J. Silva.

<sup>18</sup> Please see Law Review 0629 (April 2006).

<sup>19</sup> December 2004.

<sup>20</sup> 20 C.F.R. 1002.37.

veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense—he was not a federal civilian employee.

Mr. Silva complained to DOL's Veterans' Employment and Training Service (DOL-VETS), alleging that both SPS and DHS had violated USERRA. DOL-VETS is responsible for investigating complaints that any employer has violated USERRA. In accordance with the “demonstration project” that was in effect at the time, DOL-VETS referred Mr. Silva’s case against DHS to OSC.<sup>21</sup> OSC found his case meritorious and initiated an MSPB action against DHS. In accordance with MSPB rules, his case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself.<sup>22</sup> On September 23, 2009, the MSPB agreed with OSC and found that it had jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. On remand, DHS and Mr. Silva agreed to a settlement under which a substantial but undisclosed amount of money was paid to Mr. Silva by DHS.

The *Silva* case is an important precedent showing the broadness of MSPB jurisdiction under section 4324 of USERRA.

***Legislative Branch and Judicial Branch excluded from MSPB jurisdiction under section 4324***

**Q: Does the MSPB have jurisdiction under section 4324 for USERRA cases against employers in the Legislative Branch or the Judicial Branch of the Federal Government?**

**A:** No. Section 4324 refers to a USERRA complaint against a “Federal executive agency.”<sup>23</sup>

***Intelligence agencies excluded from MSPB jurisdiction***

**Q: Are all agencies in the Executive Branch of the Federal Government included in section 4324 with respect to MSPB jurisdiction to adjudicate alleged USERRA violations?**

**A:** No. The intelligence agencies are excluded. Those agencies are the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA), the National Geospatial Intelligence Agency (NGA), and “as

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<sup>21</sup> Please see Law Review 0605 (February 2006).

<sup>22</sup> The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation.

<sup>23</sup> 38 U.S.C. 4324(b). Please see Law Review 34 (November 2001) and Law Review 15009 (January 2015) with respect to the application of USERRA to Legislative Branch and Judicial Branch employers.



determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”<sup>24</sup>

### ***MSPB Procedures***

#### **Q: How will my MSPB USERRA case be adjudicated?**

**A:** Like any MSPB case, a USERRA case concerning a federal executive agency as employer starts before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. These AJs work out of MSPB regional offices all over the country. The hearing is usually held at or near the federal workplace.

If you are not satisfied with the AJ’s determination, you can appeal to the MSPB itself, here in Washington. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. If you win at the AJ level, the agency can appeal to the MSPB itself.

The MSPB is the ultimate “rocket docket.” Cases move very quickly, so you must be prepared before you file the case. The AJ is evaluated on timeliness and is expected to get the case decided within 120 days after it is filed.

#### **Q: If I lose at the MSPB, is it possible to get judicial review in federal court?**

**A:** Yes. If you lose at the MSPB, you can appeal to the United States Court of Appeals for the Federal Circuit, under section 4324(d). If you win at the MSPB, the agency does not have the right to appeal to the Federal Circuit.<sup>25</sup>

The Federal Circuit is a specialized federal appellate court that sits here in Washington and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

#### **Q: How do I initiate a USERRA case against a federal executive agency in the MSPB?**

**A:** There are two ways. First, you can make your USERRA complaint, in writing, to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), under section 4322(a) of USERRA.<sup>26</sup> That agency will investigate your complaint and advise you of the results of the investigation.<sup>27</sup> Upon receiving the DOL-VETS report of results, you can request (in effect demand) that DOL-VETS refer your case file to OSC.<sup>28</sup> If OSC is reasonably satisfied that you are entitled to the benefits you seek, OSC may bring an MSPB action on your behalf.<sup>29</sup>

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<sup>24</sup> 5 U.S.C. 2302(a)(2)(C)(ii). Please see Law Review 0852 (November 2008) for a detailed discussion of the application of USERRA to these intelligence agencies.

<sup>25</sup> Please see Law Review 14090 (December 2014).

<sup>26</sup> 38 U.S.C. 4322(a).

<sup>27</sup> 38 U.S.C. 4322(d) and (e).

<sup>28</sup> 38 U.S.C. 4324(a)(1).

<sup>29</sup> 38 U.S.C. 4324(a)(2)(A).

When you receive the DOL-VETS report on the results of that agency’s investigation, you can bring your action in the MSPB yourself, instead of requesting that DOL-VETS refer your case file to OSC.<sup>30</sup> You can also bypass DOL-VETS and OSC altogether and file your case directly in the MSPB.<sup>31</sup> You are not required to exhaust remedies in DOL-VETS and OSC before filing your case in the MSPB, and you do not need a “right to sue letter.”

If you request referral to OSC, and if OSC turns down your request for representation, you can then bring your action in the MSPB directly.<sup>32</sup>

**Q: Who will represent me in the MSPB USERRA case?**

**A:** If you request referral to OSC, and if OSC agrees to take your case, OSC will represent you in initiating to trying the case, at no cost to you.<sup>33</sup>

If you bring the case directly, you will need to retain a private lawyer to represent you. You can also represent yourself—what we call *pro se* representation. I do not recommend trying to do this yourself. Abraham Lincoln said, “A man who represents himself has a fool for a client.” And today the law is so much more complicated than it was in Lincoln’s lifetime.

**Q: If I retain private counsel to bring my case directly in the MSPB and I prevail, is it possible to get the MSPB to order the agency to pay my attorney fees?**

**A:** Yes. Section 4324 provides: “If the Board [MSPB] determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board *may, in its discretion*, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.”<sup>34</sup>

The MSPB has held that the attorney fees that can be awarded under section 4324(c)(4) only cover representation in the MSPB, not in the Federal Circuit, on appeal from the MSPB, and the Federal Circuit affirmed this limitation, and the Supreme Court very recently declined *certiorari* (discretionary review).<sup>35</sup> I believe that this limitation is not commanded by the language of section 4324(c)(4) and that this stingy interpretation is inconsistent with the Supreme Court’s command that the reemployment statute be “liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of great need.”<sup>36</sup> I favor a statutory amendment clarifying that the award of attorney fees to the prevailing USERRA claimant is mandatory, not

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<sup>30</sup> 38 U.S.C. 4324(b)(2).

<sup>31</sup> 38 U.S.C. 4324(b)(1).

<sup>32</sup> 38 U.S.C. 4324(b)(4).

<sup>33</sup> 38 U.S.C. 4324(a)(2)(A).

<sup>34</sup> 38 U.S.C. 4324(c)(4) (emphasis supplied). I wish that the statute said “shall” instead of “may.”

<sup>35</sup> See *Erickson v. United States Postal Service*, 759 F.3d 1341 (Fed. Cir. 2014), *cert. denied*, 2015 U.S. LEXIS 4443 (June 29, 2015). Lieutenant Colonel Mathew Tully and I discuss the *Erickson* case in great detail in Law Review 14090 (December 2014).

<sup>36</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

discretionary, and that the attorney fees are to include Federal Circuit representation as well as MSPB representation.

**Q: Will I be able to find private counsel to take my case solely on the consideration of the prospect of getting the agency to pay the attorney fees after we win?**

**A:** Probably not. There are so many variables, even if you win, that I think that it is unlikely that you will find a qualified attorney to take the case solely on that basis. You will likely need to pay the attorney a reasonable fee up front or a percentage of your recovery—what we call a contingent fee.

**Q: If I win my USERRA case in the MSPB, what remedies are available?**

**A:** “If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter [USERRA] relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.”<sup>37</sup>

**Q: If I prove that the agency violated USERRA willfully, do I get double damages?**

**A:** No. USERRA provides that a federal court may require a private employer or a state or local government to pay double damages (called “liquidated damages”) in case of a willful violation.<sup>38</sup> Section 4324, dealing with enforcement of USERRA against federal executive agencies, makes no provision for liquidated or double damages.

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<sup>37</sup> 38 U.S.C. 4324(c)(2).

<sup>38</sup> 38 U.S.C. 4323(d)(1)(C).