

# **ATTACHMENT W**

# LAW OFFICE OF ELLEN MENDELSON, PC



533 BELLA VISTA WAY, 1ST FLOOR  
SAN FRANCISCO, CALIFORNIA 94127-2303  
[www.publicemployeelaw.com](http://www.publicemployeelaw.com)

TELEPHONE 415-585-0815  
FAX 415-585-8200  
EMAIL: [Ellenlaw@aol.com](mailto:Ellenlaw@aol.com)

November 14, 2016

Anthony Serrao, Esq.  
California Department of Human Resources  
1515 S Street, North Building, Suite 500  
Sacramento, CA 95811  
[Anthony.serrao@calhr.ca.gov](mailto:Anthony.serrao@calhr.ca.gov)

Re: David Ortiz

Dear Mr. Serrao:

This follows your letter of October 28, 2016, and seeks to advance this matter to a hearing before a single POST Commission member for factual and legal findings before the February 27, 2017 meeting. We seek immediate review that results in issuance of a POST certificate. The refusal to grant Mr. Ortiz a POST certificate violates both Federal and California law. As discussed, Mr. Ortiz has been offered a job from San Francisco State University to work as an officer. His intent is to begin this position immediately after he retires from the military in June of 2017. Ortiz has served in the military since he was first certificated to act as an officer, and POST's handling of the certificate denial, based on the allegation the USERRA does not apply because POST is not "an employer" is a misreading of the statute, and violates Mr. Ortiz' rights under federal law. The Governor of the State of California vested Ortiz with peace officer powers during Ortiz' service with the California Army National Guard, thus he has already been granted peace officer certification.

#### Statement of Facts:

David Ortiz asks POST to issue to him a certificate that allows him to work as a peace officer in the State of California. He completed basic training for this position in 2002 and obtained recertification in 2012. Since 2012 he has been asking POST to certify him to work as a Peace Officer in the State of California. POST initially vested responsibility for determining whether USERRA applies to this situation in a staff analyst. Due to POST intransigence and continued misreading of USERRA Mr. Ortiz has hired this office to assist in his attempt to obtain certification. Apparently POST has never obtained advice from a licensed attorney regarding this issue. The facts support a finding that Ortiz has already been certified with peace officer status, or alternatively, that he possesses experience that should substitute for a requirement that he retake the Regular Basic Course.

Anthony Serrao, Esq.  
November 14, 2016  
Page 2

**Applicable Law:**

At the outset I direct your attention to Penal Code Section 13506. Under this section POST does not have the authority to cancel a certificate previously issued to a peace officer. It is our position that David Ortiz has been issued a certificate to function as a peace officer by reason of the issuance of a badge and certification to act a peace officer by the Alameda County Sheriff's Office in April 2002 and his service in the California National Guard. A copy of the notice of certification is enclosed as Exhibit A. He was certified to act as a California Peace Officer and has actually acted as a Peace Officer under authority granted by Governor of the State of California during his service in the California Army National Guard from 2002 to 2015. Before he could act as a National Guard member he had to complete POST training. See Exhibit B. California National Guard members are required to satisfactorily complete an introductory course of training prescribed by the Commission on Peace Officer Standards and Training before exercising powers of peace officers when called into emergency state services by the Governor. Op. Atty. Gen. No. 02-604 (October 3, 2002), 2002 WL 31232708. He completed this training and was called into service during his National Guard enrollment. Enclosed as Exhibit C is correspondence from the military that confirms he has been on active duty for the last eighteen years. Thus no recertification was ever required. Pursuant to Penal Code Section 13506 the Commission lacks jurisdiction to cancel this certification. We seek immediate issuance of a certificate to act as a peace officer in California.

Mr. Ortiz also served as a police officer in Guam. Attached as Exhibit D are documents to establish this service. This service, coupled with his military experience should entitle him to an exemption from six-year limitation for the Regular Basic Course. He has taken and passed the requalification requirement. We ask the Executive Director to grant an exemption under 11 CCR 1008(3)(A) 4. This section provides:

**Exemptions**

An exemption of the requalification requirement may be granted by the Executive Director or the Commission as follows:

(A) The Executive Director may grant an exemption to an individual who possesses a POST Basic Certificate and is returning to law enforcement after a three-year-or-longer break in service; and

1. Is re-entering a middle management or executive rank and will function at the second-level of supervision or above; or
2. Has been, with no longer than a 60-day break in service between law enforcement employers as a regular peace officer, employed continuously in another state as a full-time regular peace officer; or

3. Has served, with no longer than a 60-day break in service between law enforcement employers, continuously as a Level I reserve officer in California and the individual's agency chief executive attests in writing that the individual is currently proficient; or
4. The individual's employment, training, and education during the break in service provides assurance, as determined by POST, that the individual is currently proficient; or
5. Is re-entering law enforcement in a permanent or light duty assignment not involving general law enforcement duties if attested to in writing by the agency chief executive.

**An individual seeking an exemption from completion of the requalification requirement shall submit a letter to the Executive Director, outlining the following criteria: 1) reason for the request; 2) description of the law enforcement position the applicant is seeking; and 3) documentation of prior employment, training and education, and the dates completed as it applies to the criteria outlined in subsection 1008(b)(3)(A)(1.-5.).**

**(B) The Commission may, in response to a written request or on its own motion, upon a showing of good cause and based upon an individual's employment, proficiency, training, and education, exempt an individual from completion of the basic course requalification requirement. The individual shall: 1) have satisfied the Regular Basic Course training requirement; 2) become re-employed as a peace officer after a three-year-or-longer break in service; and 3) not be described or included in subsection 1008(b)(3)(A)(1.-5.). (emphasis added)**

The Commission possesses the authority to exempt Ortiz from any further requirements before it issues a certificate to allow him to work as a peace officer. The employer will put him in a position wherein he is a probationary employee for at least six months. He has worked as a peace officer in Guam; he has been certified to act as a peace officer by the Governor and as first responder by the United States of America.

We believe POST is discriminating against Ortiz based on his service in violation of 38 USC Section 4311. This law provides protection for members of the Armed Services from discrimination or retaliation as a result of their absence from employment due to active duty. The law provides:

- (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an

Anthony Serrao, Esq.

November 14, 2016

Page 4

employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

\* \* \*

(c) An employer shall be considered to have engaged in actions prohibited--  
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . .

POST is wrong that it is not an employer for purposes of USERRA. 38 USC Section 4303 provides the definitions for purposes of the Act. Under these definitions the term "employer" includes:

(4)(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--  
(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;  
(ii) the Federal Government;  
(iii) a State;  
(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and  
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311. (emphasis added)

The definition of State includes:

The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof). (emphasis added)

POST is a political subdivision of the State of California, it operates under the authority of California Penal Code Section 13500 et seq. and is delegated the responsibility of determining who is qualified to work as a peace officer in the State of California.

**Anthony Serrao, Esq.**  
**November 14, 2016**  
**Page 5**

**Notwithstanding the opinion of your staff analyst POST is an employer under the definition provided in USERRA.**

**The initial denial of the six-year extension was wrongful because during the period after Mr. Ortiz took the Basic Course he was on active duty. Pursuant to USERRA the time period he was on active duty cannot be counted as time that exhausts the six-year time period. Ortiz was told by the staff analyst that he was not eligible for an extension in the six-year time limitation and would not be allowed to take a requalification course, but had to retake a six-month regular basic course. He had already been certified to act as a peace officer, and was on active-duty during any time when was not acting as a peace officer. For multiple reasons Ortiz should be issued a certificate to act as a peace officer.**

**Admittedly, I believe the confusion in this matter was caused in part from the belief that Ortiz needed an exemption from the six-year requirement. This writer believes he qualifies for a certificate by reason of his California National Guard experience and the certification obtained from the Governor to act as a peace officer during his time in the Guard. Under 11 CCR 1008(C) he should be eligible for alternative job-related requalification procedures.**

**Is there something else we need to provide before you will recommend issuance of a certificate to POST on behalf of Mr. Ortiz? This whole thing is somewhat confusing, because he has been attempting to obtain a certification that may have already issued because of his National Guard experience and the authorization by the Governor for peace officer powers. The real problem appears to be granting Luanne Vasquez the ability to make a determination that she neither had the training or experience to determine.**

**A great injustice has been done that needs to be remedied as quickly as possible so Mr. Ortiz can go to work. Please expedite review of this matter. I am serving this letter and the exhibits electronically so you can expedite distribution to the appropriate individuals.**

**Best regards,**

  
**Ellen Mendelssohn**  
**Attorney for David Ortiz**

**cc. D. Ortiz**



# Alameda County Sheriff's Office

REGIONAL TRAINING CENTER, 6289 MADIGAN ROAD, DUBLIN, CA 94568-3315  
(925) 551-6970 • FAX (925) 551-6985

**CHARLES C. PLUMMER, SHERIFF**  
**MARSHAL - CORONER - PUBLIC ADMINISTRATOR**  
**DIRECTOR OF EMERGENCY SERVICES**

April 23, 2002

Dear Mr. Ortiz

**Congratulations on your completion of the Alameda County Sheriff's Office Regional Basic POST Academy. In the past six months, you have labored hard to learn many skills which will guide you through your new career. You have come quite a distance in this time, but remember this is just a beginning.**

**Remember your Code of Ethics. Your fundamental duty is to serve mankind, to safeguard lives and property, to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all to liberty, equality and justice.**

**You must keep your private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both your personal and official life, you must be exemplary in obeying the laws of the land and the regulations of your office.**

**You must never act officiously or permit personal feelings, prejudices, animosities or friendships to influence your decisions. With no compromise for crime and with relentless prosecution of criminals, you must enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.**

**Your badge is a symbol of public faith, and you must accept it as a public trust to be held as long as you hold this office. You must constantly strive to achieve those objectives and ideals, dedicating yourself to your chosen profession.**

**You have begun an exciting and rewarding career. We have given you the best training that time can buy, and our part is done. Your part begins today. As you go forward in your career, remember your past and the reasons why you had chosen this profession. Remember your code of ethics and the responsibility you carry as a California Law Enforcement Officer. Welcome and congratulations!**

Sincerely,

Charles C. Plummer

Public Administrator  
Sheriff - Marshal - Coroner  
Director of Emergency Services

EXHIBIT A