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CATEGORY: 1.1.1.7—Application of USERRA to State and Local Governments
1.2—USERRA-Discrimination Prohibited
1.3.2.2—Continuous Accumulation of SeniorityEscalator Principle
1.8—Relationship between USERRA and Other Laws and Policies

Mobilized Reservists and the Chicago Fire Department

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Q: I am a firefighter in Chicago and a chief petty officer in the Navy Reserve. I want to bring to your attention a situation here in the Chicago Fire Department involving three mobilized Reserve Component members. Let's call them Joe Smith, Mary Jones, and Bob Williams.

Smith (a member of the Army Reserve) is currently serving in Afghanistan. Jones (a member of the Illinois Army National Guard) and Williams (a member of the Marine Corps Reserve) are in Iraq.

In the Chicago Fire Department, one must test in order to be placed on an eligibility list for promotion to the next rank, in this case from firefighter to lieutenant. Promotion to lieutenant is based 35 percent on one's score on a written exam (multiple choice), 35 percent on an oral exam, and 30 percent on seniority. The written test will be offered on a single day in April 2009, with the oral exam following over the next few months.

The last time that the exam was offered was in December 1999, and several hundred firefighters have been promoted to lieutenant based on that exam. It will likely be another several years before the exam is offered again. Smith, Jones, and Williams are all eligible to take and interested in taking the exam, but they won't be back from active duty until late 2009 or early 2010. Not taking the exam in 2009 likely means that Smith, Jones, and Williams will never be promoted to lieutenant, unless arrangements are made for them to take make-up exams or unless some other arrangement is made for inserting them in the eligibility list for promotion to lieutenant.

The City of Chicago Human Resources (HR) Department insists on contacting these three mobilized Reserve Component members and arranging for them to take the written exam in April, on the same day that other firefighters take it back home in Chicago. I explained to them that contacting servicemembers in a combat zone is not feasible, because of security concerns, and that contacting them is not advisable because it could detract from their focus on their military duties. I also explained that these three firefighters would be placed at a distinct disadvantage, as compared to their peers back home, if they must study for and take the exam under such conditions.

I explained to the HR Department that Department of Labor (DOL) regulations, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), require that the employer offer these employees the opportunity to take a make-up exam, after they return to work. For many reasons, it is not advisable for them to take the exam while on active duty in a combat zone. I think it is totally unreasonable to expect Smith, Jones, and Williams to travel around with a weapon in one hand and a laptop in the other, trying to study for the promotion exam, and then to take the exam under those conditions.

Under the collective bargaining agreement between the city and the firefighters union, each firefighter taking the exam will be provided a copy of the exam after taking it and will have the opportunity to challenge the validity of specific questions. Thus, by the time Smith, Jones, and Williams return from active duty some months from now, the content of the 2009 promotion exam will be well known in the Fire Department. The city only paid for one exam, and preparing the exam is a very expensive proposition. But surely some suitable arrangement is in order. These three members should not have to sacrifice the opportunity for promotion because of their service to our country at the tip of the spear.

A: As I explained in Law Review 0604 (February 2006), section 4331 of USERRA (38 U.S.C. 4331) gives the

Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers, and the Secretary exercised that authority, publishing the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. The regulations went into effect 30 days later and are now published in Title 20, Code of Federal Regulations, Part 1002. You are correct that the USERRA Regulations address this issue directly:

"If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the servicemember while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service." 20 C.F.R. 1002.193(b).

When DOL published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005, DOL also published a lengthy and scholarly preamble, addressing in detail the purpose and intended meaning of each section and responding to the comments that DOL received after it published the proposed USERRA Regulations in September 2004.

"Section 1002.193 is consistent with the general principles regarding the application of the escalator provision, which require that a servicemember receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted. *McKinney v. Missouri-Kansas-Texas R.R. Co.,* 357 U.S. 265, 274 (1958); *Tilton v. Missouri Pacific R.R. Co.,* 376 U.S. 169, 177 (1964). In addition, recent USERRA case law dealing precisely with the issue of missed promotional exams also supports this provision of the rule. *Fink v. City of New York,* 129 F. Supp. 2d 511, 519-20 (E.D.N.Y. 2001). In that case, the court affirmed the jury award in favor of a fire marshal who missed a promotional exam because of his military service, holding that there was enough evidence for the jury to conclude that the plaintiff's military status was a motivating factor in the decision to deny him a promptly administered promotional exam upon reemployment. Id. at 520. As the court stated, "the employer must sometimes treat [servicemembers] differently from other employees in order to assure that they receive the same benefits as their coworkers. Thus, … where a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service. Id. at 519.

Accordingly, section 1002.193 requires an employer to administer its otherwise neutral evaluative employment practices in a manner that affords a returning service member the opportunity, after a reasonable period of time for adjustment, to participate in or meet the standards of that practice. As with apprenticeship systems and probationary periods addressed above, upon successfully meeting the evaluative standards, the employee's reemployment position should be adjusted based on the prior date he or she would have completed the process had he or she not entered military service. Regarding the question of what amount of time is reasonable to permit an employee to adjust, the department has revised section 1002.193 to reflect that no fixed time will be deemed a reasonable amount of time in all cases. However, in determining a reasonable time to schedule a makeup exam, employers should take into account a variety of factors, including but not limited to, the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. See section 1002.193." 2005 *Federal Register* at pages 75272-73.

In the Department of Defense, there is an organization (created in 1972) called the National Committee for Employer Support of the Guard and Reserve (ESGR). The organization's mission is to gain and maintain the support of civilian employers for Reserve Component members, by spreading the word about the requirements of USERRA.

ESGR has more than 1,000 volunteer ombudsmen around the country. They work with Reserve Component members and their civilian employers to resolve issues exactly like this. I suggest that you call ESGR at 800-336-4590.

I remember when the ESGR "school solution" for this sort of problem was to arrange for the Reservist away from work for military training to take the civilian promotion exam during the military training period, but that was when we were talking about a two-week "summer camp" in San Diego for your annual training. I entirely agree with you, and with DOL, that we don't want servicemembers in war zones to take civilian promotion exams.
The whole point of USERRA, as well as the Servicemembers Civil Relief Act, is to take civilian concerns off the mind of the servicemember, to the maximum extent possible. The member on active duty should be devoting his or her full attention to the military duties at hand, especially when the member is deployed to the tip of the spear.
This is a safety issue for Smith, Jones, and Williams, and for their military colleagues. If I am in the foxhole next to Smith in Afghanistan, I should not have to worry that he is not paying full attention to his sector of the perimeter, because he is busying studying for the Chicago Fire Department Lieutenant Exam or because he cannot put out of his mind his concern and anger that he will miss out on the opportunity for promotion at home because of his service to our country in Afghanistan.

I recognize that it is a significant burden on the City of Chicago to arrange for a make-up exam for Smith, Jones, and Williams, after they return from active duty several months from now. When Congress enacted the reemployment statute in 1940, and when Congress substantially updated the law by enacting USERRA in 1994, Congress was fully aware of the burdens imposed on employers and decided that those burdens were fully justified by the nation's need to defend itself. Yes, USERRA imposes a burden on the City of Chicago and other employers, but that burden is exceedingly light as compared to the burdens voluntarily undertaken by the brave young men and women who enlist in our Armed Forces, including the Reserve Components.

In its first case construing the reemployment statute, the Supreme Court held, "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Section 4302(b) of USERRA [38 U.S.C. 4302(b)] codifies this principle in the current law. Thus, the collective bargaining agreement between the City of Chicago and the firefighters union cannot be an impediment to preserving the promotion opportunities of these three Reserve Component members.

In *Fishgold,* the Supreme Court also held that "this legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id*. Justice William O. Douglas, joined by seven of his eight colleagues, penned these words in reference to the members of our nation's "greatest generation" who had just won World War II nine months previously. These words apply equally to the children, grandchildren, and great-grandchildren of the greatest generation who are fighting the Global War on Terrorism, including Joe Smith, Mary Jones, and Bob Williams. The *Fishgold* case and its implications are discussed in detail in Law Review 0803 (January 2008).

I also invite the reader's attention to Law Review 0821 (May 2008), entitled "The Burden of Freedom: Recent USERRA burdens on employers are not unconstitutional or unprecedented." All previous Law Review articles (more than 500) are available at www.roa.org/law_review.

You raise an interesting point with your suggestion of making an alternative arrangement for inserting Smith, Jones, and Williams into the eligibility list for promotion to lieutenant, after they return from service. If it is too hard and too expensive to arrange for a make-up written exam for these three individuals after they return from Iraq and Afghanistan, the City of Chicago should dispense with the written exam for these folks and give each of them an imputed score that will make them eligible for promotion.

Will other firefighters complain about "special privileges" for Smith, Jones, and Williams? They probably will complain, but their complaints are not well founded, because they weren't serving our country in Iraq and Afghanistan when the exam was offered in April 2009. The Supreme Court has held, "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind." *Fishgold,* 328 U.S. at 284.