

**Number 60, December 2002:
Escalator Principle Applies to Entire Period of Military-Related
Absence**

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Q: I am a member of ROA and am the commanding officer of a Reserve unit that was recalled to active duty for the present emergency. A member of my unit is a state highway patrol officer. He was recalled to active duty and participated in combat operations in Afghanistan. He served a full year on active duty (October 2001 to October 2002) and was recently released from active duty. He wants to take about 40 days off to "decompress" and also to get to know his baby son who was born while he was in Afghanistan.

The personnel officer of the highway patrol has stated that he can take the 40 days off, but that once he leaves active duty his "military leave" becomes a "personal leave," and employees on "personal leave" do not continue accruing seniority for promotion purposes. This fall (2002), five patrol officers will be promoted to sergeant in the highway patrol. This promotion is based on seniority, and my unit member is currently number three on the seniority list. If he goes on personal leave, he will drop to number six or seven and will not get the promotion. This seems unfair to me. Are his USERRA rights being violated?

A: Yes. As I explained in Law Review 7, this individual has 90 days to apply for re-employment, because his period of service was more than 180 days. I explained the "escalator principle" in Law Review 59, in this issue. The promotion in question clearly qualifies as a perquisite of seniority. This individual is entitled to be treated as if he had been continuously employed during his entire military-related absence. This includes the permissible period within which to apply for re-employment (up to 90 days), as well as the year that he was on active duty.

Q: I know a Reserve officer who recently left active duty after almost six years of essentially continuous service. She left her job as a public school teacher in October 1996 and left active duty in October 2002. Part of her active-duty time appears to fit within some of USERRA's exemptions from the five-year limit. The school district seems to have accepted that she is entitled to re-employment, but the state retirement board insists that this teacher is entitled to only 60 months of state pension credit for her 72 months of service. The retirement board is relying on a state law that limits state pension credit for military service to 60 months. Is the retirement board correct?

A: No. If this officer meets USERRA's eligibility criteria, including the five-year limit (with its exemptions), she is entitled to be treated as if she had been continuously employed as a teacher during the entire period of her military-related absence (including the 90 days to apply for re-employment,

if applicable). Under the Supremacy Clause of the United States Constitution, USERRA overrides the 60-month limit under state law. [See *Cronin v. Police Department of the City of New York*, 675 F. Supp. 847, 853 (S.D.N.Y. 1987).]

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