NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL FARIS,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2022-1561

Petition for review of the Merit Systems Protection Board in No. SF-4324-21-0370-I-1.

Decided: September 22, 2022

MICHAEL FARIS, Prattville, AL, pro se.

DANIEL F. ROLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, HUGHES and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

Michael Faris appeals from an order of the Merit Systems Protection Board ("MSPB") denying his request for corrective action. Because we agree with the MSPB's determination, we affirm.

I

Mr. Faris was hired as a civilian employee by the United States Air Force ("USAF") in 2012 and continued in that position until his resignation in 2013. SAppx. 7-9.[1] In 2014, Mr. Faris returned to his position and later that year he was promoted. SAppx. 10-12.

During his civilian service, Mr. Faris was intermittently put on leave without pay ("LWOP") status while he served in the military. *See, e.g.*, SAppx. 13-48. This happened several times between April 2016 and March 2020. *Id.* In addition, between April 3 and April 7, 2017, Mr. Faris participated in inactive duty training with the National Guard. SAppx. 118-23; Appx. 7.[2]

As the MSPB explained, "[o]rdinarily, an employee's retirement contributions are funded through deductions from his pay. 5 U.S.C. § 8422. No deductions are made when an employee is in a nonpay status, such as military LWOP." Appx. 4. Mr. Faris wanted to continue to receive retirement credit when he was on LWOP status. The Federal Employees' Retirement System ("FERS") requires that "to receive credit for this period of military service toward civilian retirement," an employee on LWOP status must pay a military deposit. SAppx. 51; *see also* Appx. 2.

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[1] "SAppx." citations refer to the appendix filed concurrently with Respondent's brief.

[2] "Appx." citations refer to the appendix filed concurrently with Petitioner's brief.

Therefore, Mr. Faris initially paid a military service deposit for each period he was on LWOP from his civil-service job. *See* SAppx. 55-62.

In 2020, after having paid the deposit several times over the course of years, Mr. Faris changed tack and filed a Form 1010 with the Department of Labor, alleging that the deposit requirement violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4335. *See, e.g.*, SAppx. 63-66. USERRA provides employment protections for military service members. *See* 38 U.S.C. § 4311(a) ("A person who . . . performs, [or] has performed, . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that . . . performance of service . . . .").

After reviewing Mr. Faris' submissions, the Department of Labor concluded that the evidence did not support a USERRA violation. SAppx. 67-68. Mr. Faris appealed that determination to the MSPB, SAppx. 1-6, which denied his request for corrective action, Appx. 1-20.

Mr. Faris, appearing pro se, timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A).

II

We review the MSPB's interpretation of a statute or regulation de novo. *Bannister v. Dep't of Veterans Affs.*, 26 F.4th 1340, 1342 (Fed. Cir. 2022). We set aside its "action, findings, or conclusions" only if we find they are "(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).

To make out a USERRA claim under 38 U.S.C. § 4311, an employee must show that "(1) they were denied a benefit of employment, and (2) the employee's military service was 'a substantial or motivating factor' in the denial of such a benefit." *Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375, 1377 (Fed. Cir. 2021). "However, when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor." *Id.* at 1377-78. Therefore, because Mr. Faris' claims "concern benefits only available to military servicemembers," he need only show that he was denied a benefit of employment. Appx. 4. Also, in considering the applicable statutory provisions, where there is doubt as to the meaning of Congress' chosen text, we "give each [statutory provision] as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

III

Mr. Faris argues that he was denied a benefit of employment because he was required to make deposits to obtain FERS credit during the times he was on LWOP status for military service. *See, e.g.*, Pet. Br. 4. Mr. Faris also argues that he was denied a benefit of employment when the agency did not allow him to make a deposit and receive FERS service credit during his week of inactive duty National Guard training in April 2017. *Id.* We consider each claim of error in turn.[3]

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[3] In coming to our conclusion, we have considered, in conjunction with our review of the entire record, Mr. Faris' informal brief (ECF No. 8), his informal reply brief (ECF No. 18), and the memorandum he filed in lieu of oral argument (ECF No. 24).

A

Mr. Faris argues that the FERS statutory scheme, by requiring him to pay a deposit to receive FERS credit for periods of military service while he was on LWOP from his civilian job, denies him the USERRA-protected benefit of receiving FERS credit *without* paying a deposit. *See* Pet. Br. 4-25. Mr. Faris' contentions are defeated by the clear language of the applicable statutory provisions.

The FERS statute provides that "an employee or Member shall be allowed credit for . . . *each period of military service* performed after December 31, 1956 . . . *if a deposit* (including interest, if any) *is made* with respect to such period in accordance with section 8422(e)."[4] 5 U.S.C. § 8411(c)(1)(B) (emphasis added). Plainly, § 8411(c)(1)(B) requires that an employee seeking credit for a period of military service must make a deposit in order to have such a credit allowed. This unambiguous statutory language compels us to conclude that Mr. Faris is not entitled to credit without paying the deposit. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

In attempting to evade this straightforward analysis, Mr. Faris points to § 8411(d), which provides that "[c]redit under this chapter shall be allowed for leaves of absence without pay granted an employee while performing military service . . . ." Mr. Faris argues he should be able to "claim rights to benefits" under this provision. Pet. Br. 8-9. However, reading the statute as a whole, as we must, *see, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009)

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[4] Section 8422(e)(1) describes how to calculate the deposit amount and references the "deposit payable."

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