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Disabled Veteran Federal Civilian Employees Have the Right To Time off from their Civilian Jobs for Medical Treatment—Is it Limited to Treatment for Service-Connected Disabilities?

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About Sam Wright

9.0—Miscellaneous

Q: I am the union steward for a local of the American Federation of Government Employees (AFGE). We represent employees of the United States Department of Veterans Affairs (VA) at a specific VA facility. We have a member (let's call him Nathan Hale) who lost his left leg when he was wounded in action in Kuwait in February 1991, during the First Gulf War. He is a disabled veteran and VA employee.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1700 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Recently, Hale suffered from a medical condition that is unrelated to his 1991 combat wound, and he needed to take time off from his VA job for a medical appointment, but he had exhausted his bank of sick leave and annual leave. He applied for unpaid leave under Executive Order (EO) 5396, promulgated by President Herbert Hoover on July 17, 1930.

We have read with great interest your Law Review 13080 (June 2013). The title of that article is "Federal Civilian Employees Who Are Disabled Veterans Have the Right to Time off from their Jobs for Medical Treatment—Thank you President Hoover."

Management at this VA facility denied Hale "Hoover leave" for his medical appointment. Management insists that the right of a disabled veteran federal employee to "Hoover leave" only applies when the medical condition necessitating a medical appointment is related to the condition that caused the employee to be a disabled veteran.

Your 2013 article does not address the question of whether the right to "Hoover leave" is limited to service-connected medical conditions. Hale insists that because he is a disabled veteran he is entitled to "Hoover leave" for a necessary medical appointment, without regard to whether the medical condition necessitating the appointment is connected to his service-connected disability. What do you think?

Answer, bottom line up front: Management is wrong. President Hoover set forth the conditions that an employee must meet to obtain "Hoover leave." Management has no right to add an additional condition.

Explanation:

EO 5396 reads as follows:

> With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.
>
> The granting of such leave is contingent upon the veteran's giving prior notice of definite days and hours of absence required for medical treatment in order that arrangements may be made for carrying out the work during his absence.

To have the right to "Hoover leave," a federal employee must meet the following conditions:

a. Must be a disabled veteran.
b. Must have an illness or injury that necessitates medical care.
c. Must schedule the "Hoover leave" in advance.
d. Must present an official statement from duly constituted medical authority (like the attending physician) attesting that the medical treatment was necessary and was conducted.

I have quoted the entirety of EO 5393. President Hoover did not release an explanatory statement addressing the specific question of whether he intended that the right to "Hoover leave" should apply when the medical condition requiring treatment is not the same condition that resulted in the individual being a disabled veteran. We cannot conduct a séance to ask President Hoover if he had contemplated this question.

The everyday work of courts is to determine the meaning of the words contained in constitutions, statutes, regulations, executive orders, contracts, wills, and other legal documents. Over the centuries, courts in Great Britain, the United States, and other common law countries have developed "rules of statutory construction" to help answer such interpretation questions.

One of the rules of statutory construction is *expressio unius est exclusio alterius.* That is Latin for "to express one is to exclude all the others." By expressing four conditions that a federal employee must meet to have the right to "Hoover leave," President Hoover implicitly excluded the imposition of other conditions. If President Hoover did not intend such an implication, he could have written "including without limitation" or words to that effect before enumerating the four conditions.

The maxim *expressio unius est exclusio alterius* has been defined as follows: "The expression of one thing is the exclusion of another. … Mention of one thing implies exclusion of another. … When certain persons or things are mentioned in a law, contract, or will, an exclusion of all others may be inferred."[3]

I invite the reader's attention to an appellate case under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4] Section 4304 of USERRA[5] provides that a veteran who received one of four enumerated bad discharges[6] is not entitled to reemployment, even if he or

[3] *Black's Law Dictionary, Revised Fourth Edition,* page 692 (internal citations omitted).
[4] *See Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008). I discuss that case in detail in Law Review 09069 (2009).
[5] 38 U.S.C. 4304.
[6] The disqualifying bad discharges are bad conduct discharges, dishonorable discharges, dismissals, and being "dropped from the rolls."

she meets the other four USERRA conditions. Captain Petty, the plaintiff, resigned his commission "for the good of the service" and received a general discharge, after he was accused of a serious violation of the Uniform Code of Military Justice. While Petty was hardly "soldier of the year" material, his general discharge was not one of the enumerated bad discharge that disqualify a person from the right to reemployment. The 6th Circuit[7] applied the *expressio unius est exclusio alterius* maxim in finding that Petty had the right to reemployment.

Q: Management has cited three Merit Systems Protection Board (MSPB) cases for the proposition that a disabled veteran is not entitled to "Hoover leave" unless the medical condition necessitating the medical treatment is related to the condition that caused the veteran to be disabled. Those three cases are *Desiderio v. Department of the Navy,*[8] *Kelley v. Department of Veterans Affairs,*[9] and *Manniello v. United States Postal Service.*[10]

What do you say about these cases?

A: In the first place, *Kelley* and *Manniello* are not decisions of the MSPB itself—those are decisions by MSPB Administrative Judges (AJs) that were not appealed to the MSPB itself. AJ decisions are not entitled to any deference as precedents to be followed in later cases.

Desiderio is an MSPB decision, almost 40 years old. For reasons I shall explain, *Desiderio* is a weak reed for VA management to rely on in support of its stingy interpretation of EO 5396. The *Desiderio* decision includes the following two paragraphs:

> Appellant [Ronald Desiderio] also asserted that he was discriminated against because he was handicapped. Pursuant to 5 C.F.R. [Code of Federal Regulations] 1201.155, an allegation of discrimination may be raised to the Board [MSPB] during the pendency of the action. We [the MSPB] note that the Appellant was discharged from service in Viet Nam in 1969 with a compensable disability due to injuries to his right arm. However, appellant testified that stomach disorders allegedly resulting from Viet Nam trauma was the basis of his absences. He did not submit additional information in the petition for review. Since Appellant's Viet Nam disability and subsequent medical problems were thoroughly discussed and explored at the hearing before the presiding official, we find this allegation of discrimination not only untimely, but also repetitious of evidence already presented in the record and, as such, this allegation cannot and does not constitute new evidence.

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[7] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.
[8] 4 MSPR 84, 1980 MSPB LEXIS 124 (MSPB Nov. 17, 1980).
[9] NY-0752-02-0090-I-1.
[10] AT-0752-05-0585-I-1.

> The petition for review asserted that appellant is entitled to the benefits of Executive Order 5396 which provides for authorized leave for medical treatment necessitated by wartime injury. *See also* FPM [Federal Personnel Manual] Supplement 990-2, Chapter 630, Subchapter 51-4, November 15, 1976. Executive Order 5396 is clearly inapplicable to the instant case inasmuch as appellant at no time [while a federal civilian employee] received treatment for his injured right arm. *Moreover, even if appellant's stomach problems were determined to be a service-related disability, appellant did not fulfill even the minimal procedural requirements for obtaining leave, namely presenting an official statement from a duly constituted medical authority concerning his medical treatment and giving his employer prior notice of the date and time of his absences.*[11]

As I have stated, a federal employee like Ronald Desiderio was required to meet four explicit conditions enumerated in President Hoover's 1930 Executive Order. Desiderio clearly failed to meet two of the conditions. He did not schedule his "Hoover leave" in advance and he did not present a written statement from his physician supporting his claim that the medical treatment was necessary and was conducted. Accordingly, it was unnecessary and inappropriate for the MSPB to address the question of whether there was an implied fifth condition—that the medical condition necessitating the medical treatment of the federal employee was the same condition that caused the employee to be a disabled veteran.

Moreover, the 1980 MSPB decision does not cite any legal authority or rationale for its dictum that "Hoover leave" is limited to circumstances where the disabled veteran needs medical care for the same condition that caused him or her to be a disabled veteran. The decision does not refer to rules of statutory construction and explain how its stingy interpretation of "Hoover leave" is consistent with those rules.

The Supreme Court has repeatedly held that statutes enacted for the benefit of those who serve or have served our country in uniform are to be liberally construed for their benefit. For example, in its first case construing the 1940 veterans' reemployment statute, the Supreme Court held that: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[12] The VA's stingy interpretation of President Hoover's Executive Order is inconsistent with this Supreme Court mandate.

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[11] *Desiderio v. Department of the Navy,* 4 M.S.P.R. 84, 85-86 (MSPB November 17, 1980) (emphasis supplied).
[12] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). *See also Boone v. Lightner,* 319 U.S. 561, 575 (1943) (requiring similar liberal construction of the Soldiers' and Sailors' Civil Relief Act).

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