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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1193

Scott E. Jones,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 30, 2008
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Ramsey County District Court
File No. C9-06-3105

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Harten, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

SHUMAKER, Judge

Appellant argues that the district court erred in granting summary judgment dismissing his claim as barred by the *Feres* doctrine of intramilitary immunity. Because the district court correctly determined that review of appellant's military status was barred by the *Feres* doctrine, we affirm in part. But because the district court erred in finding this doctrine applicable to appellant's administrative claims, we reverse in part and remand.

FACTS

Appellant Scott Jones, a former serviceman with the Minnesota National Guard, contends that the national guard violated state law by not continuing him in the military status to which he was entitled and by not paying him fully or giving him the leave allowance to which he is entitled. Ruling that a doctrine of intramilitary immunity rendered Jones's claim nonjusticiable in the state court, the district court granted summary judgment to respondent State of Minnesota, thereby dismissing Jones's lawsuit.

Jones was a member of the Minnesota National Guard from 1979 until 1989, when he left to join the army reserve. He returned to the national guard in 1997 and worked as a cook at Camp Ripley until July 26, 1998. Jones was in an Active Duty Special Work status during this time.

In 2000, Jones was appointed to a temporary military position for a short-term project in Camp Ripley's Facilities Management Office. When that assignment ended on July 17, 2001, Jones's position was terminated. Nevertheless, the national guard kept

Jones on staff in a temporary unclassified state civilian capacity until he retired from the national guard in October 2001. Despite his retirement, he worked for the national guard as a civilian until the spring of 2003.

Because the statute of limitations bars Jones's claims for pay during 1997 and 1998, he alleges that, while he was in an active-duty position beginning on July 24, 2000, he was entitled to be paid at the grade of E-7 with 26 years of service. He claims that he was given credit for only 13 years longevity and was denied the leave allowance of two and one-half days each month that is accorded to active-duty service members. Thus, he claims that, in its pay and leave determinations, the state violated Minn. Stat. § 190.08, subd. 6 (2006).

Jones also contends that the state violated Minn. Stat. § 190.08, subd. 3 (2006), when it improperly removed him from his position because he could not be removed except for cause, reduction in force, or withdrawal of federal recognition. He contends that none of these exceptions occurred.

Finding that the *Feres* doctrine barred Jones's claims, the district court granted summary judgment in favor of the state and dismissed his action with prejudice. This appeal followed.

D E C I S I O N

We review a grant of summary judgment by determining whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the

reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The district court determined that "[t]he *Feres* doctrine bars suits against the military claiming damages as a result of internal decisions, including personnel decisions. Judicial review of a discrete military personnel decision is barred under the *Feres* doctrine." Jones asserts that the district court erred by applying this doctrine, arguing that *Feres* is inapplicable because *Feres* sounds in tort and that "[n]ot all claims arising incident to or related to service are barred by *Feres*."

In *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950), the Supreme Court found, as an implied exception to the Federal Tort Claims Act, governmental immunity from lawsuits for injuries to servicemen where the injuries arise out of, or are in the course of, activity incident to military service. *Id.* at 146, 71 S. Ct. at 159. The *Feres* doctrine includes not only active-duty service personnel, but has been expanded to apply also to national guard and military reserves. *Anderson v. United States*, 724 F.2d 608, 610 (8th Cir. 1983). In general, the *Feres* doctrine applies

> if the incident occurs (1) on a military base, *or* (2) while the serviceman is on active duty status, *or* (3) under compulsion of military orders or on a military mission or directly subject to military control, *or* (4) the activity is a privilege related to or dependent upon military status.

Hoeschen v. S.C. Ins. Co., 349 N.W.2d 833, 835 (Minn. App. 1984), *aff'd*, 378 N.W.2d 796 (Minn. 1985). This court has applied the doctrine to a suit involving a ROTC cadet who sued first his psychiatrist and later the United States after he was denied commission because he was diagnosed with a personality disorder. *Mangan v. Cline*, 411 N.W.2d 9,

10 (Minn. App. 1987), *review denied* (Minn. Oct. 28, 1987). We found that because the issue "unquestionably ar[ose] out of [appellant's] military service" his action was barred. *Id.* at 11. In so holding, we noted that "[appellant's] claim inevitably implicates military decision-making, and requires judicial scrutiny of the conduct of military officers." *Id.* at 12.

The *Feres* doctrine has been expanded over the years to include a range of claims beyond tort actions. The Eighth Circuit Court of Appeals conducted a detailed analysis of the *Feres* doctrine in *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1005-08 (8th Cir. 1989). It noted that "'civilian courts may not sit in plenary review over intra-service military disputes.'" *Id.* at 1007 (quoting *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034, 1035 (5th Cir. 1986)). *Watson* recognized two exceptions to the rule that claims involving the national guard are nonjusticiable. *Id.* at 1010-11. First, facial challenges to the constitutionality of statutes or military regulations are justiciable. *Id.* at 1010 (citations omitted). Second, a final agency decision may be subject to limited judicial review and may be set aside if it is "arbitrary and capricious or not supported by substantial evidence." *Id.* at 1011.

In *Wood v. United States*, the Eighth Circuit Court of Appeals was called upon to review a complaint by a national guard lieutenant who alleged that he was improperly denied an opportunity to become an air commander. 968 F.2d 738, 740 (8th Cir. 1992). The court determined that "the nature of the pleaded claim, judicial review of a discrete intraservice personnel decision which involves, as it does, an assessment of an individual's military qualifications for command responsibilities . . . , is nonjusticiable

under *Watson*." *Id.* at 740. Similarly, in *Hupp v. U.S. Dep't of the Army*, the circuit court again determined that "employment decisions concerning a National Guard civilian technician's military qualifications are non-justiciable under the *Feres* doctrine." 144 F.3d 1144, 1147 (8th Cir. 1998).

In *Meagher v. Heggemeier*, the United States district court addressed the applicability of the *Feres* doctrine to a situation in which a retired colonel in the Minnesota Air National Guard alleged defamation and intentional infliction of emotional distress stemming from comments made in a meeting at which other officers were present. 513 F. Supp. 2d 1083, 1086 (D. Minn. 2007). In determining that *Feres* does in fact bar such a claim having to do with internal personnel actions, the federal district court stated: "We have considered the implications of a ruling that would allow a military officer to effectively challenge, in a civil Court, an unfavorable personnel decision, made by a duly authorized military Board, and we find that, without an extremely strong showing, that would serve as a dangerous precedent." *Id.* at 1097.

Although Jones's two claims are interrelated, his contention that the state violated Minn. Stat. § 190.08, subd. 3 (2006), by failing to continue him in a military status is a personnel matter that implicates military decision-making. The *Feres* doctrine renders that claim nonjusticiable in the civilian court, and the district court did not err in so holding.

Jones's claim that he was denied the pay appropriate for his status and longevity, namely E-7 with 26 years of service, is primarily an administrative issue of the type that fits an exception to the *Feres* doctrine. "Limited judicial review of final agency action is

permitted if the official has acted beyond the scope of his statutory and regulatory authority." *Nyberg v. State Military Dep't*, 65 P.3d 1241, 1247 (Wyo. 2003) (citing *Watson*, 886 F.2d at 1010-11).

Minn. Stat. § 190.08, subd. 6 (2006), mandates a pay level and allowances for active-service personnel depending on grade and length of service. If a service member is entitled to certain pay under that law but is paid less than that, the law is violated and the service member may obtain appropriate relief. We do not view this issue as a quintessential military personnel question. Rather, it is a ministerial one that involves computation of compensation rather than an exercise of military judgment or discretion, and judicial review is not precluded by the *Feres* doctrine. But Jones might be required to exhaust administrative remedies before court review is required. Exhaustion of administrative remedies is a matter the district court did not address because it applied a total *Feres* bar, but the issue must be addressed on remand. Thus, we reverse and remand solely on the issues of the amount of back pay, if any, to which Jones might be entitled and the satisfaction of such administrative procedures Jones must follow before seeking, if at all, judicial review.

Affirmed in part, reversed in part, and remanded.