

**Number 53, October 2002:  
RETROACTIVE PROMOTION FOR RECALLED RESERVIST**

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Q: I have been assisting an enlisted Naval Reservist, who was hired in March 2001 as a new police officer in our state's largest city. As a new police officer, she must complete a one-year probationary period before her seniority date as a full-fledged patrol officer is established. The seniority date governs when she will be eligible for promotion to sergeant in the police department. If there are budget-related layoffs, her seniority date could determine whether she remains actively employed.

She would have completed the one-year probationary period in March 2002, but she was recalled to active duty in October 2001, and she did not leave active duty until July 2002. The police chief has said that she must complete the probationary period, after her return from military service, and that her seniority as a full-fledged police officer will date from her completion of the probationary period. I think that it is fundamentally unfair that her seniority date will be 10 months later than it otherwise would have been.

This police officer was not a rookie officer in March 2001. She came directly from another police department in this state, and has 10 years of law enforcement experience. In this particular case, at least, I think that the one-year probationary requirement was just a passage-of-time requirement, not a real training requirement.

A: This police officer must be given the opportunity to prove that, in actual practice, promotion to full-fledged police officer was essentially automatic at the end of the one-year period. [See *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 274 (1958).] If she can show that, she is entitled to immediate promotion to full-fledged officer upon her return to the job in July 2002.

Assume that she cannot prove that promotion was essentially automatic in practice. She is nonetheless entitled, at a minimum, to have her seniority date as a full-fledged police officer backdated (upon her completion of the probationary requirement) to the date when she probably would have completed the probationary requirement but for the intervening military service. [See *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 182 (1964). See also *Brooks v. Missouri Pacific Railroad Co.*, 376 U.S. 182 (1964); *Diehl v. Lehigh Valley Railroad Co.*, 348 U.S. 960 (1955).]

Note: My friend and fellow Naval Reserve judge advocate, who submitted this question, used a draft of this "Law Review" article to convince the police chief to make an equitable adjustment in this Reservist's seniority date. This issue has now been resolved.

\* Military title used for purposes of identification only. The views expressed

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