

# LAW REVIEW 1133

ST34\_2 New York State

## New York Court of Appeals Clarifies Protections for Military Members Under State Law

By Mathew B. Tully, Esq.\* and Andrew L. McNamara, Esq.\*\*

### 1.8--Relationship Between USERRA and other Laws/Policies

***In the Matter of Robert Thomas v. New York City Department of Citywide Administrative Services*, 2011 NY Slip Op 2719**

New York State's highest court, the New York Court of Appeals, has recently issued a decision in *In the Matter of Robert Thomas v. New York City Department of Citywide Administrative Services*, clarifying the protections offered to state and local government employees that perform military service. The court held that an individual who passes a civil service exam and is on the appointment list, but is on active duty when their name is reached, has to be placed on a "special list" so that when they return from active duty they are then eligible for the appointment.

The Court of Appeals' recent decision was focused on New York Military Law Section 243, which provides for various benefits to State employees who are absent from their jobs while performing military duty. At issue was subsection 7 and 7-b, which deal with the status of an employee's position on the civil service examination list. The law provides under section 7, that any person whose name is on an eligible list while performing military duty, shall retain their respective rights and status on the list. Furthermore, if their name is reached for certification during the performance of military duty, it shall be placed on a special eligible list so long as a request is made following the termination of such duty.

In *In the Matter of Robert Thomas v. New York City Department of Citywide Administrative Services*, the petitioner in the case took an open competitive civil service examination to become a firefighter with the New York City Fire Department. The qualifications to be a firefighter include that by the date of appointment, the individual must have completed 30 college credits or obtained a high school degree and completed two years of honorable full-time military service. The petitioner had not fulfilled these requirements at the time he took the examination, and subsequently enlisted in the United States Army. While he was still on active military duty, the petitioner's name was reached on the exam list for possible certification and appointment, but he had still not yet met the qualification requirements. The Petitioner was then released and made a timely request to be placed on a special eligible list under New York State Military Law. However, the request was denied on the ground that when his name had been reached, he had not met the qualification requirements of the position in having two years of military service. The issue raised in the case was thus whether the government is required to place a service member on the special eligible list when they do not meet the qualifications for appointment when their name is first reached.

The Court of Appeals held that Section 243 of New York Military Law requires that state and local governments place individuals performing active duty on a special eligible list regardless of whether they meet qualification requirements at the moment their names are reached. The Court specifically stated that the government has no discretion to refuse to put names on the special eligible list. They do have discretion not to certify names of unqualified individuals, but only at the time in which certification is made. Since in this case, the decision about certification should have occurred when petitioner returned from service and when his name was reached on the special list, he would therefore have met qualification requirements.

Although the case has very limited implications, considering this particular scenario is relatively uncommon, it is significant in showing the statutory protections offered by State and local governments to service members seeking

employment. It further shows that State Appellate courts are willing and able to ensure that these protections are respected.

This case is based on the New York Military Law, not the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA does not supersede a state law that provides greater or additional rights. See 38 U.S.C. 4302(a)

*\*Mathew B. Tully is a Lieutenant Colonel in the New York Army National Guard and the founding partner of Tully Rinckey PLLC, a full-service law firm based in Albany, N.Y., with offices also in Washington D.C. He concentrates his practice on representing military personnel and federal government sector employees and can be reached at [mtully@tullylegal.com](mailto:mtully@tullylegal.com).*

*\*\*Andrew L. McNamara is an associate attorney at Tully Rinckey PLLC and concentrates his practice on USERRA and federal employment law. He earned his J.D., cum laude from Albany Law School of Union University and an M.S. in Bioethics from Albany Medical College. He graduated from the University of Albany, summa cum laude, with honors in History. He can be reached at [amcnamara@tullylegal.com](mailto:amcnamara@tullylegal.com).*