

Police Department Must Give Reemployed Service Member the Opportunity To Take a Make-up Promotion Examination

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Update on Sam Wright

- 1.1.1.7—USERRA applies to state and local governments
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Q: I am the police chief in an intermediate size city. We have a police officer in our department (let's call her Mary Jones) who is an Army Reservist and who was called to active duty for one year and deployed to somewhere in Southwest Asia. She gave us prior notice of her call to duty, and she applied for reemployment and returned to work within a few days after she was released by the Army.³

Mary was a patrol officer—our initial rank for police officers. While she was away from work for active duty, she reached the sixth anniversary of her graduation from the police academy

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

³ This factual set-up is hypothetical but realistic.

and thus became eligible to take an examination for promotion to Sergeant in the police department. I tried to notify Mary of the opportunity to take the test, and we were prepared to let her take it at the place where she was serving, but the commanding officer of our local Army Reserve Center told me that Mary must not be bothered while she was on active duty in a combat zone.

Because we are not a large police department, the opportunity to take the promotion examination for Sergeant arises only occasionally. It may be five years or more until the next time that Mary will have the opportunity to take this examination.

Now that Mary is back at work, she told me that she wants to take a make-up examination and that something she called “YOU SARA” requires us to give her a make-up examination and to promote her if her score is high enough, even if that means that another officer who has been promoted must be demoted back to patrol officer. She referred me to your “Law Review” articles. What do you say about this?

A: Mary is referring to the Uniformed Services Employment and Reemployment Rights Act (USERRA). As I have explained in footnote 2, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA applies to almost all employers in this country, including local governments, state governments, federal agencies, and private employers, regardless of size.

If Mary meets the five USERRA conditions,⁴ the police department is required to give her the opportunity to take a make-up examination. If she scores well enough on the exam, she is entitled to the promotion even if that means that another officer must be displaced.

Section 4331 of USERRA⁵ 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 in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. These regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The pertinent subsection is as follows:

⁴ Mary (or any service member or veteran) must have left a civilian job to perform uniformed service and must have given the employer prior oral or written notice. Her cumulative period or periods of uniformed service, relating to the employer relationship for which she seeks reemployment, must not have exceeded five years. Since Mary was called to active duty involuntarily, her recent year of active duty does not count toward exhausting her five-year limit. 38 U.S.C. 4312(c)(4)(A). Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. She must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, she must have made a timely application for reemployment. It seems clear that Mary met these five conditions. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

⁵ 38 U.S.C. 4331.

(b) 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.⁶

For example, let us say that five patrol officers were promoted to Sergeant, or made eligible for promotion, based on their scores on the examination. Among the five, Bob Williams, with a score of 90, had the lowest qualifying score. When she takes the make-up examination, Mary Jones scores a 91. She must be promoted or made eligible for promotion, even if that means that Bob Williams must be displaced.

Q: This is a terrible burden on the department and on Bob Williams, who has already been promoted to Sergeant and is doing a great job.

A: In 1940 (when Congress enacted the VRRRA), in 1994 (when Congress enacted USERRA), and at all other relevant times, Congress fully understood that this law puts burdens on employers and sometimes on the civilian colleagues of those who are called to the colors. The burdens imposed on employers and on the colleagues of those who serve are tiny as compared to the far greater burdens (sometime the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, and by their families. Please see Law Review 17055 (June 2017). These requirements are neither unreasonable nor unconstitutional.

Q: Displacing Bob Williams from his promotion is in direct conflict with our collective bargaining agreement with the police officers' union. Allowing a police officer to take a promotion examination on a date other than the date that other eligible officers take it is in direct conflict with state law.

⁶ 20 C.F.R. 1002.193(b).

A: In its first case construing the VRRRA, 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.”⁷

USERRA explicitly supersedes and overrides a state law, a local ordinance, a collective bargaining agreement or other contract, an employer policy or practice, or other matter that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of those rights.⁸ The United States Constitution explicitly provides that a federal statute like USERRA trumps a conflicting state statute or even a state constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁹

⁷ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Please see Law Review 0803 (January 2008) for a detailed discussion of the *Fishgold* case and its implications.

⁸ 38 U.S.C. 4302(b).

⁹ United States Constitution, Article VI, Clause 2. This provision is called the “Supremacy Clause.” Yes, it is capitalized just that way, in the style of the late 18th Century.