

New Developments

Administrative & Civil Law

Marchand v. GAO: The Next Butterbaugh?

On 27 December 2012, the Office of Compliance granted summary judgment in the case of *Marchand v. General Accountability Office*.¹ This decision overruled the Office of Personnel Management's (OPM's) narrow interpretation of the Federal Differential Pay Act.² Much like its predecessor, *Butterbaugh v. Department of Justice*, the *Marchand* decision found a Uniform Servicemember Employment and Reemployment Rights Act (USERRA) violation based upon an erroneous interpretation of a federal statute by OPM.³ And, like *Butterbaugh*, the *Marchand* decision will have implications for the federal government for years to come.⁴

In *Butterbaugh*, the issue before the court was an OPM interpretation of the federal statute granting fifteen days of paid military leave to federal government employees.⁵ The court found that the OPM had misinterpreted the Military Leave Act to require servicemembers to erroneously take additional leave days to cover military service, which constituted a USERRA violation. The OPM's narrow interpretation of the Military Leave Act caused many federal government employees to have to use military leave in conjunction with other types of leave to cover all periods of military duty. For example, Reserve Soldiers were forced to use military leave, annual leave, and/or leave without pay to account for absences from their federal government positions due to inactive duty training, annual training, and other types of military duty. Following the *Butterbaugh* decision, numerous federal employees qualified for compensation from their agencies for the wrongful use of annual and other types of leave to cover their military service.⁶ Although the *Butterbaugh* case was decided in 2003, the Department of Defense continues to receive so-

called "Butterbaugh Claims" to the present day,⁷ as USERRA violations have no statute of limitations.⁸

The *Butterbaugh* case underscores the danger involved when the OPM takes a narrow view of federal statutes associated with benefits for servicemembers.⁹ The statute at issue in *Marchand* was 5 U.S.C. § 5538(a).¹⁰ This provision provides, "[a]n 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 a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled" to differential pay.¹¹ Further, under 10 U.S.C. § 101(a)(13)(B), a contingency operation is defined as one implicating a call or order to active duty "under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress."¹²

The OPM interpreted (and still interprets) the language found in § 5538(a) as requiring any call or order to active duty to be specifically referenced in § 101(a)(13)(B). For the OPM, the phrase "referred to in section 101(a)(13)(B)" literally means that § 101(a)(13)(B) must explicitly delineate the statute under which the order is issued for differential pay to apply.¹³ Therefore, in OPM's opinion, the final clause of § 101(a)(13)(B) ("or any other provision of law during a war or during a national emergency declared by the President or Congress") has no relevance with respect to differential pay.¹⁴

¹ See *Marchand v. General Accountability Office*, Case No. 12-GA-05 VT (27 Dec. 2012), available at <http://www.compliance.gov/wp-content/uploads/2013/05/Marchand-Order-12-27-2012.pdf>

² *Id.* at 3; 5 U.S.C. § 5538 (2013); see *infra* note 13 and accompanying text.

³ *Id.*; see also *Butterbaugh v. Dep't of Justice*, 336 F.2d 133, 1336 (Fed. Cir. 2003). The federal statute at issue in *Butterbaugh* was the Military Leave Act, 5 U.S.C. § 6323. *Id.*

⁴ *Id.*; see also *Garcia v. Dep't of Justice*, 2006 M.S.P.R. 29, 8 (2006); *Harper v. Dep't of the Navy*, 2006 M.S.P.R. 30, 6 (2006). The United States Merit Systems Protection Board (MSPB) found that under the Uniformed Services Employment and Reemployment Rights Act (USERRA), current and former servicemembers may seek restoration of improperly charged leave for the entire period of the misapplication of the military leave statute (1980 through 2003). *Id.*

⁵ See *Butterbaugh*, 336 F.2d 133, 136.

⁶ *Id.*

⁷ See DEF. FIN. & ACCOUNTING SERV., BUTTERBAUGH CASE, <http://www.dfas.mil/civilianemployees/butterbaughcase.html> (last visited May 7, 2014).

⁸ See *Garcia v. Dep't of Justice*, 2006 M.S.P.R. 29, 8 (2006); *Harper v. Dep't of the Navy*, 2006 M.S.P.R. 30, 6 (2006).

⁹ See *Marchand*, Case No. 12-GA-05 VT, at 3.

¹⁰ *Id.* at 2.

¹¹ 5 U.S.C. § 5538(a) (2013). Differential pay is defined as the amount of basic pay which would otherwise have been payable to an employee for a pay period if such employee's civilian employment with the federal government had not been interrupted by military service; it is the amount of such basic pay which exceeds the pay and allowances the employee actually receives for the military service. *Id.*

¹² 10 U.S.C. § 101(a)(13)(B) (2013).

¹³ See *Marchand*, Case No. 12-GA-05 VT, at 3; see also OFFICE OF PERS. MGMT., PAY AND LEAVE, <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/#url=summary> (last visited May 20, 2014).

¹⁴ *Marchand*, Case No. 12-GA-05 VT., at 3.

The problem for the complainant Marchand was that he had been mobilized in 2011 in support of a contingency operation under 10 U.S.C. § 12301(d),¹⁵ the voluntary mobilization statute.¹⁶ Based on the aforementioned OPM interpretation of 5 U.S.C. § 5538(a), Marchand was excluded from receiving differential pay by his agency (the General Accounting Office) because 10 U.S.C. § 12301(d) was not explicitly mentioned as one of the authorities within the definition of a contingency operation found in 10 U.S.C. § 101(a)(13)(B).¹⁷

Marchand filed an action with the Office of Compliance, the Legislative Branch’s version of the Merit System Protection Board, seeking to challenge the OPM interpretation of § 5538(a).¹⁸ The Office of Compliance found the OPM interpretation overly narrow. Specifically, OPM’s disregard for the final phrase in § 101(a)(13)(B) (“or any other provision of law during a war or during a national emergency declared by the President or Congress”) violated the cannon against superfluity and was contrary to the will of Congress.¹⁹ It was undisputed that Marchand had been mobilized under a call or order to active duty in support of a contingency operation, albeit under 10 U.S.C. 12301(d).²⁰ Section 12301(d) was clearly within the meaning of “any other provision of law during a war or national emergency declared by the President or Congress.”²¹ Therefore, the Office of Compliance found that Marchand qualified for differential pay during his mobilization.²²

Because Marchand had been erroneously denied a benefit of employment—differential pay—that accrued due to his military service, such denial constituted a violation of USERRA.²³ Citing *Butterbaugh v. Department of Justice*, the Office of Compliance found OMB had violated USERRA when it applied the narrow OPM interpretation of 5 U.S.C. § 5538.²⁴

While the *Marchand* decision does not provide precedential value beyond the legislative branch, its holding is persuasive in that it establishes a reasonable interpretation of 5 U.S.C. § 5538 that will likely be adopted by subsequent judicial decisions.²⁵ Therefore, *Marchand* may become synonymous with *Butterbaugh* as a type of claim precipitated by an OPM rule that misinterprets the law.²⁶

—MAJ T. Scott Randall

¹⁵ *Id.* at 2.

¹⁶ *See generally* 10 U.S.C. § 12301(d) (2013).

¹⁷ *Marchand*, Case No. 12-GA-05 VT., at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² *Id.* at 4.

²³ *Id.* at 5. The discrimination analysis under USERRA for military-specific benefits is that where “the benefits are only granted to employees performing duties in the uniformed services, the question of whether the employee’s status was a substantial or motivating factor in the employer’s action is not applicable, as it is ‘self evident’ that the employee’s military service was a substantial or motivating factor.” *Id.* (citing *Haskins v. Dept’t of Navy*, 106 M.S.P.R. 616, 621–22 (2007)).

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.*