UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

[redacted]
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
SF-4324-15-0099-I-1

DATE: March 12, 2015

Brian J. Lawler, San Diego, California, for the appellant.

[redacted]

BEFORE
Benjamin Gutman
Chief Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant sought corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA), alleging that the agency improperly denied him differential pay while he is on leave performing military duty. Initial Appeal File (IAF), Tab 1. I previously ruled that the Board has jurisdiction over this appeal under 38 U.S.C. § 4324. *See* IAF, Tab 7, at 1; Tab 16, at 1.

For the reasons explained below, I agree that the relevant statute entitles the appellant to differential pay while performing voluntary military duty during a declared national emergency. The appellant's request for corrective action is therefore GRANTED.

ANALYSIS AND FINDINGS

Background

Under a 2009 statute, when a federal employee is absent from his civilian job to perform active duty in the military, his employing agency may be required to pay him differential pay—the difference between his civilian pay and his military pay. 5 U.S.C. § 5538. Differential pay is required only if (among other things) the employee was ordered to active duty "under a provision of law referred to in section 101(a)(13)(B) of title 10." *Id.* § 5538(a). That section, in turn, refers to "section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B).

The facts relevant to this appeal are undisputed. The appellant is an information-technology specialist for the agency and also a technical sergeant in the U.S. Air Force Reserve. IAF, Tab 15, at 9, 13. The military ordered him to active duty from October 2014 to April 2015 under 10 U.S.C. § 12301(d). IAF, Tab 15, at 9-12. That subsection, which is not one of the statutes mentioned by number in § 101(a)(13)(B), allows the Secretary of Defense to order a reservist to active duty at any time with the reservist's consent. The appellant was scheduled to attend military classes on intelligence operations during the current period of voluntary duty. *Id.* at 11.

Although the appellant's military pay is less than his civilian pay (*see id.* at 17-19), the agency refused to pay him the difference because it contends that military duty ordered under § 12301(d) does not qualify for differential pay. *Id.*, Tab 15; Tab 16, at 2. The appellant contends that his orders fall within § 101(a)(13)(B)'s catch-all provision—" any other provision of law during a war or during a national emergency declared by the President or Congress"—because there has been a declared national emergency since the terrorist attacks of September 2001. *Id.*, Tab 14.

The appellant filed this proceeding with the Board under USERRA. *Id.*, Tab 1. Because the facts were not in dispute, I held an oral argument in lieu of a hearing on March 11, 2015, and the record on appeal closed at the end of the argument. *Id.*, Tab 16, at 2-3; Tab 18, at 0:57.

The appellant is entitled to differential pay

The appellant had the burden of proving by a preponderance of the evidence that the agency denied him a benefit of employment (differential pay) on the basis of his military service. *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 10 (2007), *appeal dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). The agency refused to pay the appellant differential pay here because of the character of his military service— specifically, the statutory section under which he was ordered to active duty. USERRA's prohibition against discrimination based on military service covers distinctions based on the specific character of that service. *See, e.g.*, *Beck v. Department of the Navy*, 120 M.S.P.R. 504, ¶ 10 (2014); *McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶¶ 13-18 (2013). The question, therefore, was not whether there was discrimination but rather whether the appellant was in fact entitled to differential pay as a benefit of employment. *Cf. Butterbaugh v. Department of Justice*, 91 M.S.P.R. 490, ¶ 8 (2002), *rev'd on other grounds*, 336 F.3d 1332 (Fed. Cir. 2003).

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). There was no dispute that the appellant was and is absent performing active duty, entitled to reemployment rights under USERRA, and not otherwise receiving civilian pay. IAF, Tab 9, at 9-15; Tab 16, at 2. The only dispute was whether his military service was "under a provision of law referred to in" § 101(a)(13)(B).

As noted earlier, § 101(a)(13)(B) lists a series of specific statutory sections by number and then has a catch-all provision: "any other provision of law during

a war or during a national emergency declared by the President or Congress." Since September 11, 2001, there has been a national emergency declared by the President. *See* Presidential Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); *see also, e.g.*, 79 Fed. Reg. 53,279 (Sept. 4, 2014) (continuing the declaration for another year). The appellant was ordered to active duty under a statute (§ 12301(d)) that allows reservists to volunteer for military duty and that is not one of laws mentioned by number in § 101(a)(13)(B).

In a nutshell, the question here is whether an employee who volunteers for military service during a national emergency is entitled to the same differential pay afforded to those who are called up involuntarily. This is a question of first impression for the Board. Two of the Board's sister agencies have reached conflicting answers to this question: the Office of Compliance, which adjudicates USERRA disputes involving legislative-branch employees, concluded that service under § 12301(d) during a national emergency qualifies for differential pay, whereas the Office of Personnel Management (OPM), both in policy guidance and in adjudicating a compensation dispute, concluded that it does not. IAF, Tab 14, exhibit 3, at 18; exhibit 8; Tab 15, at 24-29. Neither the Office of Compliance decision nor OPM's compensation decision binds the Board, but I have considered both for their persuasive value.

Although the statutory cross-references may make this case seem complicated, as a matter of textual construction it is straightforward. The appellant was ordered to active duty under § 12301(d) during a declared national emergency. Section 1201(d) is not one of the laws listed by number in § 101(a)(13)(B), but it does constitute "any *other* provision of law . . . during a national emergency declared by the President." The appellant therefore was ordered to active duty "under a provision of law referred to in" § 101(a)(13)(B). 5 U.S.C. § 5538. So long as he met the other requirements in § 5538 (which were not in dispute here), I find that he was entitled to differential pay during this absence.

The agency offered several arguments against this interpretation—arguments about the text of § 5538, the text of § 101(a)(13)(B), and the deference owed to OPM's interpretation—but I do not find any of them persuasive. Because many of these arguments were taken from OPM's compensation decision, I have cited that decision rather than the agency's filings where relevant.

With respect to the text of § 5538, OPM asserted that the phrase "referred to in section 101(a)(13)(B)" means only the laws specifically mentioned by number in that section, not the catch-all provision. IAF, Tab 16, exhibit 8, at 4. Had Congress intended to sweep in the section's catch-all, OPM argued, it would have said "in" rather than "referred to in." *Id.* at 4-5.

I fail to see any logic in this argument. OPM's suggestion for how the statute could have been written—"a provision of law in section 101(a)(13)(B)"—would not cover the catch-all provision any more unambiguously than the current statutory language. And it is perfectly acceptable English usage to say that § 101(a)(13)(B) "refers" to the laws covered by the catch-all provision even though it does not specifically list all of those laws by number. Had Congress intended otherwise, it could have made that clear much more naturally by providing, for example, that differential pay applied only to service under "a provision of law specifically listed by number in" § 101(a)(13)(B) or "a provision of law referred to in section 101(a)(13)(B) other than that subsection's final clause."

OPM's interpretation of § 5538 also cannot be squared with its interpretation of identical language in the Family and Medical Leave Act (FMLA). The same year that it enacted § 5538, Congress added a provision to FMLA allowing federal employees to take leave in certain circumstances related to a relative's "covered active duty" in the military. 5 U.S.C. § 6382(a)(1)(E). The statute defines "covered active duty" for a reservist as a foreign deployment ordered "under a provision of law referred to in section 101(a)(13)(B) of title 10,

United States Code." *Id.* § 6381(7)(B). OPM's regulations implementing this section make it clear that it covers *both* the laws listed by number in § 101(a)(13)(B) *and* any other provision of law during a declared war or national emergency. 5 C.F.R. § 630.1202. I do not see how the same statutory language in § 5538 reasonably could be interpreted any other way.

With respect to the text of § 101(a)(13)(B), OPM argued that the catch-all should not be read to cover voluntary service under § 12301(d) because that would make other parts of the statute superfluous. IAF, Tab 14, exhibit 8, at 5-7. For example, OPM noted that Congress twice added laws to the list in § 101(a)(13)(B), and it argued that these amendments would have been superfluous if those statutes were already covered by the catch-all provision. *Id.* IAF, Tab 14, exhibit 8, at 5. Similarly, OPM asserted that if Congress wanted service under § 12301(d) to be covered, it would have included that statute in the list of enumerated laws, and so its failure to do so must reflect Congress's intention not to cover that service. *Id.* at 5-7.

These arguments all miss the mark for the same reason: the catch-all applies *only* during a declared war or national emergency. When Congress added new laws to the list, it was making sure that they would be covered even when the nation was *not* at war or in an emergency. Similarly, Congress's failure to list § 12301(d) reflects only that it did not want that service covered in peacetime, not that it wanted to exclude that service during a war or national emergency.

Indeed, it is the agency and OPM's interpretation—not the appellant's—that threatens to make part of the statute superfluous by essentially reading the catch-all out of the statute. OPM suggested that the catch-all would apply only if the President specifically mentioned § 12301(d) in his declaration of a national emergency. *Id.* at 6 n.5. But this interpretation finds no support in the text of the catch-all, which covers any other law *during* a national emergency, not any other law enumerated in a declaration of national emergency.

Finally, the agency argued that I should defer to OPM's interpretation of the statutes under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). IAF, Tab 14, brief at 8-14. But *Chevron* deference would come into play only if, after applying the ordinary tools of statutory construction, there was some statutory ambiguity for OPM to resolve. *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863, 1868 (2013). For the reasons explained above, I find the statutes unambiguous. I therefore need not decide whether OPM's policy guidance or compensation decision warrants *Chevron* deference or whether it would be OPM's, rather than the Department of Defense's, interpretation of 10 U.S.C. § 101(a)(13)(B) that merited deference. *See, e.g.*, *Eldredge v. Department of the Interior*, 451 F.3d 1337, 1341-42 (Fed. Cir. 2006) (no *Chevron* deference for OPM's retirement handbook); *Butterbaugh*, 336 F.3d at 1339-42 (same for OPM guidance on military leave); *cf. City of Arlington*, 133 S. Ct. at 1874 ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.").

The agency argued that differential pay should be available only to a reservist who is mobilized involuntarily, or at least a reservist who is sent to a combat zone. IAF, Tab 14, brief at 7, 13. There may be good policy arguments for imposing these limits, but I am required to apply the statute as written. And I see no basis in the statutory text to limit the catch-all provision as the agency suggested. The catch-all covers "*any* other provision of law" during a national emergency, and "any" usually means literally any. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008). Canons of statutory interpretation such as *noscitur a sociis* (words in a list should be given similar meanings) and *ejusdem generis* (a general term following a list of specific words embraces only items similar to those listed) apply only when there is a statutory ambiguity or a need for a narrow interpretation to avoid making parts of the statute superfluous. *See, e.g.*, *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S. Ct.

1101, 1113 (2011); *United States v. Stevens*, 559 U.S. 460, 474 (2010); *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923). Here, as explained above, there is neither ambiguity nor superfluity: the specific list is not coextensive with the broader catch-all, because the catch-all applies only during a declared war or national emergency. Congress could have written (but did not write) a statute along the lines the agency suggested that limited differential pay to reservists who are ordered to active duty involuntarily or who are deployed overseas or to a combat zone. I have no authority to second-guess Congress's policy judgment.

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

I **ORDER** the agency to provide the appellant the appropriate amount of differential pay under 5 U.S.C. § 5538(a) during each pay period described in § 5538(b) that he is absent from his civilian position in order to perform active duty in the uniformed services pursuant to a call or order to active duty under 10 U.S.C. § 12301(d) during a national emergency declared by the President.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial

decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief under 5 U.S.C. § 7701(b)(2)(A) because it is questionable whether this relief is available under USERRA and granting it therefore could result in an overpayment of salary to the appellant that he then would have to return to the agency. *See Erickson v. U.S. Postal Service*, 120 M.S.P.R. 468, ¶ 12 (2013); *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶ 10 n. 2 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001).

FOR THE BOARD:

Benjamin Gutman
Chief Administrative Judge