STATE OF NEW JERSEY

In the Matter of Brian McDevitt, Atlantic City, Police Department	DECISION OF THE CIVIL SERVICE COMMISSION
CSC DKT. NO. 2024-1913 OAL DKT. NO. CSR 04394-23	

ISSUED: MARCH 20, 2025

The appeal of Brian McDevitt, Police Officer, Atlantic City, Police Department, removal, effective May 2, 2023, on charges, was before Administrative Law Judge Tama B. Hughes, who rendered her initial summary decision on February 7, 2025. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 19, 2025, accepted and adopted the ALJ's determination to grant the appellant's motion for summary decision and reverse the removal.

This matter poses purely legal questions regarding leave entitlements under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) and New Jersey State military leave laws and regulations. In her initial summary decision, the ALJ performed a thorough and insightful analysis of the subject leave entitlement issue in light of the laws. She considered both the appointing authority's and the appellant's legal positions in that regard, and ultimately concluded that:

> [B]y its own terms, USERRA does not preempt state statutes that provide for greater "rights and benefits" of employment than USERRA does. Under the broad federal definition of "rights and benefits" of employment, unpaid leave as provided for in *N.J.S.A.* 38A:4-4 and *N.J.S.A.* 38:23-1 should be construed as a right or benefit not preempted by USERRA.

> Accordingly, I **CONCLUDE** that *N.J.S.A.* 38A:4-4 and *N.J.S.A.* 38:23-1 are not preempted by USERRA and that appellant's leave was protected.
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> * * *
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> Based upon the undisputed facts of this case and the relevant State and Federal laws set forth above, I **CONCLUDE** that the respondent has failed to meet its burden of proof on all counts of the [Final Notice of Disciplinary Action] based upon its misinterpretation of the plain and unambiguous language of both New Jersey military leave laws and the USERRA . . . and further **CONCLUDE** that appellant's motion for summary decision should be **GRANTED** and that at all times, his military leave was protected under applicable New Jersey laws and regulations.

As indicated above, the Commission has thoroughly reviewed the exceptions filed by the appointing authority in this matter and finds them unpersuasive. In this regard, the arguments made in the exceptions have already been addressed sufficiently by the ALJ. Moreover, upon its *de novo* review, the Commission agrees with the ALJ's legal analysis and conclusions.[1] Accordingly, the Commission upholds the ALJ's recommendation granting the appellant's motion for summary decision and reverses the removal.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from the first date of disciplinary separation without pay until the date of actual reinstatement. However, this award is subject to any period of active military duty past the 90 day threshold for paid military leave per year from the appellant's first date of disciplinary separation without pay to the actual date of reinstatement. Any period of active military duty after those 90 days in any given year would be considered approved leaves of absence without pay. *See N.J.A.C.* 4A:6-1.11(e). Further, as the appellant has prevailed, he is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, per the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or

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[1] Moreover, Civil Service rules support the ALJ's analysis. Namely, *N.J.A.C.* 4A:6-1.11(e) regarding military leave explicitly states that an "employee is entitled to a leave of absence without pay for such other military duty not covered by (b) . . . above." This rule does not impose a limitation on the amount of unpaid leave. Section (b) indicates a National Guard member is entitled to 90 days of **paid** leave in a calendar year for federal active duty.

counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses the removal and grants the appeal of Brian McDevitt.

The Commission orders that the appellant be granted back pay, benefits, and seniority, subject to any period of active military duty past the 90 day threshold for paid military leave per year from the appellant's first date of disciplinary separation without pay to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF MARCH, 2025

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 04394-24
AGENCY DKT. NO. N/A
2024-1913

IN THE MATTER OF BRIAN G. MCDEVITT,
ATLANTIC CITY POLICE DEPARTMENT.

Kevin D. Jarvis, Esq., for appellant Brian G. McDevitt (O'Brien, Belland & Bushinsky, LLC, attorneys)

Steven S. Glickman, Esq., for respondent Atlantic City Police Department (Ruderman & Roth, attorneys)

Record Closed: August 22, 2024 Decided: February 7, 2025

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

On January 26, 2024, a Final Notice of Disciplinary Action (FNDA) was issued removing Brian G. McDevitt (McDevitt or "appellant"), a police officer with the Atlantic City Police Department (ACPD or "respondent"), retroactively effective to May 2, 2023. Appellant filed a timely appeal.

PROCEDURAL HISTORY

This matter was appealed to the Office of Administrative Law (OAL), where it was received and perfected on March 27, 2024. N.J.S.A. 40A:14-202(d). On April 18, 2024, the matter was assigned to the Honorable Tama B. Hughes, ALJ. An initial call was held on May 2, 2024, during which the parties represented that cross-motions for summary decision were going to be filed, so a briefing schedule was provided.[1]

FACTUAL DISCUSSION

The following is undisputed and accepted as **FACT**:

1. McDevitt has been a member of the United States Air Force (USAF) National Guard since July 3, 2000;

2. McDevitt began his employment with the ACPD in August 2012;

3. McDevitt has been placed on active service temporarily for the USAF on several occasions throughout his career with the ACPD;

4. McDevitt would advise the ACPD each time he was called into active service for the USAF;

5. The City of Atlantic City ("City") would continue to make pension payments into the Police and Firemens' Retirement System (PFRS) on McDevitt's behalf during each of his deployments with the USAF;

6. McDevitt has been a member of the Policemen's Benevolent Association Local 24 (PBA 24 or "Union") at all times relevant to this action and

[1] Stipulation of Facts were due by May 24, 2024; cross-motions for summary decision were due by June 28, 2024; opposition to the motion was due by July 19, 2024; and reply briefs were due by July 26, 2024. Respondent's counsel, with the consent of appellant's counsel, requested additional time to file their initial motion for summary decision; therefore, the dates were extended, with the final reply briefs due by August 22, 2024.

continued to accrue seniority for purposes of sick, vacation, and personal time off under the Union's collective negotiations agreement (CNA) with the City during periods of deployment;

7. McDevitt was granted "a leave of absence with pay not to exceed 90 work days" by the City during periods of deployment consistent with N.J.A.C. 4A:6-l.l l(b)(l) and would receive pay from the City in the amount of the difference between his military pay and his regular pay with the ACPD for the remaining portion of each deployment consistent with City policy;

8. According to City records, McDevitt accrued military leave in the amount of 1,982 days, the equivalent of 5.43 years, between August 15, 2013, and September 26, 2022;

9. The City advised McDevitt via letter on December 13, 2022, that his then-existing military order was reviewed and exceeded the five-year cumulative service limit permitted under the Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. § 4301, et seq.;

10. McDevitt responded via letter from his attorney dated December 28, 2022, taking the position that his continued leave is protected under applicable New Jersey laws and regulations;

11. The City responded via letter dated January 18, 2023, reiterating its position that McDevitt had exceeded the five-year cumulative service limit permitted under USERRA;

12. McDevitt responded via letter from his attorney dated January 31, 2023, reiterating his position that his continued leave is protected under applicable New Jersey laws and regulations;

13. McDevitt was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking his removal from employment with the City on May 2, 2023;

14. McDevitt waived his right to a departmental hearing, and the City issued a Final Notice of Disciplinary Action (FNDA) on January 26, 2024, which was mailed on February 29, 2024, and received by McDevitt on March 7, 2024; and

15. McDevitt filed a timely appeal of his removal with the OAL on March 11, 2024.

LEGAL ARGUMENT

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may be "rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Further, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. This standard is substantially similar to that governing a civil motion under New Jersey Court Rule 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh

> the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> [Brill, 142 N.J. at 540 (citation omitted).]

After review of the moving papers, I **CONCLUDE** that for the reasons set forth more fully below, under the Brill standards, this matter is appropriate for summary disposition.

The FNDA in this matter charged the appellant with violations of: N.J.A.C. 4A:2-2.3(a)(2), Insubordination; N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-3(a)(12), Other Sufficient Cause; N.J.A.C. 4A:2-6.2(b) and (c), Resignation Not in Good Standing; and an administrative charge of violation of ACPD General Order, Volume 2 Chapter 35—Unauthorized Absences Section II, Subsection E.

The incident giving rise to the charges states:

> On or about December 13, 2022 Brian McDevitt was informed that his eligibility for military leave had terminated and that he was directed to indicate by December 28, 2022 that he would be returning to work, retiring or resigning from employment with the City of Atlantic City.
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> Officer Brian G. McDevitt was sent a memo from the City of Atlantic City's Human Resources dated December 13, 2022, informing him that his current military order was reviewed and determined to be over the five-year cumulative service limit under Uniformed Services Employment and Re-employment Rights Act [USERRA] 38 U.S.C. § 4301, et seq., which outlines the reemployment rights of all uniformed service members set forth in section 4312(c).
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> The City of Atlantic City directed Brian G. McDevitt to respond to the memo no later than December 28, 2022, indicating his course of action, to return to his position, retire or resign. The City of Atlantic City stipulated that if no response was received that the City of Atlantic City would initiate termination proceedings.
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> The letter was sent to Officer Brian G. McDevitt at XXX, Ventnor, NJ 08406 postmarked December 14, 2022 via U.S.

Postal Service certified with a return receipt affixed (receipt number 7006 3450 0002 6475 5529)

Additionally, Officer Brian G. McDevitt's representing attorney, Kevin Jarvis, Esq. was sent a memo from the City of Atlantic City's Human Resources dated January 18, 2023, advising that Officer McDevitt did not have the right to re-employment after the five-year cumulative service limit under Uniformed Services Employment and Re-employment Rights Act (USERRA) 38 U.S.C. § 4301, et seq., which outlines the reemployment rights of all uniformed service members set forth in section 4312(c).

The letter stipulated that Officer McDevitt had exceeded his five-year limit with respect to his current civilian employment and must return to his position, retire or resign by February 1, 2023.

A document outlining Officer McDevitt's accumulated leaves was attached as evidence, showing the total documented time for military leave accrued by Officer McDevitt, from the Date of August 15, 2013 to September 26, 2022. The total accrued time accounted for an absence of 1982 days equaling 5.43 years.

The letter was sent to Officer Brian G. McDevitt at XXX, Ventnor, NJ 08406 postmarked January 18, 2023 via U.S. Postal Service certified with a return receipt affixed (receipt number 7006 3450 0002 6475 5536).

On the date of January 31, 2023, the City of Atlantic City received correspondence from Officer Brian McDevitt's representing attorney Kevin Jarvis, Esq. indicating that Officer McDevitt intended to complete his military tour of duty, fulfilling his deployment orders as outlined in his last request for military leave on November 29, 2022. This correspondence failed to indicate whether Officer Brian McDevitt, would return to his position, retire or resign as stipulated in the memorandum issued from the City of Atlantic City on December 13, 2022 and January 18, 2023 respectively.

On or about the date of April 19, 2023, Officer Brian G. McDevitt was sent a memo from the City of Atlantic City's Human Resources, terminating his employment due to his failure to properly respond, indicating his course of action, to return to his position, retire or resign . . . due to his failure to return to work with the City of Atlantic City. Enclosed were the Preliminary Notice of Disciplinary Action, Charges and

> Specification documents outlining the termination proceedings.
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> The letter was sent to Officer Brian G. McDevitt at XXXA, Ventnor, NJ 08406 postmarked May 4, 2023 via U.S. Postal Service certified with a return receipt affixed (receipt number 7006 0100 0000 3080 8556)

Appellant contends that his termination violated both New Jersey's military leave laws and New Jersey's Law Against Discrimination ("NJLAD"). Respondent's actions violate New Jersey military leave laws because USERRA does not preempt state laws that "establish a right or benefit that is more beneficial to, or is in addition to, a right or benefit" provided under USERRA. 38 U.S.C. § 4302; 20 C.F.R. § 1002.7(c) (2024). New Jersey's military leave laws, unlike USERRA, provide for unlimited unpaid leave pursuant to N.J.S.A. 38A:4-4, which only limits leaves of absence "with pay" and explicitly states that "[a]ny leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time." See N.J.S.A. 38A:4-4(a).

Additionally, N.J.S.A. 38A:4-4 was amended after USERRA when its five-year-cap was passed. Given the fact that legislative bodies are presumed to be aware of other related state and federal statutes, the New Jersey Legislature's failure to amend the New Jersey military leave laws to be consistent with USERRA must be deemed intentional. See Mimkon v. Ford, 66 N.J. 426, 434 (1975); In re Federal-Mogul Global, 684 F.3d 355, 373–74 (3d Cir. 2012). Thus, the legislature's choice to not include a five-year cap to be consistent with USERRA must be "deliberate rather than inadvertent" since unpaid leave under the plain language of the statute is unlimited. Id.

Citing to N.J.S.A. 10:5-12(a), appellant also argues that his termination was an "adverse employment action" under NJLAD on the basis of his "liability for service in the Armed Forces of the United States."

Respondent contends that USERRA "clearly and explicitly" states that employees are entitled to reemployment rights and benefits only if absences by reason of military service do not exceed five years. While respondent recognizes that under USERRA, a state, municipality, or employer may provide benefits greater than those granted under

USERRA such as sick and vacation accrual, compensation, or seniority, such expansion of rights does not include an extension of the five-year cap. In this case, because there is no dispute that appellant's leave exceeded five years, his appeal must be denied. Alternatively, respondent argues that if USERRA does not preempt state law as to the five-year cap, New Jersey law does not provide for unlimited unpaid leave. By lack of reference to a "cap" on unpaid leave under New Jersey law, the controlling law is under the USERRA five-year cap.

For the reasons set forth more fully below, I **FIND** respondent's interpretation of the law to be incorrect and concur with appellant's interpretation of both New Jersey military leave laws and USERRA.

38 U.S.C. § 4312 (Reemployment rights of persons who serve in the uniformed services) states in relevant part:

> (a) Subject to subsections (b), (c), and (d) and to section 4304 [38 USCS § 4304], any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter [38 USCS §§ 4301 et seq.] if—
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> (1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
>
> (2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years . . .

In this case, it is undisputed that appellant's protected leave under the USERRA is cumulatively in excess of five years. However, under 38 U.S.C. § 4302 (Relation to other law and plans or agreements), USERRA expressly states that:

> Nothing in this chapter [38 USCS §§ 4301 et seq.] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement,

> policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter [38 USCS §§ 4301 et seq.].
>
> [38 U.S.C. § 4302(a) (emphasis added).]

Under New Jersey Statute Title 38A (Military and Veterans Law), specifically N.J.S.A. 38A:4-4 (Leave of absence without loss of pay, exceptions),

> A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other instrumentality of the State or of a county, school district or municipality who is a member of the organized militia shall be entitled, in addition to pay received, if any, as a member of the organized militia[2], to leave of absence from his or her respective duties without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year. Any leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time.

Similarly, N.J.S.A 38:23-1(a) (Leave of absence for public officers, employees) provides

> A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other

[2] N.J.S.A. 38A:1-1(a) defines "militia" as "all the military forces of this State, whether organized, or active or inactive." The parties' stipulations refer to appellant as a member of the United States Air Force ("USAF") National Guard. However, appellant's brief also refers to himself as a member of the "New Jersey Air Guard National." From what can be seen, the New Jersey Air National Guard is both part of the state militia and the United States Air Force. See New Jersey Air National Guard, https://www.airforce.com/ways-to-serve/air-national-guard/new-jersey (last visited February 4, 2025). Neither the appellant or the City argue this point, and I believe it would only be relevant as to which of the two provisions, N.J.S.A. 38A:4-4 or 38:23-1(a), would apply. Appellant points to the fact that New Jersey regulations define the "Air National Guard" as "that part of the organized militia that is an air force, is trained and has its officers appointed under the 16th clause of section 8, Article I, of the Constitution of the United States, is organized, armed and equipped wholly or partly at Federal expense, and is Federally recognized." N.J.S.A. 38:1-1(e). Accordingly, appellant only references N.J.S.A. 38A:4-4 in his brief, since under this definition, members of the Air National Guard are part of the "organized militia" referred to in § 38A:4-4. Because the provisions share the key operative language ("Any leave of absence for such duty in excess of [30 or 90] work days shall be without pay but without loss of time."), for purposes of this application, whether appellant is deemed in the "militia" or in the "USAF" is a distinction without a difference.

> instrumentality of the State, or of a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, including the National Guard of other states, shall be entitled, in addition to pay received, if any, as a member of a reserve component of the Armed Forces of the United States, to leave of absence from his or her respective duty without loss of pay or time on all work days on which he or she shall be engaged in any period of Federal active duty, provided, however, that such leaves of absence shall not exceed 30 work days in any calendar year. Such leave of absence shall be in addition to the regular vacation or other accrued leave allowed such officer or employee. Any leave of absence for such duty in excess of 30 work days shall be without pay but without loss of time.
>
> [N.J.S.A. 38:23-1(a).]

The instant matter appears to be a case of first impression as there does not appear to be any cases on point. In Irvington Police Benevolence Ass'n, Local 29 v. Twp. of Irvington, No. A-3991-12T2 (App. Div. 2014), an unpublished decision, the Court held that N.J.S.A. 38A:4-4(a) is "unambiguous" and ordered restitution to a township that had compensated officers for the difference between their municipal pay and military pay during their deployment in excess of ninety days. The Irvington matter issues are not relevant to the instant matter.

While N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1(a) clearly limit the amount of paid leave to thirty or ninety days cumulatively per calendar year, the plain text of these provisions provides for unpaid leave but does not include a limit on how many days are protected for any such leave of absence "without pay but without loss of time." While the respondent concedes that neither statute includes a "cap" on reemployment rights or benefits, without citing to any legal authority, respondent nonetheless argues that in the absence of such a provision, the USERRA controls. Such an interpretation contravenes rules of statutory interpretation.

On this point (statutory construction), the first step is to "look at a statute's plain meaning" and enforce that meaning if it is unambiguous. State v. Drury, 190 N.J. 197, 209 (2007). Here, it could be argued that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1(a) unambiguously omit any limit on unpaid leaves of absence, especially in contrast to the unambiguous limit for paid leaves of absence. Thus, by their plain terms, these provisions do not limit unpaid leaves of absence for military service.

Alternatively, if the language is ambiguous or "admits to more than one reasonable interpretation, we may look to sources outside the language to ascertain the Legislature's intent." Ibid. (internal citations omitted). The legislative history for these provisions is sparse. Both provisions were amended in 2001 in the same bill to include, among other things, the portion providing for leave "without pay but without loss of time." S. 2378 (2001), https://repo.njstatelib.org/server/api/core/bitstreams/20cbdf3d-44d8-42c7-9838-a5ea5bd286da/content.

Nothing in the legislative history of these provisions expressly indicates that this unpaid leave was intended to be unlimited, but the legislative history also makes no reference to any intended limit on unpaid leave. Additionally, one stated purpose of the bill was to "clarify that in any calendar year, military leave in excess of the allowable number of work days will be without pay but without loss of time," since the original version of the law did not include any leave for active duty in excess of 90 days in the aggregate. It would be reasonable to infer the 2001 addition of the sentence "[a]ny leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time" involved the intentional choice not to impose a limit on that leave, since the legislature could have included one like that which had previously existed.

In addition to never referencing any limit on unpaid leave, the legislative history of the 2001 amendments to N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1(a) does not refer to USERRA or whether the five-year cap is intended to apply. Notably, at the time of the 2001 amendment, USERRA and its five-year limit had been enacted since 1994. 103 P.L. 353.

Another principle of statutory construction is that "[i]t is firmly established that '[t]he Legislature is presumed to know the law.'" Comm. of Petitioners for Repeal of Ordinance No. 522 (2013) of Borough of W. Wildwood v. Frederick, 435 N.J. Super. 552, 567 (App. Div. 2014) (citation omitted). Thus, it can be presumed that the New Jersey legislature was aware of USERRA at the time of the 2001 amendment and could have chosen to impose a limit on its unpaid leave to match the five-year limit in USERRA if that was the intent of the provision.

Nothing in the plain language or legislative history of N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1(a) indicates that the legislature created the right to unpaid military leave with an intended time limit in mind. The Legislature could have chosen to match or reference the five-year limit in USERRA or ninety-day limit for paid leave if that was its intent. Instead, the Legislature chose only to limit paid leave.

With the above rationale in mind, because the appellant was a permanent employee of a municipality and member of an organized militia and/or organized federal reserve and appropriately notified his superiors and took leave for time on active duty, his leave was at all times protected under New Jersey's military leave laws.

This segues into the next question of whether the USERRA preempts New Jersey's military leave provisions.

The USERRA was passed to protect American military personnel who performed military service and then returned to their civilian jobs. USERRA entitles reservists and other military personnel to certain employment benefits while on leave and prohibits discrimination on the basis of military membership. Specifically, USERRA entitles active service members to reemployment so long as the cumulative length of their absences does not exceed five years. 38 U.S.C. § 4312(a)(2).

The question of whether USERRA, a federal statute, preempts N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1, or more generally, any state statute providing for unpaid military leave in excess of five years, again appears to be a novel issue. By its own express terms, USERRA does not preempt state laws that provide a "right or benefit that is more

beneficial to, or is in addition to, a right or benefit provided for such person" in USERRA. See 38 U.S.C. § 4302, which states in pertinent part:

> (a) Nothing in [USERRA] shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance). . . that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in [USERRA].
>
> (b) [USERRA] supersedes any State law (including any local law or ordinance). . . that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA].

In other words, USERRA "establishes a floor, not a ceiling, for the employment and reemployment rights and benefits for those it protects." 20 C.F.R. § 1002.7(a) (2024). USERRA's preemption provision does not apply to state laws that "expand upon or supplement the rights available under the USERRA." Hamovitz v. Santa Barbara Applied Rsch, 2010 U.S. Dist. LEXIS 110937, at *21 n.8 (W.D. Pa. Oct. 19, 2010).

The determination of whether a state law is preempted by USERRA depends on whether that state law "establishes a right or benefit that is more beneficial to, or is in addition to" rights under USERRA.[3] 38 U.S.C. § 4302.

Only one case, In re Cullen, 2013 N.J. CSC LEXIS 51, Final Decision (Jan. 11, 2013) aff'd, No. A-2894-12T1 (App Div. 2014), can be found where a New Jersey decision-making body referenced the definition of "rights and benefits" under 38 U.S.C. § 4303(2). In Cullen, the Commission referenced an employer's argument that granting veterans' preference in employment decisions is not a "benefit of employment" under 38 U.S.C. § 4303(2). Id. at *13 (citing Wilborn v. Dep't of Justice, 230 F.3d 1383 (Fed. Cir.

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[3] For the purposes of this chapter [38 USCS §§ 4301 et seq.]—

(2) The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

[38 U.S.C. § 4303(2).]

2000)). The Commission did not make an explicit conclusion on the issue, instead reasoning that because the returning active-duty employee was "returned to his title, with commensurate pay," he did not have a cause of action under USERRA to challenge the appointing authority's decision to promote a different employee to a police captain position. Id. at *38.

In the absence of New Jersey precedent on this issue, the USERRA definition of "rights and benefits" should be construed liberally in favor of the veteran.

> The Supreme Court has long admonished courts to construe statutes protecting veterans liberally for the benefit of the veteran. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). Congress adopted this rule of construction when it enacted USERRA. Clarkson v. Alaska Airlines, Inc., 59 F.4th 424, 429 (9th Cir. 2023). Thus, when two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran. Travers, 8 F.4th at 208 n.25 ("A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon.").
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> [Myrick v. City of Hoover, 69 F.4th 1309, 1319 (11th Cir. 2023).]

While no New Jersey court has interpreted whether unpaid leave is a "right" or "benefit" under the USERRA definition, New Jersey courts have included unpaid leave within the definition of a "term or condition of employment," which are the first examples of "rights and benefits" in the 38 U.S.C. § 4303(2) definition. Across other employment rights contexts, New Jersey courts have defined "terms and conditions of employment" broadly.

The New Jersey Supreme Court held that "terms and conditions of employment . . . refers to those matters which are the essence of the employment relationship." Twp. of W. Windsor v. PERC, 78 N.J. 98, 110 (1978) (regarding public employees' right to grievances under N.J.S.A. 34:13A-5.3); Beasley v. Passaic Cnty., 377 N.J. Super. 585, 608 (App Div. 2005) (applying Twp. of W. Windsor to the use of "terms and conditions of

employment" in the New Jersey Conscientious Employee Protection Act). Most significantly to this matter, in the context of collective negotiations, the New Jersey Supreme Court has held that "[l]eave time for employees in the public sector is a term and condition of employment." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012). Both paid and unpaid leave have been considered a "term and condition" of employment in New Jersey. See, e.g., City of East Orange, 2021 NJ PERC LEXIS 59, aff'd, 2022 N.J. Super. Unpub. LEXIS 733 (App. Div. 2022) ("paid and unpaid leaves" are "generally mandatorily negotiable terms and conditions of employment"); Lumberton Twp. Educ. Ass'n v. Lumberton Bd. of Educ., 2002 N.J. Super. Unpub. LEXIS 8 at *7 (App. Div. 2002) (unpaid leave is a "term and condition of employment" because "paid and unpaid leaves of absences intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy.").

Again, by its own terms, USERRA does not preempt state statutes that provide for greater "rights and benefits" of employment than USERRA does. Under the broad federal definition of "rights and benefits" of employment, unpaid leave as provided for in N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 should be construed as a right or benefit not preempted by USERRA.

Accordingly, I **CONCLUDE** that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 are not preempted by USERRA and that appellant's leave was protected.

Appellant also contends that his discharge was in violation of New Jersey's Law Against Discrimination ("NJLAD") under N.J.S.A. 10:5-12 (Unlawful employment practices, discrimination). While appellant may have an action under NJLAD given the undisputed facts present here, such issue/claim is not before me at this time and will not be addressed further.

With the above in mind and turning to the charges at hand, appellant was charged with N.J.A.C. 4A:2-2.3(a)(2), Insubordination; N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-3(a)(12), Other Sufficient Cause; N.J.A.C. 4A:2-6.2(b) and (c), Resignation Not in Good Standing; and an administrative charge of violation of ACPD General Order, Volume 2 Chapter 35—Unauthorized Absences

Section II, Subsection E. All of the charges stem from appellant's military leave, which has been in excess of five years.

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline. That discipline, depending upon the incident complained of, may include a reprimand, suspension, or removal from employment. N.J.S.A. 11A:1-2, 11A:2-20; N.J.A.C. 4A:2-2.2.

The appointing authority employer has the burden of proof to establish the truth of the disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is considered to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

Based upon the undisputed facts of this case and the relevant State and Federal laws set forth above, I **CONCLUDE** that the respondent has failed to meet its burden of proof on all counts of the FNDA based upon its misinterpretation of the plain and unambiguous language of both New Jersey military leave laws and the USERRA and that its cross-motion for summary decision should be **DENIED**. I further **CONCLUDE** that appellant's motion for summary decision should be **GRANTED** and that at all times, his military leave was protected under applicable New Jersey laws and regulations.

ORDER

It is hereby **ORDERED** that appellant's motion for summary decision is **GRANTED** and the charges found under the FNDA are hereby **DISMISSED**. It is further **ORDERED** that respondent's cross-motion for summary decision is **DENIED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 7, 2025
DATE

Tama B. Hughes
TAMA B. HUGHES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TBH/dc/cb