APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NICK FELICIANO,
Petitioner

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

2022-1219

Petition for review of the Merit Systems Protection Board in No. AT-4324-18-0287-I-4.

Decided: May 15, 2023

BRIAN J. LAWLER, Pilot Law, PC, San Diego, CA, argued for petitioner.

GEOFFREY MARTIN LONG, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M. MCCARTHY.

Before LOURIE, HUGHES, and STARK, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Nick Feliciano appeals the final decision of the Merit Systems Protection Board denying his request for differential pay for his military service in the United States Coast Guard. We have previously held in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021) and *Nordby v. Social Security Administration*, No. 21-2280 (Fed. Cir. May 11, 2023) that the entitlement to differential pay under 5 U.S.C. § 5538(a) and 10 U.S.C. § 101(a)(13)(B) requires the employee to serve in a contingency operation. Because those cases control the outcome here, we affirm.

I

Mr. Feliciano worked as an air traffic controller for the Federal Aviation Administration. He also served as a reserve officer in the United States Coast Guard. From July to September 2012, he performed active duty under 10 U.S.C. § 12302 to support a Department of Defense contingency operation. During this period, he received differential pay to make up the difference between his military and civilian compensation. His active duty was later extended to July 2013, but he did not receive differential pay for the extended period.

Under a new series of orders in effect from July 2013 to September 2014 and issued pursuant to 10 U.S.C. § 12301(d), he was activated again to perform military duty in the Coast Guard to support various operations—"Operation Iraqi Freedom, Operation Enduring Freedom, etc." After the orders expired, Mr. Feliciano was retained under 10 U.S.C. § 12301(h) to receive medical treatment until February 2017. He did not receive differential pay for his military service between July 2013 and September 2014.

In 2018, he filed an appeal to the Board alleging that he was subject to a hostile work environment due to his

military service. He later amended his hostile work environment appeal to include allegations related to the FAA's refusal to provide differential pay pursuant to 5 U.S.C. § 5538. While his appeal was pending, we held in *Adams* that for an employee to be entitled to differential pay under § 5538, the employee "must have served pursuant to a call to active duty that meets the statutory definition of contingency operation." 3 F.4th at 1378. Shortly after *Adams* issued, the Board, citing *Adams*, denied his request for differential pay. J.A. 58–60. The Board found that he failed to present any evidence that he was "directly involved" in a contingency operation. J.A. 58. Accordingly, the Board held that Mr. Feliciano's military service did not meet the statutory definition of contingency operation and denied his request for differential pay under § 5538.

Mr. Feliciano now appeals.

II

We set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Legal conclusions by the Board are reviewed de novo. *Wrocklage v. Dep't of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014).

III

Mr. Feliciano concedes that our holding in *Adams* affects the outcome of this case. Pet. Br. vii, 6–7. He dedicates most of his argument to challenging *Adams* and does not purport to show how his activation under 10 U.S.C. § 12301(d) qualifies as a contingency operation and

thus warrants a different outcome from that of *Adams*. *See* Pet. Br. 10–13, 14–26.

As we explained in *Nordby*, we are bound by *Adams*. To receive differential pay, an employee "must have served pursuant to a call to active duty that meets the statutory definition of contingency operation." *Adams*, 3 F.4th at 1378; *Nordby*, No. 21-2280. slip op. at 4. And for voluntary activation under 10 U.S.C. § 12301(d) to qualify as a contingency operation, "there must be a connection between the voluntary military service and the declared national emergency." *Nordby*, No. 21-2280. slip op. at 5. Mr. Feliciano has not alleged any connection between his service and the ongoing national emergency, and thus fails to demonstrate that his voluntary, active service under 10 U.S.C. § 12301(d) met the statutory definition of a contingency operation. For the same reasons as in *Adams* and *Nordby*, we conclude that Mr. Feliciano's service does not qualify as an active duty contingency operation, and that the Board properly denied differential pay.

IV

Mr. Feliciano next argues that he was prejudiced by the Board's one-year delay in issuing its decision after the proceedings. The hearing for the appeal was held on July 30 and 31, 2020, and the record was closed on September 14, 2020. The initial decision was not issued until September 1, 2021, about a year later. During this one-year interim period, we decided *Adams* in July 2021.

The Board's decision largely relied on its finding that Mr. Feliciano "failed to present any evidence that he was called to directly serve in a contingency operation." J.A. 58. He argues that he could not have presented the evidence, because such evidence was not necessary pre-*Adams*. He views *Adams* as adding a *new* requirement

that employees serve in a contingency operation to receive differential pay. We disagree. As we stated in *Adams* and again in *Nordby*, even if the term "contingency operation" does not appear on the face of § 5538, it is incorporated by reference. Section 5538 requires a finding of active duty pursuant to "a provision of law referred to in section 101(a)(13)(B) of title 10," and § 101(a)(13), in turn, defines the term "contingency operation." 10 U.S.C. § 101(a)(13) ("The term 'contingency operation' means a military operation that . . . . "); *Adams*, 3 F.4th at 1378; *Nordby*, No. 21-2280, slip op. at 4. Moreover, after *Adams* was decided, Mr. Feliciano could have, but did not, file for a petition for review by the Board. Under 5 C.F.R. § 1201.115(d), the Board has discretion to reopen the record when a petitioner demonstrates that "[n]ew and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record was closed." If Mr. Feliciano wished to present new evidence, he needed to file a petition for review by the full Board. But he did not avail himself of that option.

Mr. Feliciano offers no legal support for his assertion that it was "arbitrary, abuse of discretion, and subject to reversal" for the Board to issue the decision after "the evidentiary standard regarding the nature of his orders changed dramatically." [1] Pet. Br. 28. Once we decided

[1] Mr. Feliciano also argues that the delay violated the MSPB's own statutory guideline, 5 C.F.R. § 9701.706(k)(7), which states that "[a]n initial decision must be made no later than 90 days after the date on which the appeal is filed." However, this regulation applies to the appeals by the Department of Homeland Security employees, not by Department of Transportation employees. *See* 5 C.F.R. §§ 9701.706(a); 9701.103. And in any event, § 9701.706(l) notes that the failure of the MSPB to meet these deadlines will not prejudice either party or form the basis for any legal action.

Adams, the Board was bound by our interpretation of 5 U.S.C. § 5538(a), and the Board properly applied *Adams* in rendering its decision.

V

Because Mr. Feliciano's service does not qualify as an active duty contingency operation, as required by 5 U.S.C. § 5538(a), the Board properly denied differential pay. We affirm the decision of the Board.

AFFIRMED

COSTS

No costs

APPENDIX B

[FILED: JULY 21, 2022]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

NICK FELICIANO,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
AT-4324-18-0287-I-4

DATE: September 1, 2021

BRIAN J. LAWLER, Esquire, and MELINDA GAHN, Esquire, San Diego, California, for the appellant.

BRIAN A. PRICE, Esquire, Des Plaines, Illinois, and RASHAWN RICH GEORGE, Esquire, College Park, Georgia, for the agency.

BEFORE

SHARON J. POMERANZ
Administrative Judge

INITIAL DECISION

The appellant filed this appeal alleging that the Federal Aviation Administration (FAA or agency) violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 et seq. *See Nick Feliciano v. Department of Transportation*, Docket No. AT-4323-18-0287-I-1 (Initial Appeal filed February 25, 2018), Initial Appeal File (IAF-1), Tab 1. In his appeal, the appellant alleges that the agency created a hostile work environment based on his military service. He also alleges that the agency denied him differential pay and 22 workdays of paid military leave for time spent on military duty. *See* 5 U.S.C. §§ 5538(a); 6323(b).

The Board has jurisdiction over claims of military status discrimination and requests for corrective action under USERRA. *See* 38 U.S.C. § 4324(b) and (c); 5 C.F.R. § 1208.2(a); *Erlendson v. Department of Justice*, 121 M.S.P.R. 441, ¶ 5 (2014). The hearing the appellant requested was conducted by videoconferencing on July 30 and 31, 2020. The record closed on September 14, 2020, with the parties' submission of post-hearing briefs. For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Procedural Background

On February 25, 2018, the appellant filed this appeal. IAF-1, Tab 1. The appeal was dismissed without prejudice on December 21, 2018. IAF-1, Tab 25. On February 22, 2019, the appeal was refiled. *See Nick Feliciano v. Department of Transportation*, Docket No. AT-4323-18-0287-I-2 (IAF-2), Tab 1. The appeal was dismissed a second time on October 3, 2019. IAF-2, Tab 65. The appeal was refiled a third time on December 2, 2019. *See Nick Feliciano v. Department of Transportation*, Docket No.

AT-4323-18-0287-I-3 (IAF-3), Tab 1. The appeal was dismissed again on June 2, 2020. IAF-3, Tab 16. On June 13, 2020, the appeal was refiled a final time. *See Nick Feliciano v. Department of Transportation*, Docket No. AT-4323-18-0287-I-4 (IAF-4), Tab 1.

Factual Background

The following facts are not reasonably disputed. The appellant began working for the FAA as a Developmental Air Traffic Controller (ATC) in 2005, where he was assigned to the New York Center (ZNY) facility.[1] Hearing Transcript, Day 1 (HT-1) at 15 (Feliciano).[2] From 2003 through 2019, the appellant also served as a reserve officer in the United States Coast Guard. *Id.* at 16. The appellant's reserve obligations required him to perform military service drills one weekend every month, as well as for two additional weeks during each calendar year.[3] *Id.* at 19. While at ZNY, the appellant was supervised by Kenny Gaskin and Tony Tellarico.[4] *Id.* at 20. Wolfgang Lerch was the Operations Manager. *Id.* As ZNY was responsible for the airspace above 11,000 feet, ATC's were

[1] A Developmental ATC is an ATC in training at a field facility who has not been facility certified in terminal/en route operations of an air traffic facility. IAF-2, Tab 30 at 38 (*Human Resource Policy Manual – Employment Policy for Air Traffic Control Specialist in Training*, EMP-1.14a). Upon completion of training, a Developmental ATC becomes a Certified Professional Controller.

[2] HT-1 refers to the hearing transcript from July 30, 2020, while HT-2 refers to the hearing transcript from July 31, 2020.

[3] As discussed more below, starting in 2012, the appellant was called to active duty, where he largely remained until 2017. IAF-2, Tab 24 at 4-5, 14, 19, 25; Tab 25 at 15, 29 at 41-42, and IAF-4, Tab 4 at 10-14, 18, 27.

[4] Kenny Gaskin was requested as a witness but the agency was unable to locate him. Tony Tellarico was not requested as a witness. IAF-2, Tab 61; HT-2 at 98-100 (Beech).

not responsible for assisting aircraft with takeoffs or landings. HT-1 at 103- 04 (White).

Effective December 21, 2008, the appellant transferred from ZNY to the Myrtle Beach Tower (MYR) in Myrtle Beach, South Carolina, where he was supervised by Ricardo Washington. HT-1 at 15 (Feliciano). MYR is both an Air Traffic Control Tower and a Terminal Radar Approach Control Facility (TRACON).[5] HT-1 at 99 (White). An Air Traffic Control Tower monitors aircraft as it is taxiing, taking off and landing at the airport. HT-2 at 33 (Williams). The TRACON monitors the departure, descent and approach phases of each flight. En route refers to working air traffic that is already air borne while an ATC at a terminal facility works arrivals and departures of aircraft, as well as coordinating satellite airports and sometimes military facilities.

The appellant's training team consisted of Mr. Washington, and two training instructors, Drew Blanton and Randy Privett. When he arrived at MYR, the appellant was required to certify in five positions: (1) Flight Data; (2) Clearance Delivery; (3) Ground Control; (4) Local Control; and (5) Cab Control. Flight Data provides weather reporting and addresses flight plan changes; Clearance Delivery issues clearance for an aircraft to fly its designated route; Ground Control is responsible for taxiing aircraft to and from the runway; Local Control works all aircraft on the runway and in the air within five nautical miles of the airport; Cab Controller involves overseeing the entire Tower Cab and coordinating the Local Controller and the Ground

[5] In contrast, ZNY was an air route traffic control center, where ATCs did not assist aircraft with taking off and landing. HT-1 at 18 (Feliciano Testimony).

Controller. HT-1 at 32 (Feliciano); 99-102 (White). During training, a Developmental ATC receives a monthly skills check by the supervisor to see how the Developmental ATC is progressing. HT-1 at 57 (Feliciano); 168 (White).

The appellant began his training in the Air Traffic Control Tower training in the Tower Cab.[6] On April 13, 2009, the appellant was certified on Flight Data, and he certified on Ground Control on June 5, 2009. IAF-2, Tab 41 at 21-22, 25- 26; HT-1 at 105 (White); 213 (Washington). The appellant's training team felt he was struggling with Local Control and Cab Control positions, so they extended his training hours by 20 percent. IAF-2, Tab 37 at 47. On February 18, 2010, Mr. Washington recommended that the appellant be given skills enhancement training for the Local Control and Cab Control positions. HT-1 at 216 (Washington); IAF-2, Tab 32 at 44. Skills enhancement training identifies problem areas and focuses on them. HT-1 at 156-57 (White).

On February 17, 2010, Karl White became the appellant's supervisor. IAF- 2, Tab 38 at 5. The appellant received the skills enhancement training that Mr. Washington had recommended for him, from February 22, 2010, until February 23, 2010. IAF-2, Tab 35 at 36-41. According to agency training documents, the appellant continued to struggle. *See* IAF-2, Tab 32 at 44-45, 47-48. As a result, Mr. White extended the appellant's training hours by twenty percent, giving him 46 additional hours of training for Local Control and four extra hours of training for Cab Control.[7] IAF-2, Tab 37 at 47. If a trainee

---

[6] The Tower Cab is the glass enclosed portion at the top of the Air Traffic Control Tower.

[7] A trainee's target hours can be extended by twenty percent if additional time is needed for him to certify. HT-1 at 116 (White).

does not certify within the allotted target hours, his training is suspended. HT-1 at 117 (White).

On May 31, 2010, Mr. White conducted the appellant's certification test for the Local and Cab Control positions. IAF-2, Tab 41 at 17-18. The appellant was successful and was certified in these two positions. *Id.* at 18. After certifying in the Local and Cab Control positions, the appellant began training for the Clearance Delivery (radar) position. IAF-2, Tabs 35 at 42-48; 36 at 4-18. This position requires the Developmental ATC to monitor aircraft departure, descent, and approach.

According to the agency, the appellant struggled with the radar position, so in February 2011, he was given a skills enhancement training plan designed to assist him in getting certified in this area. IAF-2, Tab 35 at 42-43. On May 31, 2011, the members of the appellant's training team identified the following areas of concern for the appellant in the radar position: separation, control judgment, and methods and procedures. IAF-2, Tab 32 at 5. In addition, the training team identified various actions the appellant needed to take to improve in this area. *Id.* Although the appellant received additional skills enhancement training in June and July of 2011, he continued to struggle with radar control. *See e.g.*, IAF-2, Tabs 32 at 7, 13-16; 33 at 33-36; 36 at 19; 37 at 4; 38 at 22-25, 32-37, 40-41; 39 at 11.

On November 1, 2011, Mr. White conducted the appellant's monthly skills check. IAF-2, Tabs 33 at 38; 34 at 4. The record reflects that the appellant had difficulties and did not pass this skills check. HT-1 at 169-177 (White); IAF-2, Tab 33 at 38; 34 at 4; HT-1 at 20-24. Mr. White testified that the appellant used incorrect clearance and phraseology and evidenced a lack of understanding of methods and procedures. HT-1 at 172-74. At this point,

Mr. White decided to suspend the appellant's training, which he did on November 6, 2011. HT-1 at 184; IAF-2, Tab 38 at 18.

After the appellant's training was suspended, a Training Review Panel (TRP) was convened to review whether the appellant's training should be terminated. IAF-2, Tab 37 at 28-30. The TRP consisted of the following individuals: Carl Brooks, Walter Hall, and Jeff Soule, who was a union representative. HT-2 at 76-77 (Soule). On December 2, 2011, the TRP recommended that the appellant's training be discontinued.[8] IAF-2, Tab 37 at 28- 30; HT-1 at 224 (Washington).

On December 8, 2011, Mr. Washington notified the appellant that he had decided to terminate his training. IAF-2, Tab 37 at 31. The appellant was given an opportunity to submit a response to Mr. Washington's decision, which he did. IAF-2, Tab 37 at 32-35. In his response, the appellant indicated that his military commitment and a personal tragedy created distractions that had impacted his training. *Id.* The appellant also indicated that he felt Mr. White was uninterested in working with him and made him uncomfortable. On February 15, 2012, Mr. Washington informed the appellant, after reviewing the TRP recommendation again and considering his reply, he had decided to continue his training. IAF-2, Tab 37 at 40; HT-1 at 60 (Feliciano).

On February 23, 2012, Mr. White provided the appellant with another skills enhancement training plan. IAF-2, Tab 37 at 5-6. The plan stated it was designed to address deficiencies in separation, coordination, control

[8] The TRB's recommendation was not unanimous. Mr. Soule believed the appellant's training should continue and wrote a dissenting opinion to that effect. IAF-2, Tab 37 at 26-27.

judgment, and methods and procedures. *Id.* at 5. On March 14, 2012, the appellant wrote Mr. Washington requesting to have Mr. White removed as his supervisor. IAF-2, Tab 35 at 30. In his letter, the appellant stated that he believed Mr. White would not change his opinion about him after suspending his training.[9] *Id.* After consulting with the appellant and his training instructors and reviewing his training history, Mr. Washington denied the appellant's request for a supervisor change. IAF-2, Tab 35 at 35. In his memorandum, Mr. White noted that, while he had considered the appellant's request, he did not find sufficient cause to grant it. *Id.*

Starting on July 9, 2012, the appellant was called to active duty. IAF-2, Tab 25 at 15. While the appellant was scheduled to return on September 30, 2012, his military duty was extended, through various military orders, until March 24, 2014. *Id.*, Tab 24 at 14-16, 19-21, 25. The appellant returned to the FAA on March 21, 2014, but was called back to military duty on April 29, 2014. Id. at 4-5. The appellant remained on military duty until February 6, 2017, when he returned to work for the agency. IAF-4, Tab 4 at 7-9, 11, 13-14, 18, 27; IAF- 2, Tab 29 at 16-18, 41-42, 47; HT-1 at 67-69 (Feliciano).

On February 25, 2018, the appellant filed this appeal alleging that he was subjected to a hostile work environment due to his military service. IAF-1, Tab 1. On November 25, 2018, the appellant amended his appeal alleging that he was also denied differential pay pursuant to 5 U.S.C. § 5538(a) and 22 days of military leave

---

[9] Mr. Washington spoke to the appellant on March 16, 2012, about his training. IAF-2, Tab 35 at 31. Although the appellant told Mr. Washington that he did not think Mr. White could look at his performance objectively, he was unable to provide any examples where Mr. White had not done so. *Id.*

pursuant to 5 U.S.C. § 6323(b), while on active duty. IAF-1, Tab 21.

The Board has jurisdiction over this appeal

In order to establish Board jurisdiction over a USERRA appeal, the appellant must: (1) show that he performed duty in a uniformed service of the United States or is otherwise covered by 38 U.S.C. § 4311(a); and (2) nonfrivolously allege that he was subjected to one of the actions listed at 38 U.S.C. § 4311(a), such as denial of any benefit of employment, for one of the reasons listed at section 4311(a). *See* 38 U.S.C. § 4311(a); *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶¶ 2, 10 (2004); *Muse v. U.S. Postal Service*, 82 M.S.P.R. 164, ¶ 12 (1999). A claim of discrimination under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous. *Williams*, 97 M.S.P.R. 252, ¶ 10. I previously found that the Board has jurisdiction over this appeal because the appellant has shown that (1) he performed a duty in a uniformed service of the United States; and (2) has nonfrivolously alleged that he was subjected to one of the actions listed in USERRA. *See* 38 U.S.C.A. § 4311(a) and (b); IAF-2, Tab 61.

Applicable Law

Once jurisdiction is established, the appellant must prove by preponderant evidence that he was denied a benefit of employment or discriminated against due to his military service. *See* 38 U.S.C. §4311(a). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q). To establish discrimination based on his military service,

the appellant must show that his status or military service was a "substantial or motivating factor" in the agency's action. *See Sheehan v. Department of the Navy*, 240 F.3d at 1013. A substantial or motivating factor is a factor that, although not necessarily the main cause, played a part in producing the particular result. *Id.* Uniformed service is a motivating factor if the agency relied on, took into account, considered, or conditioned its decision to act or not to act on an appellant's uniformed service. *See Erickson v. United States Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). If the appellant meets this requirement, the agency then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that it would have taken the action anyway, for a valid reason. *See Sheehan*, 240 F.3d at 1013-14.

Discriminatory motivation under USERRA may be established by direct evidence or reasonably inferred from a variety of factors. *See Sheehan*, 240 F.3d at 1014; *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶ 20 (2013). These factors include proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards employees protected by USERRA together with the knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Sheehan*, *Id.* An essential element of a USERRA discrimination claim is "that the contested agency decision was based on an improper motivation."

The term 'benefit of employment' is broadly interpreted and includes military leave benefits (such as differential pay). *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484-85 (Fed. Cir. 1998);

Pucilowski v. Department of Justice, 498 F.3d 1341, 1344 (Fed. Cir. 2007). The Board also has jurisdiction over employees who are not covered by 5 U.S.C. § 6323, where the employee is covered by an agency rule that confers a military benefit similar to 5 U.S.C. § 6323. *See Pratt v. Department of Transportation*, 103 M.S.P.R. 111, 10 (2006). In such a case, the Board has the authority to order compensation for any resulting lost wages and benefits. *See* 38 U.S.C. § 4324(c); *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160, ¶ 11-14 (2006).

An absent employee is entitled to differential pay if (1) he is performing active duty under a provision of law referred to in section 101(a)(13)(B) of title 10; (2) he is entitled to reemployment rights under USERRA; and (3) he is not otherwise receiving pay from his civilian position. *See* 5 U.S.C. §5538(a), (b). Section 101(a)(13)(B), contains the definition of "contingency operations" as the call or order to "active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title . . . or any other provision of law during a war or during a national emergency declared by the President or Congress." In addition, a qualified employee performing full-time military service is entitled to 22 workdays of leave when called to active duty to support a contingency operation. 5 U.S.C. § 6323(b).

The appellant has failed to show that he was subject to a hostile work environment due to his military service.

In his appeal, the appellant alleges that, from December 2008 until February 2017, he was subjected to a hostile work environment based on his military service in violation of USERRA. IAF-2, Tab 61 (*Order and Summary of Prehearing Conference*); HT-1 at 6. The Board has recognized that a hostile work environment is a cognizable denial of a benefit of employment under

USERRA. *Petersen v. Department of Interior*, 71 M.S.P.R. 227, 235 (1996); 38 U.S.C. § 4303(2). To establish such a claim, an employee must show (1) a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment; (2) prove that his workplace was both objectively and subjectively offensive; and (3) show that any harassment took place on account of his protected status as a military service member. *Kitlinski v. Department of Justice*, 123 M.S.P.R. 41, ¶ 18 (2015), *vacated in part on other grounds*, *Kitlinski v. Merit Systems Protection Board*, 857 F.3d 1374, 1381 (Fed. Cir. 2017) (citing 11 Title VII precedent as a useful framework for assessing USERRA hostile work environments).

When determining whether an objectively hostile work environment exists, the totality of the circumstances is to be considered, including the frequency, severity, and offensiveness of the allegedly discriminatory conduct, whether the conduct was physically threatening or humiliating, and whether it unreasonably interfered with an employee's work performance. *See Patterson v. County of Oneida*, 375 F.3d 206, 227 (2d Cir. 2004) (alterations and internal quotation marks omitted). In general, the actions taken by the agency "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (*quoting Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)).

The appellant alleges that the agency engaged in a pattern and practice of harassment based on his military service by, among other things, demanding that he provide military orders before performing military service (for periods of less than 31 days); calling his military command demanding that they verify his military status; harassing the appellant about his military service

obligations; forcing him to perform military service on his days off resulting in him having to work 12 consecutive work days; changing his regular days off to show him as being absent without leave when he was performing military service; requiring him to perform 80 additional hours of training before getting certified; and conducting his certification check on Memorial Day weekend in 2010 for over four hours (when the air traffic was particularly busy due to the holiday weekend). IAF-1, Tab 1; IAF-2, Tab 61. The appellant also alleges that this harassment led to a delay in him getting fully certified as an ATC, and as a result delayed promotions he would otherwise have been entitled to. There are two specific time periods at issue here – the appellant's time at ZNY and his time at MYR.[10]

1. ZNY

Although the appellant testified that he left ZNY due to the work environment there, the testimony and evidence presented did not establish that the appellant's treatment there was sufficiently severe or pervasive to establish a hostile work environment or that any treatment of him was on account of his military service. Rather, the appellant's testimony focused on a couple of incidents that occurred during his three years there. Specifically, the appellant testified about an issue with his schedule where the Operations Manager, Mr. Lerch, put him on the schedule when he was supposed to be on military leave. HT-1 at 22, 24 (Feliciano). According to the appellant, an unidentified friend told him that Mr. Lerch had not approved his military leave for this time period. *Id.* After finding this out, the appellant was able to have

[10] I find it appropriate to consider these two time periods separately because they involve different supervisors, and there is no evidence that they colluded in their treatment of the appellant.

his schedule changed to reflect his military leave status by Walter Englehart.[11] The appellant testified that when he returned from military duty, Mr. Lerch punched his shoulder and yelled at him for having his schedule changed without going through him. *Id.* at 23, 27- 28. The appellant also testified that he heard from another co-worker, someone named Kravitz, they were trying to get rid of him, so he talked to friends who suggested he transfer, which he did.[12] *Id.*

Mr. Lerch testified that he did not specifically recall the incident regarding the appellant's leave, but he denied ever punching the appellant's shoulder. HT-2 at 22-23. Mr. Lerch also testified that, as Operations Manager, it would not have been his decision to get rid of the appellant, rather his training team would have made that decision. Nevertheless, he testified that he did not try to get rid of the appellant while he was at ZNY. *Id.* at 23.

I found the testimony of Mr. Lerch to be more credible than the appellant's testimony regarding what occurred at ZNY for several reasons. Both the appellant and other witnesses testified that it was the responsibility of the supervisor on duty to approve leave and place it on the schedule, not the Operations Manager. HT-1 at 34 (Feliciano). As a result, Mr. Lerch would not have been the person approving the appellant's leave, so I found the appellant's testimony regarding this incident contrived. On the other hand, Mr. Lerch's testimony that the appellant's retention was up to his training team was

---

[11] Mr. Englehart passed away prior to the hearing, so he was not a witness. HT-2 at 22 (Lerch).

[12] The appellant also testified that he spoke to the manager of the ZNY facility, a Mr. Lacata, who told him he was "aware of what was going on." HT-1 at 29 (Feliciano). Mr. Lacata was not called as a witness at the hearing.

consistent with the record and testimony of other witnesses, detailed below, regarding whether a Developmental ATC should be retained. More importantly, the appellant's testimony regarding his time at ZNY (and his belief that his supervisors were trying to get rid of him) was based upon hearsay from mostly unidentified individuals, who did not testify at the hearing. For all of these reasons, I find the appellant failed to present sufficient evidence that he was subject to a hostile work environment while at ZNY. I further find that, even assuming the events occurred as set out by the appellant, these random occurrences were not sufficiently severe or pervasive to alter the conditions of his employment and the evidence does not establish that any of incidents occurred on account of his military service.

2. MYR

In support of his hostile work environment claim while at MYR, the appellant alleges that he had frequent issues with his military service, such as his supervisor calling his military command to verify his military status, being required to provide military orders for his military service, being harassed about his military service, and issues with his schedule related to his military service. The appellant further claims a hostile work environment related to his training and failure to get promoted.

With respect to his military service obligations, the appellant testified that his relationship with Mr. Washington was initially good, but changed at some point. HT-1 at 31 (Feliciano). The appellant claimed that Mr. Washington repeatedly called his Coast Guard Reserve Unit about his military status. HT-1 at 37-38 (Feliciano). His shipmates joked that "his babysitter" was calling. *Id.* at 38. The appellant testified that when he had military duty, he would tell the supervisor on duty and "they would

just put in in the schedule." HT-1 at 34. Mr. Washington required him to show his military orders when he had drill weekends.[13] The appellant testified that, at some point, Mr. Washington accused him of falsifying paperwork due to the dates on the orders but told him that he would "push it under the rug."[14] HT-1 at 37 (Feliciano).

The appellant testified about an incident in 2012 where he claims Mr. Washington called the Federal Law Enforcement Training Center (FLETC), where he was attending a course, and told military command that he did not have permission to attend the training. HT-1 at 65-66. According to the appellant, Mr. Washington yelled at him for leaving without permission. *Id.* The appellant testified that "a friend" from work called him and told him that Mr. White was planning his termination, and that his trainers Joel Johnson and John Williams planned to pull the plug on him. *Id.* at 66.

Mr. Washington denied requiring the appellant to submit orders for his monthly guard duty or accusing him of falsifying written orders. HT-1 at 227- 228 (Washington). Mr. Washington testified that one time in 2011, the appellant left for military duty and management at the facility did not know that he was leaving. According to Mr. Washington, Mr. White had planned for the appellant to do his required monthly skills check, so he called the appellant's commanding officer to see if the agency could get notification before the appellant went on

---

[13] The appellant testified that he did not have orders for drill weekends, so he had to have some made specifically for this purpose. HT-1 at 34 (Feliciano).

[14] While the appellant also testified to regular conversations with his Master Chief about his issues at work, he did not identify this individual by name or call him as a witness at the hearing, so I give little weight to these alleged conversations.

military duty.[15] According to Mr. Washington, the appellant's commanding officer told him that the appellant should have notified him 30 days before he left on military leave. HT-1 at 229-230 (Washington). Mr. Washington testified that he contacted the appellant's commanding officer a second time because the agency did not have any military orders for the appellant, and the human resource's office needed them for his time and attendance, but this was not for a weekend drill. He also called a couple of times to get military orders at the request of the agency's human resources office. HT-1 at 230-231 (Washington).

The record contains evidence that supports Mr. Washington's testimony. Specifically, a memorandum written by Mr. White indicating that the appellant did not receive his monthly skills check in October of 2011, due to his military leave. *See* IAF-2, Tab 33 at 37. While the appellant testified that he believed this memorandum reflected military animus, Mr. White testified that he wrote the memorandum to document the file so that no one could question why a skills check was not done in October of 2011. HT-1 at 61 (Feliciano); at 160-61, 168 (White).

I find the testimony and record fails to support the appellant's contention that Mr. Washington repeatedly called the appellant's reserve command. Rather, it appears he called the appellant's command when the appellant failed to keep his training team advised of his absences or to ensure the appellant's time and attendance

---

[15] It appears that the appellant would often leave on military duty without informing Mr. White or his training team of his absence. Mr. White testified that he felt the appellant should have informed him of his military absences because he was a member of his training team. HT-1 at 200.

was properly documented. While the appellant argues that the agency could not require him to submit documentation for military leave of less than 31 days, I have found nothing to support his assertion. The appellant points to 20 U.S.C. § 1002.121 to support his position but this regulation applies to reemployment under USERRA, which is not the issue here.[16] See 20 C.F.R. § 1002.121. In any event, there are reasons an agency might require military orders for periods of less than 31 days, such as ensuring accurate time and attendance. I do not find the agency's request for any such documentation to be unlawful or to constitute harassment.

The appellant next argues that the agency required him to perform additional hours of training before certifying him, conducted his certification test ride on Memorial Day weekend in 2012, and delayed promoting him on account of his military service. The appellant testified that his union representative, Jim McCullum, told him that his supervisors felt his military obligations were interfering with his training.[17] HT-1 at 33. When Mr. White took over as his supervisor, the appellant testified that he refused to certify him for the Local Control position, even though his trainers recommended he be certified. HT-1 at 40 (Feliciano Testimony). Mr. White then assigned him 80 hours of extra training which the appellant felt he did not need. Id. at 41-42. The appellant testified that he believe Mr. White's animosity towards

---

[16] This regulation, promulgated by the Department of Labor, does not technically apply to the Federal government. *See* 20 C.F.R. Part 1002. Section 1002.121 states documentation is required in connection with an application for reemployment when the period of military service exceeds 30 days.

[17] This testimony was contradicted by Mr. White, who testified that he did not believe the appellant's military service was interfering with his training. HT-1 at 190.

him was due to his military service, in part, because he once yelled at the appellant for getting his leave approved through a different supervisor instead of him. HT-1 at 41 (Feliciano). The appellant also testified that Mr. White suggested that his military duty might be interfering with his training and progression. HT-1 at 33, 42-43 (Feliciano).

Mr. White denied that he told the appellant that his trainers were recommending him for tower certification and the evidence in the record indicates that Mr. Washington recommended the appellant for additional training prior to Mr. White taking over as the appellant's supervisor. HT-1 at 105, 107 (White); *Id* at 216 (Washington); IAF-2, Tab 32 at 44. While the appellant argues that the additional hours of training were in retaliation for his military service, it is clear from the ample evidence in the record and testimony of witnesses that the appellant was struggling with certain aspects of his training. For example, John Williams, who was assigned to the appellant's radar training team, testified that the appellant had difficulties with separation and control instructions and although he received skills enhancement training, the issues still persisted. HT-2 at 37-38 (Williams).

At the point the appellant's training was suspended in November 2011, he had been having issues with directives, scanning the area, and his speech rates. *Id.* at 43-44 (Williams); *see also* IAF-2, Tab 38 at 45-46, Tab 39 at 12-13; Tab 41 at 35-36 (training report documenting appellant's issues with working speed, equipment capabilities, phraseology on April 7, 2009). Another of the appellant's training instructors, Joel Johnson, testified that the appellant was unable to make quick decisions and lacked control judgment. HT-2 at 59-60 (Johnson). According to Mr. Johnson, the appellant's training was

suspended due to continuing problems with decision making and separation.[18] *Id.* at 64. Mr. Johnson testified that Mr. White suspended the appellant's training due to his lack of progress, and that he agreed with it. *Id.* at 69-70.

Another area of contention for the appellant was his radar training which was to take place at a training facility in Oklahoma City.[19] According to the appellant, radar training was a month-long course and he testified that he wanted to break the course into two two-week segments, so he would not have to recertify upon returning to MYR, but the agency would not allow him to do that even though other employees had been allowed to break up their training. HT-1 at 50-51 (Feliciano). Mr. White credibly testified that MYR did not have control over when the appellant went to radar training because the training dates were set by Oklahoma City. *Id* at 140 (White); *see also* HT-1 at 220 (Washington testifying that dates of training are set by Oklahoma City). Mr. Washington testified that once a Developmental ATC certifies in the Tower, and works there for a week or two, they attend the next available radar class. HT-1 at 221 (Washington).

The appellant also alleged that the agency forced him to perform a certification test (known as a check ride) on Memorial Day weekend in 2010, a time period when MYR was particularly busy. He also complained about the tasks he was required to do during that test by Mr. White. A check ride occurs when a supervisor believes a trainee is

---

[18] Although the appellant alleged that he was being treated differently, Mr. Johnson testified that it was not unusual for a Developmental ATC to receive skill enhancement training. HT-2 at 67-68.

[19] The appellant attended radar training in August of 2010. IAF-2, Tab 41 at 16.

ready to work a position on their own and watches them perform the position for a period of time [in order to certify them in the position]. HT-1 at 44 (Feliciano). The appellant testified that a check ride usually lasted for 45 minutes but his check ride was conducted over two days and was four hours long. *Id.* Although the appellant passed the check ride, he testified that he thought Mr. White was trying to fail him by making it extra hard. HT-1 at 45 (Feliciano Testimony).

Mr. White testified that the appellant was given a skill check on May 30, 2010, for one hour and 29 minutes for the Local Control and Cab Controller positions, an assertion that is supported by the training record. HT-1 at 127-128; IAF-2, Tab 33 at 9-10. Although the appellant testified that his check ride was over four hours long, the documentation shows that on May 30, 2010, the appellant had a skill check. IAF-2, Tab 33 at 9-10. On May 31, 2010, Mr. White conducted the appellant's check ride, which he passed. *Id.*; Tab 41 at 17-18; HT- 1 at 130-131. The training record indicates the check ride took 2 hours and 2 minutes. HT-1 at 131; IAF-2, Tab 41 at 17, box 7.

While the appellant complained that his check ride was conducted on Memorial Day, he passed the test and was certified. I see no problem with conducting a check ride on a busy air traffic day, as the appellant presumably would have to work busy air traffic days as an ATC, and the evidence does not lead to a conclusion that his supervisor tested him on this date to set him up for failure; rather, the evidence reflects that his supervisor did so to adequately test his skills. Thus, I cannot conclude there was anything hostile or inappropriate about conducting the test on this day and I note the test was about two hours, a time period that seems reasonable.

The appellant also argued that the agency suspended his training in retaliation for his military service. According to the appellant, he returned from military duty on November 1, 2011, and was immediately required to take a skills check, which he failed, resulting in his training being suspended.[20] IAF-1, Tab 1. The record reflects that Mr. White suspended the appellant's training on November 6, 2011. HT-1 at 184-185 (White).

After the appellant's training was suspended, a TRP was convened to determine the propriety of that action. Two of the three members of the TRP testified at the hearing.[21] Jeff Soule, a union representative for National Air Traffic Controllers Association, testified that he voted against suspending the appellant's training because he felt that certain procedures were not followed before sending the matter to the TRP.[22] HT-2 at 79-80 (Soule). Another TRP member, Carl Brooks, testified that the TRP reviewed the appellant's training reports, skills enhancement trainings, and then voted to suspend his training. HT- 2 at 86-87 (Brooks). The findings of the TRP majority are set out in a December 2, 2011 memorandum. IAF-2, Tab 37 at 28-30. The TRP noted the appellant was deficient in the areas of separation, control judgment, methods and procedures, and communication. *Id.* at 28. The TRP also noted that the appellant had received extensive skills enhancement training, and Mr. White had "utilized available tools to make the training process

---

[20] The appellant alleged that he had been gone on military duty for over a month, but the record reflects that he was absent for approximately two weeks. HT-1 at 171 (White).

[21] The third member, Walter Hall, could not be located to testify.

[22] Mr. Soule also testified, contrary to the appellant's belief, that the TRP only voted one time. HT-1 at 59 (Feliciano); HT-2 at 79 (Soule).

successful," but the appellant had failed to improve or correct his deficiencies. *Id.* at 30.

I have considered some of the appellant's other allegations, but conclude that they fail to establish he was subjected to a hostile work environment on account of his military service. For example, the appellant claims that when he returned from radar training, he was forced to recertify on Labor Day weekend, another busy air traffic time. HT-1 at 51 (Feliciano). This recertification appears to have occurred shortly after the appellant returned from radar training and he passed the certification test. There is no evidence to suggest that the timing of the certification was intended to harass or create a hostile work environment for the appellant.

Similarly, the appellant complains that he did not get his Certificate of Tower Operations (CTO) until December of 2010, even though he was certified in May of 2010. HT-1 at 52. The appellant has not shown he was adversely impacted by this delay, as it did not impact his pay. *Id.* at 52-53. More importantly, the appellant has not shown this delay was unusual or a result of his military service rather than the typical time the agency took for a license to be sent to an employee. *See* HT-1 at 135-136 (White)(testifying that there is no set time for an employee's CTO to be sent to him and it does not affect compensation).

In conclusion, I find a preponderance of the evidence does not support the appellant's contention that he was subjected to a hostile work environment on account of his military service. The testimony of the witnesses and the record evidence largely contradicts the appellant's testimony which seemed to rely on witnesses who were not identified and did not testify.

With respect to the appellant's allegations that his supervisors created a hostile work environment by demanding military orders and calling his command, I find the appellant was responsible for creating these circumstances. Specifically, I find it reasonable for his supervisors and training team to expect the appellant to notify them if he was going to be absent from work due to his military duty, even if it was not necessary for the purposes of getting his leave approved. As previously discussed, there was at least one instance where the appellant failed to take his monthly skills check because he went on military duty without informing Mr. White of his upcoming absence. In other instances, it appears that Mr. Washington called the appellant's command at the request of the agency's human resource's office. Regardless, it seems apparent that some of these phone calls could have been avoided had the appellant provided the agency with information it needed to ensure his civilian record properly reflected his military time. With respect to the appellant's allegations that he was subjected to additional training and unreasonable skills checks, the record supports the proposition that the appellant was struggling with training, and the additional training was done to assist him, not to discriminate against him as he alleges. As far as the skills checks, I cannot conclude that they were scheduled at a time, and in a manner, to treat the appellant unfavorably based on his military service. As a result, I find the appellant has failed to establish that he is entitled to corrective action and his request for corrective action is, therefore, denied.

The appellant is not entitled to differential pay.

In his appeal, the appellant also seeks corrective action alleging that the agency improperly denied him differential pay while he was on leave performing military duty for the years 2012 through 2017. IAF-1, Tab 21. The

purpose of differential pay is to ensure that a Federal employee called to active duty does not receive a reduction in basic pay during that time period. 5 U.S.C. § 5538(a); *Adams v. Department of Homeland Security*, 3 F. 4th 1375, 1377 (Fed. Cir. 2021). Differential pay is required only if (among other things) the employee was ordered to active duty to for a contingency operation which is defined in section 101(a)(13)(B) of title 10. *Id.* Section 101(a)(13)(B) defines the term "contingency operation" to include a call or order to active duty "under section 688, 12301(a), 12303, 12304, 12304a, 12305, or 12406 of this title . . . or any other provision of law during a war or during a national emergency declared by the President or Congress."[23] 10 U.S.C. § 101(a)(13)(B). An absent employee is entitled to differential pay if (1) he is performing active duty under a provision of law referred to in § 101(a)(13)(B); (2) he is entitled to reemployment rights under USERRA; and (3) he is not otherwise receiving pay from his civilian position. 5 U.S.C. § 5538(a), (b). For the time periods set forth below, there is no dispute that the appellant met prongs (2) and (3). Thus, the appellant would be entitled to differential pay if he served pursuant to a call to active duty that meets the statutory definition of contingency operation. *Adams*, 3 F.4th at 1378.

There is no dispute that the appellant did not receive differential pay for most of the time he was on military leave during the time period at issue in this appeal. IAF-4, Tab 17 at 22. Between 2012 and 2017, the appellant was on military duty from July 9, 2012, through March 21, 2014; and from March 29, 2014, until February 5, 2017. IAF-2, Tab 28 at 48. The appellant was paid differential

---

[23] There is no dispute that the omitted sections § 101(a)(13)(B) do not apply to the facts of this case. *See* 10 U.S.C. § 101(a)(13)(B).

pay for his military duty from July 9, 2012, through September 20, 2012.[24] HT-1 at 88 (Feliciano).

The appellant testified at the hearing that he did not request differential pay or submit his military leave and earnings statement for any other time period. HT-1 at 87-88 (Feliciano). The agency argued that the appellant did not comply with agency policy because he did not submit his military leave and earnings statements, and therefore is not entitled to differential pay for the remainder of the time in dispute. The agency's policy requires an employee to timely submit documentation required to get reservist differential pay. *See* IAF-2, Tab 40 at 20 (Human Resources Policy Manual (HRPM), Volume 3: Premium Pay and Allowance).

The relevant issue here is whether the appellant was performing active duty under a provision of law referred to in § 101(a)(13)(B). In *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2020), the Federal Circuit stated that an employee is entitled to differential pay only when he is directly called to *serve* in a contingency operation. *Adams*, 3 F.4th 1375, 1379 (distinguishing this requirement from 5 U.S.C. § 6323(b) which provides 22 days of military leave to employees called to active duty in *support* of a contingency operation). To determine if the appellant was directly called to serve in a contingency operation, the starting place is the appellant's military orders.

The appellant's initial military orders stated that he was being called to active duty from July 9, 2012, until September 30, 2012, pursuant to 10 U.S.C. § 12302, in

[24] In support of this, the agency has submitted an Earnings and Leave Statement for pay date October 2, 2012, that shows he received Reservist Differential Pay of $1,928.66, though the exact timeframe covered is not specified. IAF-2, Tab 31 at 17.

support of a DOD contingency operation, specifically Expeditionary SPOE. IAF-2, Tab 25 at 15. Although § 12302 is not one of the enumerated sections in 10 U.S.C. § 101(a)(13)(B), the appellant's orders stated that he would be supporting a contingency operations and the agency paid him differential pay for this time period.

The appellant's orders, referenced above, were extended until July 8, 2013. IAF-2, Tab 24 at 25. Thereafter, from July 9, 2013, to September 30, 2013, the appellant's military orders stated that he was being called up under 10 U.S.C. § 12301(d), to support Operation Iraqi Freedom and Operation Enduring Freedom. IAF-2, Tab 24 at 19-21. From October 1, 2013 to March 28, 2014, the appellant's military orders stated that he was being called to active duty under 10 U.S.C. § 12301(d) to support a contingency operation, specifically Operation Iraqi Freedom. IAF-2, Tab 24 at 14-15. The appellant was released from active duty and returned to work on March 21, 2014, but was reactivated on March 29, 2014. I was unable to find any military orders in the record covering the time period from March 21, 2014, until April 28, 2014. From April 29, 2014, until September 30, 2014, the appellant's military orders stated that he was being called to active duty, pursuant to 10 U.S.C. § 12301(d), to support a contingency operation, specifically Operation Iraqi Freedom and Operation Enduring Freedom. IAF-2, Tab 30 at 33-34.

Beginning on October 1, 2014, the appellant's military orders indicated that he was being placed on reserve medical hold for medical treatment pursuant to 10 U.S.C. § 12301(h). IAF-4, Tab 4 at 27. Section 12301(h) permits the Secretary of Defense to order a reserve member, with their consent, to active duty for the purpose of receiving medical care, among other things. These orders were extended several times in order for the appellant to

receive medical treatment. The appellant remained in active duty for medical treatment until February 6, 2017, when he returned to the agency.[25] IAF-4, Tab 4 at 12; IAF-2, Tab 22 at 182 (SF-50, Notification of Personnel Action, form).

Based on the above, the appellant's military service can be divided into two time periods. The first time period is from October 1, 2012, until September 30, 2014, where the appellant's military orders indicated he was activated in support of contingency operations. The second time period is from October 1, 2014, until February 3, 2017, when the appellant was called to active duty for medical reasons.

Turning to the first period of time, the appellant's military orders indicated that he was activated in support of a contingency operation pursuant to either § 12302 or § 12301(d) of title 10 U.S.C. Neither of these sections are specifically enumerated in 10 U.S.C. § 101(a)(13)(B). In *Adams v. Department of Homeland Security*, the Federal Circuit stated that it is not sufficient for the

---

[25] See IAF-4, Tab 4 at 7-9; IAF-2, Tab 30 at 26-28 (extending military duty from February 1, 2015 to April 15, 2015); IAF-2, Tab 30 at 19; IAF-4, Tab 4 at 11 (amending the appellant's orders until June 15, 2015); IAF-4, Tab 4 at 13; IAF-2, Tab 29 at 10 (extending the orders until September 30, 2015); IAF-2, Tab 29 at 47 (placing the appellant on medical hold from December 2, 2015 until January 15, 2016); IAF-2, Tab 29 at 41-42 (extending medical hold until April 16, 2016); IAF-4, Tab 4 at 10 (further extending medical hold until June 30, 2016); IAF-4, Tab 4 at 18 (amending the appellant's orders to end on September 30, 2016); IAF-4, Tab at 4-6; IAF-2, Tab 29 at 16-18 (further extending medical hold until December 15, 2016); IAF-4, Tab 4 at 14; IAF-2, Tab 29 at 11-13 (extending medical hold until February 3, 2017. There are no orders in the record for the period of time from October 1, 2015, until December 1, 2015. I assume for the purposes of this decision that the appellant was on medical hold during this time period as his orders before and after this time period reflect that.

claimant's orders to state that they are being activated in support of a contingency operation for the purpose of proving entitlement to differential pay. *Adams*, 3 F.4th at 1379. Rather, the individual must show that they were directly called to serve in a contingency operation. *Id.*

While the appellant's orders for this first period of time did not indicate he was being activated under an enumerated section of 10 U.S.C. § 101(a)(13)(B), they indicated that his activation was in support of a contingency operations. As indicated above, the court in Adams found supporting a contingency operation insufficient; rather direct involvement was required. *Adams, id.* at 1379. The appellant has failed to present any evidence that he was called to directly serve in a contingency operation, as he has presented no evidence of what he did while on active duty with the U.S. Coast Guard during this time period.

In addition, starting on July 9, 2013, the appellant's orders indicated he was being called to active duty under 10 U.S.C. § 12301(d). Section 12301(d) allows the Secretary of Defense to order a reserve member to active duty "with the consent of that member." In *Adams*, the court found that service under § 12301(d) was voluntary duty that did not necessarily qualify for differential pay under 5 U.S.C. § 5538(a), in the absence of evidence the service member was directly involved in a contingency operation. *See Adams*, 3 F.4th at 1380 (quoting OPM guidance stating that "qualifying active duty does not include voluntary active duty under 10 U.S.C. § 12301(d)"). The appellant has presented no evidence that he was directly involved in a contingency operation during his service here.

Turning to the second period of time when the appellant was called to active duty for medical reasons, his

orders specifically stated that he was being called pursuant to 10 U.S.C. § 12301(d). As indicated, above, this service does not generally qualify as "active duty" for the purposes of receiving differential pay, and the appellant has presented no evidence he was directly involved in a contingency operation at the time he was receiving medical treatment. While the appellant has argued that his service qualifies as a contingency operation under the "any other provision of law during a declared national emergency" section of 10 U.S.C. § 12301(d), the Federal Circuit rejected this argument in *Adams*, finding that it could not conclude that this section, which covers voluntary duty, was included in the phrase "any other provision of law during a war or national emergency."[26] *Adams*, 3 F.4th at 1380. OPM's guidance explains that "[t]he term 'contingency operation' means a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." *See Id.* at 22. As indicated, above, although the agency has its own personnel system, I find OPM's guidance instructive

[26] In Adams, the Federal Circuit noted that its reading of § 5538(a) was consistent with the Office of Personnel Management's (OPM) guidance which states, "qualifying active duty does not include voluntary active duty under 10 U.S.C. § 12301(d)." Adams, at 1380, citing, OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. §5538 at 18 (available at https://www.opm.gov/policy-data-oversight/pay-leave/payadministration/reservist-differential/policyguidance.pdf. While the agency is not bound by OPM guidance on this matter as it has its own policy on differential pay, I find OPM's guidance instructive as the agency was required to consult with OPM in developing its procedures on this issue and the agency policy cites OPM'S guidance as a reference. *See* 5 U.S.C. § 5538(e)(2); IAF-2, Tab 41 at 40 (section m).

particularly because the agency was required by § 5538(e)(2) to consult with OPM in prescribing the procedures to ensure that its employees received the rights under that section.

Accordingly, I find the appellant's period of service reflected above does not qualify as a "contingency operation" as required by 5 U.S.C. § 5538(a). The appellant therefore, is not entitled to differential pay. Based on this finding, I find it unnecessary to address the agency's argument that the appellant failed to comply with the agency's policy on differential pay by failing to timely request it. The appellant's request for corrective action is denied as he failed to show by preponderant evidence that he was directly involved in a contingency operation during the time at issue in this appeal.

The appellant is not entitled to 22 Days of military leave for the years 2012-2017.

In his appeal, the appellant alleges that he was denied 22 days of military leave in violation of 5 U.S.C. § 6323(b). The parties stipulated that the appellant's request for 22 days of military leave occurred during a time when he was called to active duty in support of a contingency operation, but the agency argues that the appellant is not entitled to these days because he failed to comply with agency policy for requesting military leave.[27] HT-1 at 9 (Stipulation). There is no dispute that the appellant did not request

[27] Although the parties stipulated that the appellant was called to active duty to support a contingency operation, I am not bound by this stipulation to the extent it is not supported by the record evidence.

military leave during the time period he was on active duty.[28] HT-1 at 87 (Feliciano).

As a preliminary matter, I note that both parties reliance on 5 U.S.C. 6323(b) as basis for the appellant's entitlement to leave is misplaced. The FAA, as a component of the Department of Transportation, is exempt from most of the provisions of Title 5, United States Code, including section 6323. *See* 49 U.S.C. § 40122(g)(2); *Miller v. Department of Transportation*, 86 M.S.P.R. 293, ¶¶ 4-5 (2000); *Pratt v. Department of Transportation*, 103 M.S.P.R. 111, ¶¶ 8-10 (2006). As a result, the leave provisions of 5 U.S.C. § 6323 do not apply to the agency. *Pratt, id.* The Board has held, however, that it has authority, under USERRA, to determine an agency's compliance with its own rules that confer a military benefit. *Pratt*, 103 M.S.P.R. at ¶10.

The record contains the agency's HRPM, referenced above, that applies to reservist differential and was in effect during the relevant timeframe.[29] IAF-2, Tab 41 at 37-47. Subsection 8(b) of this policy covers the use of paid time off. *Id.* at 42. This subsection includes a paragraph dealing with military leave and states, "An employee may continue to use military leave, as applicable. [See HRPM LWS 8.4 Military Leave]." *Id.* It further states that military leave for contingency operations may be available for contingency operations. *Id.* Based on the above, it appears the agency granted employees military leave in a

---

[28] The appellant testified that he asked his union representative, Jim McMillan, about getting 22 days of military leave and Mr. McMillan told him he did not qualify for it. HT-1 at 68-69 (Feliciano). I find this does not constitute a request for leave as there is no evidence that the union representative was one of the appellant's managers or in a position to approve the appellant's leave request.

[29] The policy in the record is marked "Cancelled" so it does not appear to be the agency's current policy. IAF-2, Tab 41 at 37.

similar manner as provided by 5 C.F.R. § 6323(b). The specific military leave policy, however, was not submitted into the record by either party so I am unable to determine the exact requirements of the agency's policy for the granting of 22 days of military leave.[30]

The agency has argued that the appellant was required to request the leave while he was actually serving military duty, although it relied on § 6323(b) and OPM's implementing regulations to support its position.[31] Without the agency's policy, I cannot determine if the appellant qualifies for this leave or if his request for leave was timely. In the absence of the agency's policy, I am left to speculate the extent to which the agency followed § 6323(b) and/or OPM's implementing regulations. I decline to do so.

Accordingly, I find the appellant has failed to present a preponderance of the evidence to show that he was entitled to 22 days of military leave and his request for corrective action is denied.

The agency failed to prove laches should be applied to the appellant's claim.

The agency has argued that laches should be applied to the appellant's claims. The equitable defense of laches bars an action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. *Brown v. Department of Air Force*, 88 M.S.P.R.

---

[30] I was unable to locate the agency's military leave policy in the public domain.

[31] Specifically, 5 C.F.R. § 353.208 which states, "An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. 6304, military leave under 5 U.S.C. 6323, earned compensatory time off for travel under 5 U.S.C. 5550b, or sick leave under 5 U.S.C. 6307, if appropriate, during such service."

22, ¶ 5 (2001). The party asserting laches must prove both the unreasonable delay and show that it was materially prejudiced or injured by it. *Pueschel v. Department of Transportation*, 113 M.S.P.R. 422, ¶ 6 (2010), *aff'd*, 441 Fed. Appx. 771 (Fed. Cir. 2011), *cert. denied*, 133 S.Ct. 39 (2012); *Nuss v. Office of Personnel Management*, 974 F.2d 1316, 1318 (Fed. Cir. 1992). The Board generally declines to apply the doctrine of laches to appeals brought pursuant to USERRA because there is no statute of limitations for filing such a claim. *See Brown v. Department of the Air Force*, 88 M.S.P.R. 22, ¶ 6 (2001); *see*, *Sleevi v. Merit Systems Protection Board*, ---Fed.Appx.---, 2021 WL 2879045 (July 9, 2021) (nonpresidential)(finding laches appropriate where the appellant waited a nearly 13 years to file his USERRA appeal with no explanation for the lengthy delay).

The agency argues that laches should be applied to this appeal because it was unable to locate several former employees to respond to the appellant's allegations. Specifically, the agency was unable to locate Walter Hall, Kenny Gaskin, Steve Kravits, Rick Sealy, Randy Privett, and Kenneth Blanton.[32] HT-2 at 100-102. One of the witnesses, Walter Engelhart, passed away prior to the hearing. Given my finding above, *i.e.*, that the appellant failed to show he was subjected to a hostile work environment due to his military service, I decline to apply laches to this appeal.

DECISION

The Appellant's request for corrective action is DENIED.

---

[32] Wendy Beech, a paralegal with the agency, testified regarding her efforts to locate former employees for the hearing. HT-2 at 100-101 (Beech).

FOR THE BOARD: /s/
Sharon J. Pomeranz
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **October 6, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30- day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of

issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time

limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's

website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (not the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial

petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

2022-1219

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Nick Feliciano v. Department of Transportation, MSPB Docket No. AT-4324-18- 0287-I-4, and that the administrative record is under my official custody and control on this date

on file in this Board

December 16, 2021
Date

Tawanda Williams for
Jennifer Everling
Acting Clerk of the Board

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NICK FELICIANO,
Petitioner

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

2022-1219

Petition for review of the Merit Systems Protection Board in No. AT-4324-18-0287-I-4.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM

ORDER

Nick Feliciano filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the Department of Transportation. The petition was first referred as a petition to the panel that heard the

[1] Circuit Judge Newman did not participate.

appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue November 3, 2023.

FOR THE COURT

/s/

October 27, 2023
Date

Jarrett B. Perlow
Clerk of Court

APPENDIX D

5 U.S.C. § 5538

Nonreduction in pay while serving in the uniformed services or National Guard

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

APPENDIX E

10 U.S.C. § 101

§ 101. Definitions

(a) In general.—The following definitions apply in this title:

(1) The term "United States", in a geographic sense, means the States and the District of Columbia.

[(2) Repealed. Pub.L. 109-163, Div. A, Title X, § 1057(a)(1), Jan. 6, 2006, 119 Stat. 3440]

(3) The term "possessions" includes the Virgin Islands, Guam, American Samoa, and the Guano Islands, so long as they remain possessions, but does not include any Commonwealth.

(4) The term "armed forces" means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.

(5) The term "uniformed services" means—

(A) the armed forces;

(B) the commissioned corps of the National Oceanic and Atmospheric Administration; and

(C) the commissioned corps of the Public Health Service.

(6) The term "department", when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, such term means the

executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(7) The term "executive part of the department" means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(8) The term "military departments" means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(9) The term "Secretary concerned" means—

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force and the Space Force; and

(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

(10) The term "service acquisition executive" means the civilian official within a military department who is designated as the service acquisition executive for purposes of regulations and

procedures providing for a service acquisition executive for that military department.

(11) The term "Defense Agency" means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department (other than such an entity that is designated by the Secretary as a Department of Defense Field Activity); or

(B) that is designated by the Secretary of Defense as a Defense Agency.

(12) The term "Department of Defense Field Activity" means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department; and

(B) that is designated by the Secretary of Defense as a Department of Defense Field Activity.

(13) The term "contingency operation" means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against

an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

(14) The term "supplies" includes material, equipment, and stores of all kinds.

(15) The term "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(16) The term "congressional defense committees" means—

(A) the Committee on Armed Services and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

(17) The term "base closure law" means the following:

(A) Section 2687 of this title.

(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(C) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(18) The term "acquisition workforce" means the persons serving in acquisition positions within the Department of Defense, as designated pursuant to section 1721(a) of this title.

(19) The term "climate resilience" means the capability to avoid, prepare for, minimize the effect of, adapt to, and recover from, extreme weather, or from anticipated or unanticipated changes in environmental conditions, that do (or have the potential to) adversely affect the national security of the United States or of allies and partners of the United States.

(20) The term "extreme weather" means recurrent flooding, drought, desertification, wildfires, thawing permafrost, sea level fluctuation, changes in mean high tides, or any other weather-related event, or anticipated change in environmental conditions, that present (or are projected to present) a recurring annual threat to the climate security of the United States or of allies and partners of the United States.

(b) Personnel generally.—The following definitions relating to military personnel apply in this title:

(1) The term "officer" means a commissioned or warrant officer.

(2) The term "commissioned officer" includes a commissioned warrant officer.

(3) The term "warrant officer" means a person who holds a commission or warrant in a warrant officer grade.

(4) The term "general officer" means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(5) The term "flag officer" means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or rear admiral (lower half).

(6) The term "enlisted member" means a person in an enlisted grade.

(7) The term "grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(8) The term "rank" means the order of precedence among members of the armed forces.

(9) The term "rating" means the name (such as "boatswain's mate") prescribed for members of an armed force in an occupational field. The term "rate" means the name (such as "chief boatswain's mate") prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice).

(10) The term "original", with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to that member's most recent appointment in that component that is neither a promotion nor a demotion.

(11) The term "authorized strength" means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(12) The term "regular", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(13) The term "active-duty list" means a single list for the Army, Navy, Air Force, Marine Corps, or Space Force (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(14) The term "medical officer" means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(15) The term "dental officer" means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(16) The term "Active Guard and Reserve" means a member of a reserve component who is on active duty pursuant to section 12301(d) of this title or, if a member of the Army National Guard or Air National Guard, is on full-time National Guard duty pursuant to section 502(f) of title 32, and who is performing Active Guard and Reserve duty.

(c) Reserve components.—The following definitions relating to the reserve components apply in this title:

(1) The term "National Guard" means the Army National Guard and the Air National Guard.

(2) The term "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

(4) The term "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(5) The term "Air National Guard of the United States" means the reserve component of the Air

Force all of whose members are members of the Air National Guard.

(6) The term "reserve", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of one of the armed forces.

(7) The term "reserve active-status list" means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 14002 of this title) that contains the names of all officers of that armed force except warrant officers (including commissioned warrant officers) who are in an active status in a reserve component of the Army, Navy, Air Force, or Marine Corps and are not on an active-duty list.

(d) Duty status.—The following definitions relating to duty status apply in this title:

(1) The term "active duty" means full-time duty in the active military service of the United States. Such term includes fulltime training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

(2) The term "active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(3) The term "active service" means service on active duty or full-time National Guard duty.

(4) The term "active status" means the status of a member of a reserve component who is not in the

inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(5) The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

(6)(A) The term "active Guard and Reserve duty" means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.

(B) Such term does not include the following:

(i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.

(ii) Duty performed as a property and fiscal officer under section 708 of title 32.

(iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.

(iv) Duty performed as a general or flag officer.

(v) Service as a State director of the Selective Service System under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)).

(7) The term "inactive-duty training" means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Such term includes those duties when performed by Reserves in their status as members of the National Guard.

(e) Facilities and operations.—The following definitions relating to facilities and operations apply in this title:

(1) Range.—The term "range", when used in a geographic sense, means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. Such term includes the following:

(A) Firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas.

(B) Airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration.

(2) Range activities.—The term "range activities" means—

(A) research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and

(B) the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems.

(3) Operational range.—The term "operational range" means a range that is under the jurisdiction, custody, or control of the Secretary of a military department and—

(A) that is used for range activities, or

(B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

(4) Military munitions.—(A) The term "military munitions" means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard.

(B) Such term includes the following:

(i) Confined gaseous, liquid, and solid propellants.

(ii) Explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents.

(iii) Chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges.

(iv) Devices and components of any item specified in clauses (i) through (iii).

(C) Such term does not include the following:

(i) Wholly inert items.

(ii) Improvised explosive devices.

(iii) Nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) have been completed.

(5) Unexploded ordnance.—The term "unexploded ordnance" means military munitions that—

(A) have been primed, fused, armed, or otherwise prepared for action;

(B) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(C) remain unexploded, whether by malfunction, design, or any other cause.

(6) Energy resilience.—The term "energy resilience" means the ability to avoid, prepare for, minimize, adapt to, and recover from anticipated and unanticipated energy disruptions in order to ensure energy availability and reliability sufficient to provide for mission assurance and readiness, including mission essential operations related to readiness, and to execute or rapidly reestablish mission essential requirements.

(7) Energy security.—The term "energy security" means having assured access to reliable supplies of energy and the ability to protect and deliver sufficient energy to meet mission essential requirements.

(8) Military installation resilience.—The term "military installation resilience" means the capability of a military installation to avoid, prepare for, minimize the effect of, adapt to, and recover from extreme weather events, or from anticipated or unanticipated changes in environmental conditions, that do, or have the potential to, adversely affect the military installation or essential transportation, logistical, or other necessary resources outside of the military installation that are necessary in order to maintain, improve, or rapidly reestablish installation mission assurance and mission-essential functions.

(f) Rules of construction.—In this title—

(1) "shall" is used in an imperative sense;

(2) "may" is used in a permissive sense;

(3) "no person may * * * " means that no person is required, authorized, or permitted to do the act prescribed;

(4) "includes" means "includes but is not limited to"; and

(5) "spouse" means husband or wife, as the case may be.

(g) Reference to Title 1 definitions.—For other definitions applicable to this title, see sections 1 through 5 of title 1.

APPENDIX F

18 U.S.C. § 209

Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection— Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision

of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.

APPENDIX G

EXCERPT OF DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD DIRECT ACCESS STANDARD TRAVEL ORDER JULY 8, 2012 (Full Document Available at C.A. App. 579)

Remarks/Comments/Additional Instructions

Member has been called up under 10 U.S.C. 12302 per Executive Order 13223, dated September 14, 2001. The period of service under 10 U.S.C. 12302 is exempt from the five-year limit as provided in 38 U.S.C. 4312(c)(4)(B). Reservists recalled under Title 10 USC are currently ordered to active duty for a maximum period of twelve consecutive months, unless released sooner, IAW USCG policy and the provisions of 10 USC 12302.

You are ordered to active duty for a period of less than 30 days for medical/dental screening and/or care. If you are not determined to be medically qualified for deployment, you will be released from active duty and returned to prior status. If you are determined to be medically qualified for deployment, you are further ordered to active duty for a combined period not to exceed the stated duration of these orders, unless sooner released by proper authority.

These orders are in support of a DOD contingency operation. These orders are supporting operation: Expeditionary SPOE.

This call to Active Duty is in a temporary duty status (TDY). Members permanent unit remains STA Shinnecock.

APPENDIX H

EXCERPT OF DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD DIRECT ACCESS STANDARD TRAVEL ORDER JUNE 3, 2013 (Full Document Available at C.A. App. 573-75)

Remarks/Comments/Additional Instructions

Member has been called up under 10 U.S.C. 12301(d) per Executive Order 13223, dated September 14, 2001. The Secretaries of the Military Departments have each determined the period of service under 10 U.S.C. 12301(d) as exempt from the five year limit in 38 U.S.C. 4312(c)(4)(B).

You are ordered to active duty for a period of less than 30 days for medical/dental screening and/or care. If you are not determined to be medically qualified for deployment, you will be released from active duty and returned to prior status. If you are determined to be medically qualified for deployment, you are further ordered to active duty for a combined period not to exceed the stated duration of these orders, unless sooner released by proper authority.

These orders are in support of a DOD contingency operation. These orders are supporting operation: Operation Iraqi Freedom, Operation Enduring Freedom, etc.

This call to Active Duty is in a temporary duty status (TDY). Members permanent unit remains STA SINNECOCK.

Orders that are issued across fiscal year are subject to availability of funds and contingency FTE allocations.

APPENDIX I

EXCERPT OF DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD DIRECT ACCESS STANDARD TRAVEL ORDER SEPTEMBER 23, 2013 (Full Document Available at C.A. App. 568-70)

Remarks/Comments/Additional Instructions

Member has been called up under 10 U.S.C. 12301(d) per Executive Order 13223, dated September 14, 2001. The Secretaries of the Military Departments have each determined the period of service under 10 U.S.C. 12301(d) as exempt from the five year limit in 38 U.S.C. 4312(c)(4)(B).

You are ordered to active duty for a period of less than 30 days for medical/dental screening and/or care. If you are not determined to be medically qualified for deployment, you will be released from active duty and returned to prior status. If you are determined to be medically qualified for deployment, you are further ordered to active duty for a combined period not to exceed the stated duration of these orders, unless sooner released by proper authority.

These orders are in support of a DOD contingency operation. These orders are supporting operation: Operation Iraqi Freedom.