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## **Missed Promotion Examination while Mobilized**

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**Q:** I am a colonel in the Army Reserve Civil Affairs. With many of my colleagues, I have been mobilized three times in the last seven years, twice to Southwest Asia. Accordingly, your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) are read and reread in my house and my command.

I have discussed USERRA at some length with a very frustrated sergeant major in my command. In 1998, while we were in Kosovo, he was scheduled to take a promotion examination for the rank of sergeant in the police department where he works. The police chief agreed that he could take the promotion exam in Kosovo, and I agreed to arrange for a suitable proctor. In accordance with our agreement, the police chief mailed the exam to me.

The unmarked exam was delayed in the mail, just as our absentee ballots were delayed in 1998. I received the exam three days after the other police officers in Massachusetts took it. I administered the exam the next day, through the proctor, and mailed it back to the police chief by Military Express Mail. I later learned that our member had the highest score on the exam, and he was awarded the promotion upon his return to work.

Unfortunately, the police officer who scored just one point lower appealed to the Massachusetts Civil Service Commission (MCSC), which ruled that our member's test score was invalid because he took the test four days after the other police officers back home. The MCSC awarded the one promotion to the officer who scored number 2.

The member's next two promotion opportunities for sergeant in the police department coincided with our subsequent mobilizations. Based on the MCSC's ruling in the 1998 case, the police chief refused to permit him to take the promotion exams in Southwest Asia. If this guy had not been in the Army Reserve, he would probably be a lieutenant in the police department by now. Because of his three mobilizations in the last seven years, he has yet to make sergeant in his civilian job. It is not fair, and there ought to be a law.

I understand that DOL is working on proposed USERRA regulations. Do they address this situation?

**A:** Yes. "If an opportunity for promotion, or eligibility for promotion, that you missed during service is based on a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your employment position and then give you the skills test or examination. If you are successful on the makeup exam and, based

on the results of that exam, there is a reasonable certainty that you would have been promoted, or made eligible for promotion, during the time that you served in the military, then your promotion or eligibility for promotion must be made effective as of the date it would have occurred had your employment not been interrupted by military service.” Proposed section 1002.193.

**Q:** What do you think of the idea of arranging for proctored promotion exams for National Guard and Reserve personnel who have been called to active duty?

**A:** Generally speaking, I think that is a bad idea, especially for personnel deployed to a place like Iraq. When you are called to active duty, and especially when you are deployed to the theater of operations, you should be devoting your full time and attention to your military duties. The whole idea of USERRA, as well as the Servicemembers' Civil Relief Act (SCRA), is to take these civilian distractions from the member's mind while he or she is on active duty. I invite the reader's attention to Law Reviews 106 and 147. I think that the right answer is for the member to take a makeup exam shortly after returning to work, not to take the exam on active duty.

\* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government.

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