

No. 10-1509

In the Supreme Court of the United States

KELLY S. JENNINGS, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the decision of the Merit Systems Protection Board authorizing the removal of petitioner from his position as an administrative law judge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unreported. The final order of the Merit Systems Protection Board (Pet. App. 14a-18a) is reported at 110 M.S.P.R. 497.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2011. A petition for rehearing was denied on March 21, 2011 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on June 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Social Security Administration (SSA) filed a complaint with the Merit Systems Protection Board

(Board) seeking permission to remove petitioner from his position as an administrative law judge (ALJ). The Board found good cause to remove petitioner, Pet. App. 14a-17a, and the court of appeals affirmed, *id.* at 1a-13a.

1. Petitioner was appointed to the position of administrative law judge in the SSA in 1994. Pet. App. 2a. At the time, petitioner was also a commissioned officer in the United States Army Reserve. *Ibid.* In 2006, after receiving an anonymous complaint that petitioner was not reporting for work at the SSA as required, the agency opened an investigation. *Id.* at 3a-4a. The SSA determined that, for several years, petitioner had simultaneously been employed on a full-time basis by the Army and the SSA and had collected pay from both employers. *Ibid.* For much of that time, petitioner had reported for Army duty at Fort McPherson, Georgia, during the hours when he was required to be present at his SSA office in Atlanta. *Id.* at 3a.

2. In August 2007, the SSA filed a complaint with the Board for a finding of good cause to remove petitioner from his position as an ALJ. Pet. App. 4a-5a; see 5 U.S.C. 7521(a) (certain employment actions, including removal, “may be taken against an administrative law judge * * * only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board”). The complaint charged petitioner, *inter alia*, with improper dual employment, lack of candor, and failure to comply with time and attendance regulations. Pet. App. 4a-5a.

Petitioner answered and denied the charges. See Pet. App. 20a-21a. Among other defenses, petitioner asserted that the SSA had violated his rights under the Uniformed Services Employment and Reemployment

Rights Act of 1994 (USERRA), 38 U.S.C. 4301-4333, which generally forbids an employer to deny “initial employment, reemployment, retention in employment, promotion, or any benefit of employment” based on a person’s “membership” in or “obligation to perform service in a uniformed service.” 38 U.S.C. 4311(a). Petitioner did not, however, articulate how he believed USERRA had been violated. See Pet. 19-20 (quoting the USERRA allegations in petitioner’s answer).

In December 2007, petitioner filed a motion with the presiding ALJ to enjoin the SSA from taking certain related actions against him. C.A. App. 232-234. Petitioner asserted that the agency had retroactively placed him on leave-without-pay status for the period in which he was employed by the Army; that the agency had directed him to repay significant sums that he had collected during that period as salary; and that the agency had “confiscated” funds from his retirement accounts. *Id.* at 233. The ALJ denied the motion, explaining that the employment actions challenged in the motion were beyond the scope of a Board proceeding under 5 U.S.C. 7521. C.A. App. 100-102.

Following discovery, the ALJ conducted a two-day evidentiary hearing on the SSA’s charges against petitioner. Petitioner did not raise any argument or defense under USERRA at the hearing. Nor did he invoke USERRA in his post-hearing briefing.

In June 2008, the ALJ issued a decision finding that the agency had established “good cause to remove [petitioner] as one of its judges.” Pet. App. 21a; see *id.* at 19a-77a.

3. Petitioner filed a petition for review by the full Board. The Board denied the petition, finding “no error in law or regulation that affects the outcome.” Pet. App.

15a. The ALJ's decision consequently became the final decision of the Board. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-13a. Most of petitioner's appellate brief was devoted to his argument that the SSA had failed to establish good cause for his removal under 5 U.S.C. 7521. See Pet. C.A. Br. 13-27. The court rejected petitioner's arguments and concluded that the Board's decision was supported by substantial evidence. Pet. App. 5a-13a.

Petitioner's sole contention with respect to USERRA appeared in a short section near the end of his brief in which he argued that his placement on leave-without-pay status constituted a "denial of a benefit of employment under USERRA." Pet. C.A. Br. 27; accord Pet. C.A. Reply Br. 13. Although petitioner briefly criticized the ALJ for failing to address the argument, he did not dispute the ALJ's conclusion that his placement on leave-without-pay status was beyond the scope of the Board proceeding. See *ibid.*; see also C.A. App. 100-102. Because the Board had not addressed that issue, the court of appeals declined to address it as well:

Finally, [petitioner] complains about the agency's postremoval determinations to place him on leave without pay for the period in question and seize funds from his retirement accounts. As those issues were not before the Board in this matter, they are not properly before us. Thus, we decline to express an opinion on these actions.

Pet. App. 13a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioner does not dispute that substantial evidence in the record supported the Board’s finding that SSA had good cause to remove him from his position as an ALJ under 5 U.S.C. 7521(a). Rather, petitioner contends (Pet. 15-18) that the court of appeals and the Board erred when they permitted his removal without “address[ing]” his arguments under USERRA. Pet. 16.

That fact-bound claim is without merit. The only USERRA argument that petitioner raised in the court of appeals appeared in a terse section near the end of his appellate brief in which he criticized the SSA for placing him on leave-without-pay status. Pet. C.A. Br. 27. The court of appeals expressly addressed that claim, explaining that the agency’s determination to place petitioner on leave-without-pay status was not before the Board and thus the issues raised by petitioner were not properly before the court.¹ Pet. App. 13a (“As those issues were not before the Board in this matter, they are not properly before us.”). Any other USERRA argument that petitioner may have had was waived when he failed to present the argument in his appellate brief. See, *e.g.*, *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010). The court of appeals violated neither the Fifth Amendment nor 5 U.S.C. 7703(c) by declining to address arguments that had not been properly raised.

Similarly, petitioner’s contention (Pet. 17 & n.8) that the Board violated the Fifth Amendment by failing to address USERRA is unfounded. Although petitioner

¹ Petitioner does not contend that the ALJ erred in ruling that issues related to petitioner’s leave-without-pay status were not properly before the Board in a proceeding under 5 U.S.C. 7521. See C.A. App. 100-102. Such an argument would not warrant this Court’s review in any event.

initially alleged in his answer to the SSA's complaint that the agency had violated his rights under USERRA, see Pet. 19-20, petitioner failed to raise any argument under USERRA at the administrative hearing or in his post-hearing brief. The ALJ consequently had no reason to address USERRA in his decision, which became the final decision of the Board when the full Board denied review. Pet. App. 15a.

2. Petitioner's contention (Pet. 19-24) that the court of appeals' decision is inconsistent with *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985), and related decisions by the Board is likewise mistaken. Those cases concern the circumstances in which, under Board regulations, the Board must afford a hearing to a claimant before determining that an argument or defense is without merit. See, e.g., *id.* at 643-644 (before Board could dismiss appeal without a hearing, employee was entitled to an opportunity to make a nonfrivolous allegation that her resignation was involuntary). This case implicates no such concerns because petitioner was afforded a two-day evidentiary hearing in which he was free to raise any relevant argument he chose. See Pet. App. 20a. And even if petitioner were correct, an intracircuit conflict would not warrant this Court's review. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

3. Finally, and for similar reasons, petitioner's argument (Pet. 24-25) that the court of appeals' decision conflicts with *Kirkendall v. Department of Army*, 479 F.3d 830 (Fed. Cir.) (en banc), cert. denied, 552 U.S. 948 (2007), does not warrant review. The Federal Circuit held in *Kirkendall* that a USERRA claimant is entitled to a hearing upon request. See *id.* at 844-846 (plurality opinion); *id.* at 862-863 (concurring opinion). That hold-

ing is of no help to petitioner, who received a two-day evidentiary hearing on the SSA's charges but failed to raise any argument or defense under USERRA. Nor, in any event, would an inconsistency between *Kirkendall* and the Federal Circuit's unpublished disposition in this case warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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