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Promotional Rights and Procedures

Part Four: Miscellaneous Claims

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This is the last of a four-part article on the law of promotions in public safety agencies. [Part one](#) discussed vacancies; [Part two](#) addressed grading issues. [Part three](#) focused on reverse discrimination. This article reviews miscellaneous unrelated claims.

❖ Forced assignments and promotions

Under most civil service systems, promotions in rank are awarded only to applicants who place on an eligibility list that is based on a grading scheme. But what if a change in assignments does not involve a change in rank?

“Rank has its privileges” may be a popular saying, but coveted assignments sometimes trump those privileges. A police officer assigned to narcotics enforcement may have a base pay lower than a sergeant, but might earn more money because sergeants might be exempt under the Fair Labor Standards Act and do not earn 150% after their regular work periods are exceeded. [1]

Some police officers and firefighters have well-paid secondary jobs or side businesses that would suffer if they change their current work patterns. Others may not want a promotion because they love their assignments as a canine or motorcycle traffic officer.

A leading case on the topic involved several railway brakemen who refused promotion to conductors. They would leave the upper echelons of seniority and descend to the lowest levels, which could have an adverse affect on older workers. They raised disparate impact and disparate treatment claims under the Age Discrimination in Employment Act.

A three-judge appellate court summarily rejected their claims, enforcing a mandatory promotion requirement. [*Hiatt v. Union Pacific RR.*](#), #94-8088, 65 F.3d 838 (10 Cir. 1995); cert. den. 1996 U.S. Lexis 993.

- In the absence of a seniority provision in a collective bargaining agreement, there is a managerial right to assign and reassign members of the work force.

❖ **Military absences – makeup exams**

In New York, a federal court upheld a jury award of double pay plus \$300,000 for emotional distress, to a NYFD promotional candidate who was denied a chance to make up a missed exam due to his military service.

The court also sustained his promotion without taking the test because of the city's refusal to offer a makeup exam. *Fink v. City of N.Y.*, #97-CV-6314, 129 F.Supp.2d 511, 2001 U.S. Dist. Lexis 2290, 166 LRRM (BNA) 2923 (E.D.N.Y.).

In Florida, an arbitrator rejected a union grievance that management had improperly allowed a deputy sheriff, who was on military duty, to take a promotional exam at an off-site location.

The arbitrator noted that federal laws protecting military leave rights supersede a bargaining agreement and administrative rules. [*Palm Beach County Sheriff's Office and PBC Police PBA*](#), AAA Case # 32-390-100713-04, 121 LA (BNA) 1624 (Smith, 2005).

❖ **College degree requirements**

The President's Commission on Law Enforcement and Administration of Justice recommended in 1967 that a four-year degree should be required for promotion to sergeant.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals included a four-year degree or a 120-semester units requirement as a condition of initial employment by 1982. [2]

Some agencies have adopted the educational requirement for promotion; many have not. Few require a four-year degree for entry level.

An arbitrator held that a county violated the bargaining agreement when it denied a promotion to a worker seeking an investigator position who lacked an associate's degree; there was nothing in the bargaining agreement requiring a degree. *Franklin County and Prof. Guild L-1960*, 123 LA (BNA) 314, FMCS Case #6/59036 (Smith, 2006).

New Jersey's Public Employment Relations Commission rejected an age discrimination challenge to a new requirement that state police lieutenants who are promoted to captain must possess a bachelor's degree. The union conceded that establishing captain qualifications is a managerial prerogative, but raised the issue of age discrimination. Older lieutenants are less likely to have a four-year degree than younger candidates.

The Commission rejected the complaint. "The State is ... free to require a bachelor's degree for promotion to captain and an arbitral challenge to that requirement would substantially limit government's policymaking powers." [*N.J. State Police and Superior Officers Assn.*](#), #SN-2006-030, PERC #2006-68, 32 NJPER 41, 2006 NJPER (LRP) Lexis 39 (2006).

Also in New Jersey, an appellate court upheld the use of college credits for promotional purposes. An ADEA complaint filed by older officers was rejected:

"Plaintiffs were not disparately treated. As far as the record shows, they were treated exactly the same as all other candidates except for the fact that in the awarding of seniority credits, this protected class of officers was treated more favorably than the unprotected class."

There was no basis to support a finding that the awarding of college credits was not directly related to legitimate and altogether appropriate qualifications for promotion. [*Esposito v. Twp. of Edison*](#), 306 N.J. Super. 280, 703 A.2d 674 (1997).

❖ Accommodation of disabilities

A federal court in Connecticut held that a police dept. had duty to accommodate officer's

dyslexia, including his use of a laptop computer. *DeLeo v. Stamford*, 919 F.Supp. 70, 1995 U.S. Dist. Lexis 11564 (D.Conn.).

In Massachusetts, however, a federal court declined to order a test provider to lengthen the test period by 50% to accommodate an applicant with Attention Deficit Disorder. [3]

The judge noted that there is a difference between what a psychologist might mean by “disability” and what the ADA means when it uses that term. A person might have a medically recognized “learning disability” and yet not have a “disability” within the meaning of the ADA.

The fact that a person does poorly on standardized exams might be a result of many factors, “such as anxiety, stress, nervousness, cautiousness, poor organization, poor time management, lack of motivation, lack of appropriate preparation, or weakness in a particular subject matter.”

Under the strict language of the ADA, “an impairment that interferes with an individual’s ability to perform a particular function, but does not significantly decrease that individual’s ability to obtain a satisfactory education otherwise, does not substantially limit the major life activity of learning.” *Baer v. Natl. Bd. of Medical Examiners*, #05-10724, 392 F.Supp.2d 42, 2005 U.S. Dist. Lexis 7796 (D. Mass. 2005). [4]

❖ Statutes of limitations

The Sixth Circuit has noted that a promotion or hiring from a tainted roster is not a continuing act, but is the result of previous discrimination:

“To allow employees to challenge an eligibility roster during the entire time it is used would be to create substantial uncertainty for employers who have to make important staffing decisions based upon the list.”

Cox v. City of Memphis, #99-5789, 230 F.3d 199, 2000 FED App. 0370P (6th Cir.)

More recently, a federal court in New York came to the same conclusion. For the purposes of the statute of limitations, a failure to promote is not a continuing violation. *Deravin v. Kerik*, #00CV7487, 2007 U.S. Dist. Lexis 24696 (S.D.N.Y. 2007); remanded on other grounds, 335 F.3d 195 (2nd Cir. 2003).

❖ No back pay for delayed promotions

In Arkansas the state Supreme Court held that a city's delay in promoting persons who scored highest on eligibility list did not entitle them to differential back pay awards. *Orrell v. City of Hot Springs*, 578 S.W.2d 18 (Ark. 1979).

New York's highest court voted 6-to-1 to deny retroactive pay and benefit differentials to firefighters who successfully challenged twelve questions on a promotional exam. The majority noted that persons who score high on a civil service exam do not acquire a legally enforceable right to the promotions sought.

They reasoned that an award of pay differential (for the time between the dates they should have been promoted and the dates they actually were promoted) would violate the spirit of civil service laws. The dissenting justice thought that all plaintiffs who are still in active service should have the complete remedy of retroactive seniority and pay differentials. *Andriola v. Ortiz*, 604 N.Y.S.2d 530, 82 N.Y.2d 320 (1993).

An Ohio Court of Appeals overturned a writ of mandamus requested by six Cincinnati firefighters who sought an award of back pay and retroactive benefits on the ground that their promotions had been wrongfully delayed.

The promotional process was contested in a lawsuit, and the lower court had issued an injunction. The appellate panel wrote:

“A city cannot ignore a court order enjoining a promotion. While the injunction existed, the city was forbidden by law from doing the act enjoined — promoting the [plaintiffs]. Thus, the city had no duty to promote the [plaintiffs] on the date of the vacancies because of the injunction.”

[*State ex rel. Worsham v. Cincinnati*](#), #C-090328, 2010 Ohio 2765, 2010 Ohio App. Lexis 2293.

❖ Notes:

1. The Supreme Court found that St. Louis police sergeants and lieutenants are exempt from overtime provisions of the FLSA under 29 U.S. Code §213(a)(1) as “bona fide executive, administrative, or professional” employees. [*Auer v. Robbins*](#), #95-897, 519 U.S. 452, 117 S.Ct. 1905 (1997).

2. Task Force on Police, Standard 15.1, p. 369 (1973).
3. Common symptoms of ADHD/ADD include making careless mistakes; not listening when spoken to; disregarding instructions; fidgeting or squirming; and excessive running or talking. [Diagnostic and Statistical Manual of Mental Disorders](#).
4. Also see, [Learning Disabilities and the Americans With Disabilities Act](#): The Conundrum of Dyslexia and Time, 15 Journal of the Legal Writing Institute 167, Brigham Young Univ. (2009).

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