OFFICE OF COMPLIANCE
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Gregory A. Marchand, Complainant,	)	Case No. 12-GA-05 (VT)
v.	)	
Government Accountability Office, Respondent.	)	December 27, 2012

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

Complainant, MAJ Gregory Marchand, brings this action alleging that the Respondent, Government Accountability Office, violated the Uniformed Services Employment and Reemployment Rights Act when it denied him reservist differential pay under 5 U.S.C. § 5538.

On June 25, 2012, both parties in this matter filed motions for summary judgment. The parties submitted their oppositions to each other's motion on July 2, 2012. Furthermore, oral arguments regarding the parties' motions were held on July 13, 2012. For the reasons outlined below, Complainant's Motion for Summary Judgment is hereby GRANTED. Respondent's Motion for Summary Judgment is hereby DENIED.

I. ISSUE

Whether the United States Government Accountability Office ("GAO") violated Complainant's rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") when it denied him reservist differential pay under 5 U.S.C. § 5538.

II. FINDINGS OF FACT

1. At all times relevant to the instant complaint, Complainant worked as Deputy Assistant General Counsel for Respondent GAO.

2. In addition to his employment with Respondent, Complainant is a reserve Major (O-4) in the United States Army.

3. On August 13, 2010, Lieutenant Colonel Michael Mueller contacted Complainant and requested a volunteer to be mobilized to support the Contract and Fiscal Law Department. While Complainant did not volunteer at that time, LTC Mueller later notified Complainant that Complainant had been selected for the position.

4. On November 30, 2010, Complainant was ordered "to active duty for operational support under provision of section 12301 (D), title 10 United States Code." Furthermore, Complainant's deployment orders were for the purpose of "contingency operation for active duty operational support" pursuant to the national emergency declared under Presidential Proclamation 7463.

5. Complainant served on active duty from January 3, 2011 through January 2, 2012.

6. Complainant's gross amount of civilian pay he received or would have received from January 3, 2011 to January 2, 2012 was greater than his gross amount of military pay during the same time period.

7. Complainant did not receive reservist differential pay while mobilized..

8. Respondent denied Complainant's reservist differential pay based only on the fact that he was ordered to perform active duty pursuant to 10 U.S.C. § 12301(d).

III. LEGAL STANDARD

In order to obtain summary judgment, the moving party must establish that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A disputed fact is material if, when resolved in the non-movant's favor, it has the potential to alter the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In evaluating a motion for summary judgment, the facts are interpreted in the light most favorable to the nonmoving party. *Id.* at 249.

IV. LEGAL ANALYSIS AND CONCLUSIONS

A. Relevant Statutory Authorities

The parties have agreed upon all issues of material fact, leaving the only issue in this case one of statutory interpretation. The statute at issue in this matter is 5 U.S.C. § 5538, which provides, in relevant part:

> (a) Any 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, 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) . . .

Furthermore, 10 U.S.C. § 101(a)(13)(B) defines "contingency operation" as a military operation that:

> 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 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

B. Section 5538 Must Be Interpreted Broadly

The only issue in the instant matter is whether 5 U.S.C. § 5538 applies to a Federal Government employee mobilized to active duty under 10 U.S.C. § 12301(d). When interpreting a statute, the first step is to determine whether "the language at issue has a plan and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

In the present case, Respondent argues that the phrase "a provision of law referred to in section 101(a)(13)(B) of title 10" in 5 U.S.C. § 5538 only refers to the provisions of law explicitly enumerated in § 101(a)(13)(B), and not to the catch-all provision, "or any other provision of law during a war or during a national emergency declared by the President or Congress." Complainant argues to the contrary and that § 5538 must incorporate this catch-all provision. Upon review of the parties' submission and the relevant statutory and legal authorities, I cannot accept Respondent's restrictive construction of § 5538.

Respondent's narrow construction is not supported by the broader context of the statute as a whole. Section 5538 was passed as part of a larger bill, the Consolidated Appropriations Act, 2010, PL 111-117, December 16, 2009. In this larger Act, Congress employs the phrases "enumerated in" and "listed in." *See, e.g.*, PL 111-117, 123 Stat. 3153 (§ 520(b)(1)), 3248. If Congress intended to limit the applicability of § 5538 to only the enumerated statutes listed in § 101(a)(13)(B), it would have used the same narrow language used in the larger Act. *Cf. U.S. v. Int'l Business Mach. Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989) ("Had Congress intended to make the exemptions permanent, it knew how: it could and we believe would have used the words of futurity . . ."). "Where Congress knows how to say something but chooses not to, its silence is controlling." *Delgado v. U.S. Attorney Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001)).

Respondent's narrow construction of § 5538 offends the canon against superfluity. Courts are "reluctant to treat statutory terms as surplusage" and it is the duty of the courts "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995) and *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955)). "The cardinal principle of statutory construction is to save and not to destroy." *U.S. v. Menasche*, 348 U.S. 528, 538 (1955). If Respondent's position were taken, the catch-all phrase in § 101(a)(13)(B) would be rendered

superfluous. Thus, Respondent urges a statutory construction that "implies that the legislature was ignorant of the meaning of the language it employed," which is the courts' duty to avoid. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

The courts have "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21, n.9 (1991)). It is in this vein that I find that 5 U.S.C. § 5538 applies to a Federal Government employee mobilized to active duty under 10 U.S.C. § 12301(d) by virtue of the catch-all phrase contained in 10 U.S.C. § 101(a)(13)(B).

C. OPM Guidance Does Not Deserve *Chevron* Deference

Respondent claims I must adopt its narrow construction of § 5538 because such an interpretation of the statute is supported by guidance issued by the Office of Personnel Management ("OPM"). This argument is not persuasive.

The Supreme Court set the standard by which an agency's construction of a statute which it administers is reviewed by the courts in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court stated, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Thus, agency interpretations are not dispositive on the issue of statutory construction where Congress' intent is clear, as Congress' "intention is the law and must be given effect." *Id.* at 843, n.9.

Here, Congress' intent that § 5538 applies to "any other provision of law during a war or during a national emergency declared by the President or Congress" is clear. Therefore, "that is the end of the matter," and I must give effect to the unambiguously expressed intent of Congress.[1]

D. Complainant's Entitlement To Reservist Differential Pay

It is undisputed that from January 3, 2011 through January 2, 2012, Complainant served on active duty after receiving deployment orders under 10 U.S.C. § 12301(D) and pursuant to the national emergency declared under Presidential Proclamation 7463. It is also undisputed that gross amount of civilian pay he received or would have received from January 3, 2011 to January 2, 2012 was greater than his gross amount of military pay during the same time period, but that Complainant did not receive reservist differential pay while mobilized. Because I find that § 5538 applies to Complainant, I find that the Agency denied Complainant reservist differential pay.

[1] Furthermore, the Supreme Court has noted, "[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law . . . do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Instead, such interpretations are "entitled to respect" only to the extent that those interpretations "have the 'power to persuade'." *Id.* Because I hold that Congress' intent is unambiguous, I do not need to address whether OPM's Guidance is entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

E. The Denial Of Complainant's Reservist Differential Pay Constituted A Violation Under USERRA

Complainant alleges that Respondent's denial of his reservist differential pay violated USERRA. For the reasons discussed below, I find that Respondent violated USERRA when it improperly denied Complainant his reservist differential pay.

"[A]n employee making a USERRA complaint of discrimination . . . bear[s] the initial burden of showing by a preponderance of the evidence that the employee's military service was 'a substantial or motivating factor' in the adverse employment action." *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). Once the employee meets this requirement, "the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *Id.* However, where, as here, 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 "generally self-evident" that the employee's military service was a substantial or motivating factor. *See Haskins v. Dep't of the Navy*, 106 M.S.P.R. 616, 621-22 (2007); *see also Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003).

Complainant's reservist differential pay is an employment benefit under USERRA, as it "accrues by reason of" his employment with Respondent. Furthermore, "the fact that it is a benefit afforded to him by force of statute makes it no less a part of his 'employment agreement.'" *Pucilowski v. Dep't of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007).

I find that this claim, which involves the issue of statutory interpretation regarding a benefit to service members, is similar to the Federal Circuit's decision in *Butterbaugh.* In *Butterbaugh*, the Federal Circuit held that the practice of charging reservists military leave for every day they were on reserve duty, even if they were not scheduled to work some of those days, violated USERRA. Similar to Respondent in this matter, the agency in *Butterbaugh* claimed that such a practice was not a violation of USERRA because "the agency was merely following OPM's guidance in charging non-workdays against military leave." 336 F.3d at 1334. The Federal Circuit disagreed with the agency's interpretation of the statute, as well as OPM's guidance, and held that the statute regarding military leave referred to workdays. *Id.* at 1343. Despite the agency's reliance on the OPM guidelines, the Federal Circuit "held that this practice [charging non-workdays against military leave] . . . constituted the denial of a benefit of employment in violation of USERRA." *Hernandez v. Dep't of the Air Force*, 498 F.3d 1328, 1329 (Fed. Cir. 2007).

I find that Respondent violated USERRA when it improperly denied Complainant his reservist differential pay. Here, as in *Butterbaugh*, Respondent denied Complainant a benefit to which he was entitled by statute. Similar to the statute at issue in *Butterbaugh*, § 5538 explicitly and unambiguously entitles the benefit at issue to Complainant. Therefore, similar to the court in *Butterbaugh*, I find Respondent's reliance on OPM guidance unpersuasive and insufficient to overcome a finding of a violation under USERRA.

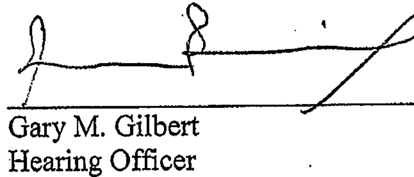
V. CONCLUSION

After considering all of the evidence in the record and the parties' pleadings on summary judgment, I find that Respondent violated USERRA when it denied Complainant reservist differential pay under 5 U.S.C. § 5538 for the time period from January 3, 2011 to January 2, 2012.

VI. DAMAGES AND ATTORNEY FEES

With regard to any claim for damages or attorney fees, a telephonic conference will be held on January 8, 2013 at 2 PM EST, at which time the parties should be prepared to discuss a briefing schedule for an award of damages and attorney fees. A call-in number for the conference will be forthcoming.

IT IS SO ORDERED.



Gary M. Gilbert
Hearing Officer

December 27, 2012
Date