

Make-up Promotion Exam for Reservist on Active Duty and away from his or her Police Officer Job

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Q: I am a Lieutenant Commander (O-4) in the Coast Guard Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

³ At its September 2018 annual convention, the Reserve Officers Association adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our

Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am currently on a two-year active duty period, with one year left to go.

On the civilian side, I am a patrol officer for a local police department, where I have been employed since I left active duty in 2011. I am now eligible for promotion to Sergeant in the police department. The promotion exam will be offered in January of 2019, and I want to take it, but I am on active duty stationed more than 2000 miles away from my home and civilian job. I am very anxious to take the exam when it is offered because it has been four years since the exam was last offered and it may be at least that long before the exam is offered again. Missing the opportunity to be promoted in 2019 will have a terrible effect on my police department career.

I want to take the promotion exam in January when it is offered, but I think that it is unlikely that the Coast Guard will let me take leave to go home to take the exam. Does USERRA require the employer to give me the opportunity to take the exam here at the Coast Guard base where I am serving?

A: Section 4331(a) of USERRA 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 draft USERRA regulations in the *Federal Register* in September 2004. After considering the comments provided, DOL made a few adjustments and published the final regulations in December 2005. The DOL USERRA regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. One subsection of the regulations is exactly on point to your situation:

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

organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

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.*⁴

Section 4331(a) of USERRA⁵ requires DOL to consult with the Department of Defense (DOD) on the content of the DOL USERRA regulations, and DOL did consult with DOD in detail. Based on DOD's input, DOL adopted the "school solution" that the service member should complete his or her period of active duty, return to work, and *then take a make-up exam for promotion*. While on active duty, especially contingency active duty in a national emergency, the service member should be devoting his or her full attention to military duties, and USERRA should be construed in such a way as to minimize distractions related to the civilian job back home.⁶ If I am clinging to the keel of my overturned fishing boat, I should not have to worry that you are not paying full attention to finding me because you are studying for a promotion exam back home.

I recognize that offering make-up examinations can be burdensome on employers and that giving the returning service member a promotion and displacing another employee who has been in the promoted position for several months, will be burdensome on employers and on the fellow employees. In 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA to replace the 1940 statute), and at all other relevant times Congress fully understood that the reemployment statute can impose burdens on others. Congress decided that those burdens are justified by the nation's need to defend itself.

Without a law like USERRA, it would not be possible for the services to recruit and retain enough personnel to defend our country.⁷ The burdens imposed on employers and on the co-workers of those who serve are tiny compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform.⁸

I urge you not to get into an extended argument with the police chief now, about what your USERRA rights may be a year from now, when you leave active duty and apply for

⁴ 20 C.F.R. 1002.193(b) (emphasis supplied).

⁵ 38 U.S.C. 4331(a).

⁶ Please see Law Review 134, published in 2003.

⁷ Please see Law Review 14080 (July 2014).

⁸ Please see Law Review 17055 (June 2017).

reemployment. Instead, you should concentrate on meeting the five USERRA conditions for reemployment and documenting that you meet them.⁹ After you return to work next year, that will be the time to make a formal written request to take a make-up exam. If the police department ignores or denies your request, that will be the time to take legal action.

⁹ As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you must have left your civilian job (federal, state, local, or private sector) to perform uniformed service, and you must have given the employer prior oral or written notice. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment. There are nine exemptions—kinds of service that do not count in exhausting your five-year limit. Please see Law Review 16043 (May 2016). You must have been released from the period of service without having received one of the disqualifying bad discharges enumerated in section 4304 of USERRA, 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by courts martial for serious offenses) and other-than-honorable administrative discharges. After release from the period of service, you must have made a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.