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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to implement provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), as amended by the Veterans Programs Enhancement Act of 1998. The purpose of the amendment is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed in cases raising claims that an agency employer or the Office of Personnel Management (OPM) has not complied with a USERRA provision governing the employment and reemployment rights to which a person is entitled after service in the uniformed services.

EFFECTIVE DATE: October 7, 1999.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653–7200.

SUPPLEMENTARY INFORMATION: On December 22, 1997, the Board issued an interim rule to implement provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103–353 (62 FR 66813). The interim rule requested public comments and allowed 60 days, until February 20, 1998, for submission of comments.

Comments were received from two Federal agencies, both of which have significant responsibilities under USERRA. The Office of Personnel Management supported the interim rule, as published, citing in particular its support for the establishment of time limits for filing a USERRA appeal with MSPB. (The Preamble to the interim rule explained that the Board is authorized by 5 U.S.C. 1204(h) to promulgate regulations to carry out its functions, that the Board has used this authority since its inception to prescribe time limits for filing appeals with the Board, and that the Board is also authorized by 38 U.S.C. 4331(b)(2)(A) to promulgate regulations to carry out its functions under USERRA.) The OPM comments noted that the establishment of time limits would avoid matters becoming stale, while adequately safeguarding the procedural rights of Federal employees.

The Department of Labor, on the other hand, objected to the establishment of time limits for filing USERRA appeals. In support of its position, the Department cited the broad remedial purpose of USERRA and the stated intent of Congress that Federal employees be provided protections comparable to those afforded employees of State and private employers. The Department pointed out the specific prohibition on application of any State statute of limitations to claims brought against State or private employers (38 U.S.C. 4323(c)(6), now 38 U.S.C. 4323(i) as amended by the Veterans Programs Enhancement Act of 1998). The Department argued that, rather than imposing time limits on the filing of USERRA claims, the Board should apply the equitable doctrine of *laches* to claims brought by Federal employees.

While the Board was evaluating these comments, the House of Representatives passed H.R. 3213, the USERRA Amendments Act of 1998. This bill included a provision (section 4) that would require the Board to adjudicate any USERRA claim filed on or after October 13, 1994 (the enactment date of USERRA) ''without regard as to whether the complaint accrued before, on, or after October 13, 1994.'' Subsequently, both the House and Senate passed H.R. 4110, the Veterans Programs Enhancement Act of 1998, which incorporated the language of section 4 of H.R. 3213 as section 213. (The other provisions of H.R. 3213 became sections 211 and 212 of H.R. 4110.) The President signed H.R. 4110 on November 11, 1998, Public Law 105–368. Under this amendment to USERRA, the time limits in the Board's interim rule clearly could not be applied to USERRA complaints that accrued prior to October 13, 1994.

In view of both the 1998 USERRA amendments and the comments on the interim rule submitted by the Department of Labor, the Board undertook an extensive review of the history of veterans reemployment rights law. From this review, the Board has concluded that it would be inconsistent with the intent of Congress for the Board to exercise its regulatory authority to establish a time limitation on the filing of claims by Federal employees under USERRA.

The prohibition on State statutes of limitation in USERRA is carried over from an earlier law, the 1974 Vietnam Era Veterans Readjustment Assistance Act. Section 404 of that law, which created Chapter 43 of Title 38, is commonly referred to as the Veterans Reemployment Rights Act (VRR Act). The legislative history makes clear Congress' preference for the application of *laches* in VRR cases. The Senate Report, S. Rep. No. 907, 93d Cong., 2d Sess. at 111 (1974) (emphasis added) states:

> There is also added a provision at the end of this section which reaffirms and reflects more clearly the *congressional intent that legal proceedings under this chapter shall be governed by equity principles of law*, specifically by barring the application of State statutes of limitations to any such proceeding.
>
> Congress, in 1940, omitted any reference to the application of a time-barred defense in cases arising under this law, in part to insure the application of a policy of keeping enforcement rights available to returned veterans as uniform as possible throughout the country. *The equity doctrine of laches accomplishes the purpose as nearly as possible.*
>
> Therefore, those court decisions which have either applied a State statute of limitations to completely bar a claim under the prior law (see e.g. *Blair* v. *Paige Aircraft Maintenance, Inc.*, 467 F.2d 815 (1972) (Alabama 1-year statute of limitations); *Bell* v. *Aerodex, Inc.*, 473 F.2d 869 (5th Cir. 1973) (Florida 1-year statute of limitations) or have applied a State statute of limitations to partially bar a claim under the prior law (see e.g. *Gruca* v. *United States Steel Corp.*, (No. 73–1803 3d Cir. decided April 17, 1974); *Smith* v. *Continental Airlines, Inc.*, 70 CCH Labor Cases 13,501 (C.I.), Calif. 1973) are not in accord with the intent of Congress as to the application of time-barred defenses.

Congress did not include either in the 1974 law or in USERRA in 1994 an explicit prohibition on the application

of a Federal time limitation to veterans reemployment rights claims brought by Federal employees. Congress' silence regarding applying Federal statutes of limitation to veterans reemployment cases, however, is not necessarily determinative. In *Wallace* v. *Hardee's of Oxford*, 874 F. Supp. 374, 376 (M.D. Ala. 1995), the court rejected Hardee's argument that if Congress intended to preempt use of Federal statutes of limitation it would not have barred only State statutes of limitation. The court noted that ''the Act's silence can be explained on the basis that Congress enacted the bar on State statutes of limitations specifically to overrule case law on that issue.'' *Id.* ''Because, to the court's knowledge, there was no case law borrowing from Federal statutes of limitations in the veterans' reemployment area, there would have been no reason for Congress to enact a statute on that subject. In this situation, Congress's silence on borrowing from Federal statutes of limitation cannot be determinative.'' *Wallace*, 874 F. Supp. at 376.

Other courts considering time limits in veterans reemployment matters have applied *laches*. In *Farries* v. *Stanadyne/Chicago Div.*, 832 F.2d 374, 379–80 (7th Cir. 1987), the court applied *laches* to a VRR Act claim, relying on the Senate Report language cited above indicating that legal proceedings under the Act are to be governed by equitable principles, including the doctrine of *laches*. In *Stevens* v. *Tennessee Valley Authority*, 712 F.2d 1047, 1056–57 (6th Cir. 1983), the court applied *laches* to a veterans reemployment rights matter (cited with approval in the USERRA legislative history, H.R. Rep. No. 65, 103rd Cong., 1st Sess. at 39 (1993)). In *Goodman* v. *McDonnell-Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980), the court applied *laches* in a VRR Act case, concluding that analogous statutes of limitation are only one element in determining ''whether the length of delay was unreasonable and whether the potential for prejudice was great.'' The court found that this approach is consistent with the purpose of the doctrine of *laches* and congressional intent to protect veterans' reemployment rights. *Id.*

USERRA broadened both the substantive and procedural rights of veterans. The legislative history does not distinguish between those rights in noting a congressional intent to construe the Act broadly but directs that the Act be treated as ''an organic whole.'' The House Report at 19 states:

> * * * the extensive body of case law that has evolved over (the fifty years of legislation regarding veterans employment and reemployment rights), to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be ''liberally construed.''

The House Report cites two Supreme Court cases for its principle of liberal construction. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), interprets the provision of the Selective Service Act requiring that, upon return from military service, an employee is to be restored without loss of seniority. Noting that the Act is to be liberally construed, the Court stated that it must ''*construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.*'' *Id.* at 285 (emphasis added). In *Alabama Power Co.* v. *Davis*, 431 U.S. 585 (1977), the Court, citing *Fishgold*, held that the Military Selective Service Act should be construed broadly to enable an employee to accumulate pension benefits while on military duty, as long as there is ''reasonable certainty'' that he would have accumulated those benefits had he stayed at his job. *Id.* at 591–92.

Given the broad remedial purpose of USERRA, the mandate for its liberal construction, the stated intent of Congress that Federal employees be provided protections comparable to those afforded employees of State and private employers, the stated intent of Congress that the Federal Government serve as a model employer, the 1998 amendment extending the Board's jurisdiction to complaints that accrued prior to the USERRA effective date, and the legislative history and judicial construction of veterans' reemployment rights law reviewed above, the Board has concluded that application of a time limitation to Federal employees' USERRA claims would be inconsistent with congressional intent.

The Board in this final rule is revising 5 CFR 1201.22(b)(2) to remove the time limits for filing USERRA appeals and to state instead that the time limit set forth in § 1201.22(b)(1)—which applies to MSPB appeals generally—shall not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services. No other changes are made to the interim rule.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h) and 38 U.S.C. 4331.

Accordingly, the Board adopts its interim rule published on December 22, 1997 (62 FR 66813), as final, with the following change:

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.22(b)(2) is revised to read as follows:

§ 1201.22 [Amended]

(b) * * *

(2) The time limit in paragraph (b)(1) of this section shall not apply to an appeal alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (see paragraph (a)(22) of § 1201.3 of this part).

Dated: September 28, 1999.

Robert E. Taylor,

Clerk of the Board.

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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 735

RIN 0560–AE60

Amendments to the Regulations for Cotton Warehouses—Electronic Warehouse Receipts, and Other Provisions

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts, with minor changes, a proposed rule that was published in the November 2, 1996, **Federal Register** (61 FR 60637) regarding cotton warehouses that are operating under the United States Warehouse Act (USWA). This rule makes a number of clarifying and technical changes to existing warehouse regulations, but also removes the requirement that all electronic warehouse receipts for cotton must be issued as single bale receipts. The rule will thereby allow warehouse operators to issue single and multiple bale warehouse receipts as either paper or electronic warehouse receipts. Portions of the proposed rule were already adopted in a final rule that was