

Ask the Lawyer - Neil A.G. McPhie

By Neil A.G. McPhie

Q.

What happens if you return from active duty to find that the federal civil service job you left to serve in the military was abolished while you were deployed?

A.

When that “old job” is not there when the veteran returns and applies for reemployment, employers are required by the Uniformed Services Employment and Reemployment Rights Act to hire him or her to a position of “like status.” In *Heidel v. U.S. Postal Service* (1996), the Merit Systems Protection Board noted that Congress did not define “like status” in USERRA. Case law, the Board said, indicated the phrase can be determined through the consideration of “pertinent factors,” such as “opportunities for advancement, general working conditions, job location, shift assignment, rank and responsibility, etc.” To this the Board added that a position is not of “like status” if the duties and responsibilities of the new position are not comparable to those of the former position.”

For example, *Heidel* involved a G-4 mail handler who left his job at the Postal Service to serve on active duty. He returned with a service-connected disability, and the Postal Service reemployed him to a PS-2 custodial position. The MSPB found this personnel action violated USERRA and ordered the agency to assign the veteran to a position of “like status.” The agency then assigned the veteran to a position requiring him to handle and repair damaged mail. This position had the same title and grade as the position the veteran had prior to going on active duty, but it was more socially isolating and had fewer responsibilities. The employee again appealed to the Board, which found the position and the original one had different duties and responsibilities and therefore were not of “like status.”

If an agency eliminates a position while an employee is on active duty and replaces it with a higher-ranking position, this newly created position may not be considered of like status. For example, *Leite v. Dep’t of the Army* (2008) involved a GS-13 resource management chief whose position was eliminated and replaced with a GS-14 financial manager position while she was on active duty. Upon her return, the agency reemployed her to a comparable GS-13 position, but she believed that USERRA entitled her to the GS-14 position. Noting that promotion to this GS-14 position was not a privilege of seniority and that there was no way of knowing whether the veteran would have been assigned the duties of this new position had she never left for active duty, the Board found the agency satisfied USERRA by assigning her to the comparable GS-13 position.

Veterans experiencing difficulty returning to their federal sector jobs should immediately contact a federal employment law attorney.

