

## Public Employee Promotion Exam while Mobilized

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***Sandoval v. City of Chicago*, 560 F.3d 703 (7<sup>th</sup> Cir.), cert. denied, 558 U.S. 874 (2009).**<sup>1</sup>

According to the Department of Defense (DOD), 875,829 Reserve Component (RC) personnel have been called to the colors since the terrorist attacks of September 11, 2001 and 55,242 RC members are currently activated.<sup>2</sup> Several thousand of these activated RC members have worked for state and local governments as police officers, firefighters, and corrections officers.

To have a satisfactory career in one of these professions, one needs to be promoted or at least to have the opportunity to compete for promotion, but promotion opportunities can be years apart. In many places, there have been years of litigation about the propriety of promotion exams—there have been allegations that the exam has a disparate impact on members of certain minority groups. When those questions are finally resolved and an exam is offered, years of pent-up demand for promotion opportunities are resolved based on a single exam given on a single day.

Let us say that Joe Smith is a local police officer and a Marine Corps Reservist. He has been a patrol officer for nine years and is anxious to compete for Sergeant in the police department. Unfortunately for Joe, the promotion exam is scheduled for July 13, 2013, while Joe is on active duty in Afghanistan. Joe was called to active duty and deployed in April, and he is not expected to be released from active duty and to return home until November.

Missing this promotion exam is more than a minor inconvenience for Joe, since it may be years (if ever) before Joe's next opportunity to take the exam and to be considered for promotion to Sergeant. Joe's career progression in the police department will likely be permanently stunted because he was called to the colors in 2013.

Can Joe take the exam while he is on active duty? That was the "school solution" for Employer Support of the Guard and Reserve (ESGR) back in the "strategic reserve" days when Joe was likely in San Diego for two weeks of annual training, but that solution does not work for RC members who have been mobilized and deployed to war zones.

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<sup>1</sup> This is a decision of the United States Court of Appeals for the 7<sup>th</sup> Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The "*cert. denied*" means that the United States Supreme Court denied *certiorari* (discretionary review). The denial of Supreme Court review does not make this decision a Supreme Court precedent, but it does add something to the precedential value. In any case, federal district courts in Illinois, Indiana, and Wisconsin will treat this decision as a precedent that is binding on them.

<sup>2</sup> Here at ROA, we receive a weekly report from the Office of the Assistant Secretary of Defense for Reserve Affairs, and these figures come from the report dated May 21, 2013. By component, the mobilization figures are as follows: Army National Guard (375,473), Army Reserve (211,201), Navy Reserve (53,316), Marine Corps Reserve (62,414), Air National Guard (98,842), Air Force Reserve (66,234), and Coast Guard Reserve (8,349). The transformation of the "strategic reserve" to the "operational reserve" has been completed.

We do not want service members at the tip of the spear to be studying for and taking promotion examinations for their civilian employers back home. When the individual is on active duty, and especially when he or she is deployed to the tip of the spear, that individual should be devoting his or her full time and attention to the military duties. This is a safety issue, for the individual service member and for his or her colleagues. If I am in the Humvee next to Joe, I should not have to worry that he is not paying attention to his sector of the horizon because he is studying for the police officer promotion exam.

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received, DOL made some adjustments and published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Here is the pertinent subsection:

“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 service member 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).

The “school solution” under the DOL USERRA Regulations is for Joe to take a *make-up exam* after he completes his active duty assignment and returns home and is reinstated into his civilian job. Let us say that Joe scores a 90 on the make-up exam, and Bob Jones, another police officer who took the exam on July 13 (while Joe was in Afghanistan) scored 89. Bob was promoted to Sergeant on October 1, 2013. Based on his score on the make-up exam, Joe is entitled to be promoted to Sergeant with an effective date (for seniority purposes, and for counting off until he is eligible to take the exam for Lieutenant) of October 1, 2013. Yes, Bob is going to be displaced, and he will of course be disappointed, *but Bob did not respond to a call to the colors and deploy to Afghanistan.*

I recognize that offering make-up examinations can be burdensome on employers, and that giving an individual like Joe a retroactive promotion can disappoint the expectations of a fellow police officer who was promoted while Joe was deployed. If the number of persons allowed promotion is limited then the fellow employee now may have to give up the promotion, at least temporarily, to make room for Joe to be promoted. But the sacrifices that employers and fellow employees are asked to make need to be balanced against the sacrifice of the service members who routinely and voluntarily serve as the ¾ of 1% of our nation’s population who serve our country in uniform and who may return disabled or not at all. We all serve the nation by abiding by USERRA.

Unfortunately, the Chicago Police Department (CPD) did not consider the DOL USERRA Regulations when addressing this issue, although the Regulations were published in the *Federal Register* in December 2005, three months before this issue arose in the CPD. The DOL USERRA Regulations are not mentioned in this 7<sup>th</sup> Circuit decision.

Juan Sandoval and Sidney Pennix were CPD patrol officers eligible to take the exam for promotion to Sergeant. The exam was scheduled for and was conducted on March 25, 2006. Both Sandoval and Pennix were on active duty outside the United States on that date. Sandoval was in El Salvador and Pennix was in Iraq.

The CPD insisted that all officers competing for Sergeant take the exam on the same day, apparently concerned that officers taking the exam later might receive an unfair advantage by hearing about some of the more difficult questions on the exam. Apparently, no consideration was given to the possibility of having Pennix and Sandoval take make-up exams after they returned from military duty.

The CPD offered Pennix and Sandoval the opportunity to take the promotion exam on July 13 at the nearest overseas Ernst & Young<sup>3</sup> office. Both officers accepted the offer. Sandoval took the exam at the Ernst & Young office in San Salvador, the capital of El Salvador, but Pennix had to travel all the way to Frankfurt, Germany to take the exam.

Both Sandoval and Pennix passed the exam and were placed on the eligibility list for promotion after returning to work, but both claimed that they would have done better, and would have been promoted earlier, if they had had the opportunity to take the exam at locations that were on or near the military installations where they served. They also sought compensation for the cost and danger of traveling to San Salvador and to Frankfurt to take the exam. The United States District Court granted summary judgment for the City of Chicago.<sup>4</sup> Sandoval and Pennix appealed to the 7<sup>th</sup> Circuit, and this decision resulted.

After agreeing with the plaintiffs that the case was properly brought in federal court because the City of Chicago is a political subdivision of the State of Illinois and not an arm of the state government,<sup>5</sup> the 7<sup>th</sup> Circuit affirmed the summary judgment for the City. Pennix and Sandoval applied to the United States Supreme Court for *certiorari* (discretionary review) in the last appellate step that was available to them.<sup>6</sup> The Supreme Court denied *certiorari*, and the case thus became final.

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<sup>3</sup> Ernst & Young is a major accounting and consulting firm and was compensated for providing proctoring services.

<sup>4</sup> *Sandoval v. City of Chicago*, 2008 U.S. Dist. LEXIS 46521 (N.D. Ill. June 13, 2008).

<sup>5</sup> Please see Law Review 13075, the immediately preceding article in this series. I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 898 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012, and we have added an additional 76 new articles in the first five months of 2013.

<sup>6</sup> At least four of the nine Justices must vote for *certiorari* for it to be granted, and this discretionary review is denied more than 95% of the time.