**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**THE STATE OF OHIO**
**DEPARTMENT OF REHABILITATION AND CORRECTION**

**AND**

**SEIU/DISTRICT 1199**

**Before: Robert G. Stein**
**Grievance # 27-29-20090318-0006-02-12**

**Grievant: Kimberly Etchison**

**Advocate for the EMPLOYER:**

**Allison Vaughn**
**Labor Relations Officer**
**Bureau of Labor Relations**
**Ohio Department of Rehabilitation and Correction**
**770 West Broad Street**
**Columbus OH 43222**

**Advocate for the UNION:**

**Joshua D. Norris**
**SEIU District 1199 Advocate**
**1395 Dublin Road**
**Columbus, Ohio 43215**

## INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement ("Agreement") (Joint Exh. 1) between SEIU/District 1199, The Health Care and Social Service Union ("Union") and The State of Ohio, Department of Rehabilitation and Correction ("Employer" or "Department"). That Agreement was effective for calendar years 2006 through 2009 and included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to the terms of Article 7, Section 7.07(A) of the Agreement as a member of a panel of arbitrators chosen by the parties. A hearing was conducted on September 29, 2010 at the office of SEIU District 1199, located in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not fully recorded via a written transcript, was closed upon the parties' individual submissions of post-hearing briefs. The parties have also agreed to the submission of ten (10) joint exhibits.

## ISSUES

(A) Is the parties' dispute procedurally arbitrable?

(B) Is the parties' dispute substantively arbitrable?

(C) Did the Employer violate Article 26.09 or Article 28 of the Agreement by rehiring Vanessa Portis-Reed and reinstating her seniority credits and other benefits pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994? If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

Article 7—Grievance Procedure
Article 26.09—Military Leave of Absence
Article 28--Seniority

## BACKGROUND

Vanessa Portis-Reed ("Portis-Reed") was employed as a Correctional Program Specialist at the Dayton Correctional Institution. She had held that same position for the Department at several of its locations since March 22, 1993. On December 17, 2007, she submitted a letter of resignation to Warden Lawrence Mack. (Joint Exh. 3) That letter specifically stated: "The effective date of my resignation will be December 21, 2007. I am resigning my position to serve in the active duty or reserve components of the United States Armed Forces. (United States Army)." By September 2008, Portis-Reed had completed twenty-six (26) years of military service, including active duty from December 1982 until

July 1987 and then from that later date with the United States Army Reserves. (Joint Exh. 5) On September 4, 2008, Portis-Reed extended her enlistment with the Reserves to complete an assignment in support of Operation Enduring Freedom, in lieu of submitting a request for military retirement. Her work assignment subsequent to her resignation from the Department had involved both extensive training and then service as a military historian. Because the position proved to be too unstable and involved too many relocations, Portis-Reed's testimony indicated that she decided to return to Dayton and to seek reemployment with the Department.

After a prior phone conversation with Debbie Birdsong, Personnel Director at the Dayton Correctional Institution, Portis-Reed submitted an October 3, 2008 letter (Joint Exh. 6), indicating that she was applying for reemployment with the Department pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et. seq*. As a result, Portis-Reed was officially rehired or reinstated on December 28, 2008. (Joint Exh. 8) Although her previous position at the Dayton facility had been eliminated due to downsizing, the Department "restored Ms. Portis-Reed to her previous positions as Case Manager as if she had never left, with the exception that [she was not placed] back on her original Flyer's housing unit because she agreed she would go to the vacant housing unit." (Employer brief p. 8)

On March 28, 2009, a grievance was filed by Kimberly Etchison ("Etchison" or "Grievant") (Joint Exh. 2). Etchison's grievance alleged:

> On 3/6/09 I was informed by management that Vanessa Portis-Reed did receive all her Union seniority credits back after giving a voluntary resignation 12/17/07. Ms. Portis-Reed returned to DPC more than one year later.

A Step 3 hearing in response to the grievance was held on April 8, 2009 and was denied, based upon a finding by the hearing officer that there was no violation of the Agreement. (Joint Exh. 2) In response, the Union appealed the grievance to arbitration, pursuant to Article 7, Section 7.06, Step 4. The matter was then submitted to this arbitrator for final and binding resolution.

## SUMMARY OF THE UNION'S POSITION

(A) The Union notes that the relevant Agreement language regarding the issue of the instant grievance's timeliness is included in Section 7.06, which states:

> . . . [T]he grievance shall be reduced to writing and presented to the local or agency designee within fifteen (15) days of the date on which the grievant knew or reasonably should have had knowledge of the event.

The Union insists that this grievance complied with those provisions based on its March 18, 2009 filing date. The Union contends that the grievance was timely submitted based on March 5, 2009 e-mail communications (Union Exh. 1, 2) indicating that the seniority status of Portis-Reed had

been adjusted to reflect credit for the period between December 2007 and December 2008 when she performed active military duties. The Union argues that that specific e-mail established a date on which the Grievant knew or reasonably should have known of the events giving rise to the grievance. The Union notes that the grievance proceeded through the prescribed process with no challenge from the Employer regarding it timeliness. Purported compliance with the time requirement with the grievance's March 18, 2009 filing date was also noted in the Department's Step 3 Response (Union Exh. 2), which noted: "To the question of procedural objections, the Union/Management had none and the hearing was considered properly constituted." The Union stresses: "The grievance was filed when the issue was properly ripe and an impact had occurred." (Union brief p. 3)

(B) Regarding the substantive arbitrability of the instant grievance, the Union avers that "the parties bargained for the arbitrator's judgment in deciding the arbitrability of the issues presented to him" based on the inclusion of the following language in Section 7.07(E) of the Agreement: "Questions of arbitrability shall be decided by the arbitrator." (Union brief p. 2) The Union claims that "the question for the arbitrator to determine is whether the State in fact did or did not erroneously apply or interpret the provisions of USERRA in this situation." (Union brief p. 1) The Union points

out that the controlling language regarding the main issue of this dispute is included in Section 26.09, which states:

> The provisions of State and Federal law shall prevail for all aspects of military leave, including request for and return from such service.

The Union asserts that the parties here have agreed to submit all questions of contract interpretation and application to the arbitrator. The Union also avers that the Agreement's language "effectively incorporates by reference USERRA and any other state or federal law dealing with military leave . . . even if the CBA did not incorporate the statute by reference. . . . Nothing in the CBA prevents the arbitrator from providing his judgment on issues arising from the contract, and nothing in the contract excludes federal employment or uniformed services laws from the arbitrator's jurisdiction." (Union brief p. 2)

(C) The Union specifically notes that the instant grievance should not be viewed as an attack against one of its own members, who has demonstrated dedication to preserving freedoms and protecting U.S. citizenry. However, the Union stresses that it has a recognized duty to "insure proper application and fair and consistent protections under the collective bargaining agreement . . . in regards to standing in the bargaining unit and seniority." (Union brief p. 4)

Because she had been a member of the Army Reserves for nearly twenty-five (25) years, the Union insists that Portis-Reed was keenly aware of the protections provided under USERRA, although, in this specific situation, she purportedly "intentionally and deliberately waived them in order to gain access to her retirement funds from OPERS [The Ohio Public Employees Retirement System]. Clearly Ms. Portis-Reed was familiar with the provisions and her ability to utilize military leave and return to work after her tour of duty or assignment was completed; however in this case, for the first time in her entire tenure, she chose, without influence, to voluntarily resign her position at DCI, with no intention of returning. Nothing in her letter of resignation indicates or even mildly implies that she had any intention of returning whatsoever . . . Ms. Portis-Reed also testified that this was a voluntary decision, and that she wasn't called, mobilized or ordered to duty." (Union brief pp. 4-5) The Union also stresses that Portis-Reed could have taken military leave instead of resigning, as she had done on numerous prior occasions but, by resigning, she purportedly forfeited USERRA employment rights because she wanted to focus on her military career as an historian. The Union argues that Portis-Reed waived her rights under USERRA by voluntarily resigning from her civilian employment to fulfill her military obligation, thereby allegedly excusing the Employer from any obligation to reinstate her. (Union brief p. 6)

The Union specifically asserts that Portis-Reed did not meet the second of five (5) identified criteria to establish eligibility for reemployment protection under USERRA:

- absence from a position of civilian employment by reason of service in the uniformed services;
- advance notice given to the employer of the military service;
- applicant must have five (5) years of less of cumulative service in the uniformed services with respect to a position of employment with a particular employee;
- application for reemployment or return to work in a timely manner after conclusion of service; and
- separation from service without a disqualifying discharge or under less than honorable conditions.

The Union contends that Portis-Reed "went beyond the mere notice of leave requirement and in fact resigned her position in the agency. By this action, she took herself beyond the scope of the intended protections because the intent of the act was to guarantee reemployment to a civilian career after time spent in uniformed service . . . By erroneously assuming that Ms. Portis-Reed retained her USERRA rights, and restoring her position in the agency, [the Department] violated articles 26.09 and 28." (Union brief p. 8) Agreement Section 28.01, Exception C, entitled "Resignation," states:

> Any bargaining unit employee who voluntarily resigns from his/her position and subsequently is rehired within thirty (30) days shall suffer no loss of seniority benefits.

Based on the above assertions, the Union requests that its grievance be granted and that Portis-Reed's seniority be recalculated and that her seniority standing in the bargaining unit be properly adjusted.

## SUMMARY OF THE EMPLOYER'S POSITION

(A) In support of its position that the Grievant's submission of the instant grievance was untimely, the Department insists that the Grievant "knew or should have known that Ms. Portis-Reed's seniority credits were restored in January 2009 or at the latest February 2009 . . . [T]he fact that the Grievant filed an identical grievance on January 23, 2009 evidences the untimeliness of the instant grievance . . . The Grievant knew on January 23, 2009 that Vanessa Portis-Reed received all her union credits but attempted to circumvent contractual filing timeliness by alleging she was informed of this same information on March 3, 2009." (Employer opening statement p. 3) The Department contends that because the Grievant had knowledge of the purported "grievable event" in January she failed to meet the filing deadline clearly enunciated in the Agreement.

(B) In support of its position that the instant grievance is not substantively arbitrable, the Department cites to Section 7.02(A) of the Agreement, which defines a recognized grievance as "an alleged

violation, misinterpretation, or misapplication of specific Article(s) or Section(s) of the Agreement." The Department further claims: "In the instant case, Management did not 'interpret or apply any specific article or section of the agreement; Management applied federal law, i.e., USERRA, which governs military leave and requests for reinstatement." (Employer brief p. 2) The Employer also contends that "the Grievant does not have standing to file a grievance challenging another bargaining unit member's seniority unless or until it directly impacts that Grievant, in other words, until the issue is ripe." (Employer brief p. 3)

(C) Regarding the underlying issue of Portis-Reed's entitlement to seniority credits for the period of her active military service ending in December 2008, the Department contends that the rights or benefits provided by USERRA supersede those provisions of the Agreement. The Department notes that 38 U.S.C. § 4302(b) specifically provides:

> This chapter supersedes any State law (including any local law or ordinance), **contract**, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided in this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit. (Emphasis added)

(Joint Exh. 9) The Department explains that it restored Portis-Reed to her previous position as case manager in compliance with the "plain language" of 38 U.S.C. § 4311(a), which provides:

> 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 employer on the basis of that membership, application for membership, performance of service, application for service, or obligation. (Emphasis added)

The Employer specifically stresses that "federal case law reiterat[es] that the plain language of the statute does not preclude reemployment in light of resignation for military service even with withdrawal of pension funds." (Employer opening statement p. 5) The Employer also notes that 20 C.F.R. § 1002.88 provides the right to reemployment if the employee's resignation was due to intended military service. That section provides:

> Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the unformed service, the employee does not forfeit the right to reemployment after completing service . . .

Further, the Department urges that 20 C.F.R. § 1002.264 indicates that a service member employee may withdraw civilian pension funds and then repay a previous distribution from a pension benefit plan upon being reemployed. The Department stresses that the Union erroneously compared Portis-Reed's situation with the plaintiff in the Union-cited case of *Sutton v. City of Chesapeake*, U.S. Dist. LEXIS 57342 (E.D.Va., Norfolk Div. 2010) (Union Exh. 4) because plaintiff Sutton in that case notified his employer that he was retiring from his civilian employment after he received active duty orders from the U.S. Coast Guard. The Department notes the significance of Portis-Reed's resignation, rather than her retirement, and the fact that she did not access all of her retirement

benefits through OPERS. The Department relies on the case of *Lapine v. Town of Wellesley*, 304 F.3d 90 (1st Cir. 2002) as the basis for its claim that a veteran's expressed intention to permanently leave his civilian employment as a police officer and his failure to disclose to his civilian employer that he was in the process of seeking an active duty assignment with the U.S. Army Reserve did not result in a forfeiture or waiver of rights to reemployment under USERRA. *Lapine* at 106.

> Rights generally do not mature until the veteran requests reinstatement, and rights not yet matured will not readily be considered to have been waived . . . Even if the veteran, before or during military service, voluntarily makes statements of taken [sic] action clearly indicating an intent not to return to the employer, a waiver will not be implied from such statements or conduct because the statute was intended to keep that possibility open until the veteran returns to civilian life.

*Lapine* at 105-06. The Department claims that Portis-Reed's decision to resign, rather than to request military leave, was her right under USERRA and did not result in any express or implied waiver of her prospective rights to reemployment.

Based on these assertions, the Employer requests that the instant grievance be denied in its entirety.

**DISCUSSION**

(A) As noted above, the arbitrator's initial role in this particular matter is to determine whether the instant dispute is procedurally and substantively arbitrable and thus subject to the arbitrator's review and

jurisdiction. Once it has been determined that the parties have submitted the subject matter of a dispute to arbitration, "procedural issues, which grow out of a dispute and bear on its final resolution, should be left to an arbitrator." *John Wiley and Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 908, 918-19 (1964).

> In the final analysis, the issue of arbitrability must be determined by the arbitrator. This is especially true when issues of procedural arbitrability are in dispute. Essentially, in such circumstances, the function of an arbitrator is to decide whether or not an allegation of non-arbitrability is sound. This is often compared to the responsibility of a trial judge, who is asked to dismiss a complaint on motion for a directed verdict or failure to state a sustainable cause of action. Essentially, the decision on arbitrability by the arbitrator is part of his or her duties.

*Operating Eng'rs v. Flair Builders*, 406 U.S. 487 (1972).

In this specific case, the evidence does not clearly establish that the Grievant failed to timely submit the instant grievance. Her prior grievance, filed with another co-employee on January 23, 2009, had been determined by another factfinder to be unripe at the time of his review and was subsequently withdrawn at mediation by the grievants and the Union. It was reasonable, therefore, for the Grievant to wait until after the Department had officially established that Portis-Reed's quarterly-updated seniority record included credit for the time she had been on uniformed military duty throughout most of 2008. Once that amended record was established and noted by virtue of Union Exhibits 1 and 2 and Etchison was aware of the Employer's established conduct in

recognizing accrued seniority for Portis-Reed during her military service absence, Etchison complied with the recognized grievance procedure timelines.

Arbitrators are reluctant to resolve grievances based upon an alleged failure to comply with the time limits set forth in a grievance procedure. *School Bd. of Broward County (Fla.) and Broward Teachers' Union*, 82 LA 2096 (Raffaele 1984). The process of arbitration is intended to permit parties to have their employment issues resolved in a less formal manner than in the judicial system. Reliance upon procedural technicalities in determining a grievance, instead of addressing the substantive issues, does little to further the administration of the parties' Agreement. National policy in the United States favors the arbitration and resolution of existing and recognized disputes. The presumption of arbitrability is so strong that the U.S. Supreme Court has resolved that "doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co*. 363 U.S. 574, 80 S.Ct. 1347 (1960). The presumption of arbitrability is particularly strong when the issue is a procedural one. *St. Vincent de Paul Residence*, 199 LA 1133 (Gregory 2004). Arbitrators have often determined that doubts as to the interpretation of a contractual time limitation should be resolved in favor of arbitration. *City of Rock Island (Ill.) and Am. Fed'n of State, County, and Mun. Employees (AFSCME), Council 31, Local 988*, 116 LA 1035 (Wolff

2002); *Hayes-Albion Corp*., 73 LA 819-823 (1979); *Air Force Logistics Command*, 85 LA 1179, 1180 (1985); *Los Angeles Community College Dist. and Am. Fed'n of Teachers, College Guild, Local 1521*, 103 LA 1174 (Kaufman 1995). Thus, the arbitrator finds that the grievance is procedurally arbitrable.

The arbitrator and others who have served the parties for many years are keenly aware of the emphasis the parties contractually place on timeliness and procedural correctness, including the mutually agreed upon forfeiture language contained in the collective bargaining agreement. Therefore, the ruling regarding procedural arbitrability in this matter is confined to the evidence and testimony placed into the record and is not intended to establish a precedent.

(B) Pursuant to Section 7.07(E) of the Agreement, the arbitrator also has the recognized authority to determine if the instant matter is substantively arbitrable. As noted by the Union, the central issue in this case is whether Portis-Reed qualified for seniority benefits under USERRA. (Union opening statement p.1) The proper application of USERRA is mandatory here, based on the Agreement's Section 26.09 language requiring that "[t]he provisions of State and Federal law shall prevail for all aspects of military leave . . ."

Significantly, the Sixth Circuit Court of Appeals has succinctly determined: "USERRA claims are arbitrable." *Landis v. Pinnacle Eye Care,*

*LLC*, 537 F.3d 559, 563 (6th Cir. 2008). "Federal law favors arbitration. While the U.S. Supreme Court has not addressed the arbitrability of USERRA claims, it has repeatedly been held that statutory claims are arbitrable." *Id*. at 561.

Here, the Department has not satisfied its burden to prove that Congress intended to preclude arbitration of USERRA claims, and its arguments are insufficient to overcome the presumption in favor of arbitration. *Kitts v. Menards*, Inc., 519 F.Supp.2d 837, 844 (N.D.Ind. 2007). USERRA provides several procedures to enforce the substantive rights it provides, including non-judicial remedies. See, e.g., 38 U.S.C. §§ 2421-2426. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 105 S.Ct. 3345, 87 L.Ed.2d 444 (1985). Arbitrators often deal with disputes involving statutory claims, such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Family Medical Leave Act. "Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co*., 400 U.S. 1, 24-25,103 S.Ct.927, 74 L.Ed.2d 765

(1983). The Supreme Court has been quite specific in finding that "arbitration is merely a form of trial to be used in lieu of a trial at law. *Kitts* at 842, citing *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 480, 109 S.Ct. 1917, 104 L.Ed.2d 185 (1987).

There is no specific reference to arbitration in the text of USERRA which clearly precludes arbitration, including § 4302(b), Once the parties to a collective bargaining agreement agree to arbitrate disputes, the parties are held to participate in arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 626-27. By agreeing to arbitration, a party does not forego the substantive rights provided by USERRA and other legislation, but rather it submits its claims to an arbitral forum rather than a judicial forum. *Garrett v. Circuit City Stores, Inc*., 449 F.3d 672, 677 (5th Cir. 2006). The parties here have agreed to arbitrate grievances alleging contractual violations, including the instant matter purportedly dealing with a violation of the Agreement dealing with employee military duty and seniority rights under USERRA. The arbitrator has authority or jurisdiction to review and resolve such issues.

(C) Based upon a review of the parties' arguments and the evidence submitted into the record here, a resolution of the instant grievance arises from a disagreement regarding the interpretation and application of Sections 26.09 and 28, Exception C of the parties'

Agreement. Ohio courts have consistently held that "[t]he overruling concern when constructing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n and Cmty. Mut. Ins. Co.*, 40 Ohio St.3d 51, 544 N.E.2d 244 (1989). The primary search is for a common meaning of the parties, rather than to impose upon them obligations contrary to their own understanding. *Graphic Communications Union Dist. Council No. 2 (Local 388) and Weyerhauser Co.,* 04-1 Lab. Arb. Awards (CCH) P 3483 (Snow 2003). The underlying question to be resolved is "What should the parties mutually understand the relevant contract provisions in the Agreement to mean in the specific circumstances giving rise to the parties' dispute?" The starting point is to review the actual language adopted by the parties to express their intent and to determine what that language meant to them when the Agreement was drafted and mutually-adopted. *Package Co. of Cal. Red Bluffs Molded Fibre Plant and United Paperworkers Int'l Union, Local 1876*, 91-2 Lab. Arb. Awards (CCH) P 8457 (Pool 1991). An arbitrator's decision may not be based on competing equities or sympathies, but rather on the basis of the language which the parties themselves have adopted to govern their on-going relationship. Arbitrators cannot search for inferences and intentions that are not apparent and not actually supported by any contractual language documenting any purported intent.

As the grieving party in this matter, the Union has the burden of proof to demonstrate by at least a preponderance of the evidence that the Employer's decision or action in recognizing Portis-Reed's right to the accrual of seniority during the period she pursued active military service was, in fact, in violation of the Agreement.

> An established principle in labor arbitrations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

*Am. Std., Paintsville, Ky. And United Steelworkers of Am., Local 7926*, 05-2 Lab. Arb. Awards (CCH) P 3213 (Allen 2005).

The first rule in interpreting contractual language is the "plain meaning rule." The "plain meaning" principle of contract interpretation applies when, as in the instant matter, there is specific language in the Agreement which speaks directly to and defines the outcome of a contested issue. *Beacon Journal Pub. Co. and Graphic Communications Int'l Union, No. 42C*, 00-2 Lab. Arb. Awards (CCH) P 4548 (Ruben 1999). If the language of a contract is free from ambiguity, an arbitrator should effectuate the clearly-expressed intent of the parties. *Duluth (Minn.) City and County Employees Credit Union and AFSCME Council 96, Local 3558*, 117 LA 28 (Befort 2002). In those circumstances, there is no need for an

arbitrator to go beyond the face of a contract to resolve a dispute. *QUADCOM 9-1-1 Pub. Safety Communications System (Carpentersville, Ill.) and Local 73, Serv. Employees' Int'l Union*, 113 LA 987 (Goldstein 2000). Any "equity" arguments advanced cannot be used as a substitute for express contractual language." *Los Angeles School Dist.*, 85 LA 905, 908 (Gentile 1985). An arbitrator's decision must be based on the terms of the contract which the parties themselves have created and adopted to govern their on-going relationship, absent any inferences or intentions which are not apparent and not supported by words documenting any purported intent.

> It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

*NSS Enters., Inc. and Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 12*, 114 LA 1458 (2000).

As noted by the parties themselves, the language relevant to this dispute is included in Section 26.09 of the Agreement, which clearly states that the provisions of "federal law shall prevail for all aspects of military leave, including request for and return from such leave." As also noted by the parties themselves, the applicable legislation regarding this particular grievance is USERRA. "In 1994, Congress enacted USERRA pursuant to the War Powers Clause to encourage non-career military service, to minimize

disruptions in the lives and communities of those who serve in the uniformed services, and to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a); *Bedrosian v. Northwestern Mem'l Hosp*., 409 F.3d 840, 843-44 (7th Cir. 2005).

> Statutory protections of job security for armed services members has a long history, dating back to the Selective Training and Service Act of 1940. USERRA is the latest iteration of those protections, and was enacted in part as a result of Congress' finding that existing veterans' right statutes were overly complex and ambiguous, leaving veterans and employers confused as to their rights and responsibilities. Congress thus sought "to clarify, simplify and where necessary, strengthen the existing veterans' employment and reemployment rights provisions" Courts have recognized that "[b]ecause **USERRA** was enacted to protect the rights of veterans and members of the uniformed services, it **must be broadly construed in favor of military veterans**." (Emphasis added)
>
> . . . USERRA performs four key functions: First, it guarantees returning veterans a right of reemployment after military leave. 38 U.S.C. § 4312. Second, it prescribes the position to which such veterans are entitled upon their return. 38 U.S.C. § 4313. Third, it prevents employers from discriminating against returning veterans as a result of their military service. 38 U.S.C. § 4311. Fourth, it prevents employers from firing without cause any returning veterans within one year of reemployment. 38 U.S.C. § 4316.

*Petty v. Metro. Gov't of Nashville-Davidson County*, 538 F.3d 431, 439 (6th Cir. 2008), citing to *Francis v. Booz, Allen & Hamilton, Inc*., 452 F.3d 299, 303-04 ((4th Cir. 2006).

In response to the Grievant's claims, Portis-Reed's resignation was ineffective in waiving her statutory right to reemployment. *Wrigglesworth v. Brumbaugh*, 121 F.Supp.2d 1126, 1137-38 (W.D. Mich. 2000). The *Wrigglesworth* court also noted that a collective bargaining agreement's treatment of resigning workers cannot justify denial of the statutory right of

reemployment to a veteran. *Id*. at 1138. "Protection of job security for armed services members is an old statutory protection which dates back to the Selective Training and Service Act of 1940 . . . [The] basic premise is that 'He who was called by the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service to his county an advantage which the law withheld from those who stayed behind." *Id*. at 1130, citing to *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 284, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946).

Despite the Grievant's claim that Portis-Reed forfeited or waived her reemployment right because she had submitted a letter of resignation to the Department indicating her intention to pursue active military duty, courts have ruled: "The general rule is that a resignation from civilian employment to enter military service does not deprive a veteran of employment rights." *Winders v. People Express Airlines*, 595 F.Supp. 1512, 1518 (D.N.J. 1984), citing to *Hillard v. N.J. Army Nat'l Guard*, 527 F.Supp. 405, 410 (D.N.J. 1981); Accord, *Green v. Oktibbeha County Hosp*. 526 F. Supp. 49, 54-55 (N.D. Mass 1981); *Davis v. Halifax County Sch. Sys*., 508 F.Supp. 966, 969 (E.D.N.C. 1981); *Micalone v. Long Island R.R. Co*., 582 F.Supp. 973, 978 (S.D.N.Y. 1983). Especially in view of Portis-Reed's virtually double careers in the civilian employment and military realms, her past history of returning to her position with the Department after similar prior

periods of uniformed military service, and her compliance with the USERRA requirements, Portis-Reed's decision to refer to her departure from active civilian employment in 2007-2008 as a "resignation," rather than "military leave," did not waive her reemployment rights. The "plain language" of the Agreement assured Portis-Reed the USERRA right to reemployment with the Department.

Regarding the Grievant's reemployment rights, significant consideration must be given to the overriding principles regarding the application of USERRA rights and protections:

- USERRA is to be broadly construed in favor of its military beneficiaries. *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed. 117 (1978); *Fishgold*, 328 U.S. at 284-85,

- "A waiver of reemployment rights under USERRA must be clearly expressed to be effective. *Wrigglesworth* at 1132.

- "The 'resignation' is not truly contractual in nature in that the employee receives no consideration for his 'agreement' to resign the employment and to forfeit valuable rights of reemployment . . .[A[llowing such 'resignations' to be effective would undercut the effectiveness of the statute." *Id*. at 1132-33.

- "[T]he legislative history confirms that in enacting Section 4312 [of USERRA] Congress intended to legislate a right to reemployment separate from the right against discrimination enacted as part of Section 4311 and that this entitlement does not depend on proof of discrimination." *Id.* at 1137.

- "[T]he long history of litigation under the predecessor statutes to USERRA, including many decisions by the United States Supreme Court, have demonstrated that the Act protected the unqualified right of a veteran to re-employment upon proof of advance notice to the employer of the military

> service, proof that the service limitation is not exceeded, and proof that a timely request for reemployment is made." *Id*.

The anti-waiver provision included in 38 U.S.C. § 4302(b), which specifies that USERRA supersedes any contract or agreement "that reduces, limits or eliminates any right or benefit," also serves to ensure a veteran's accrual of seniority for the time spent in full-time military service. USERRA defines "benefit" or "benefit of employment" as any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice . . . 38 U.S.C. § 4303(2). Clearly, the accrual of seniority is a benefit of employment deserving of proper maintenance and recognition. More specifically, 38 U.S.C. § 4316(a) addresses the specific requirements regarding seniority rights under USERRA:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

The Department properly recognized accrued seniority for the period during which Portis-Reed served in the uniformed service. "The employee cannot be denied his place on the [seniority] 'escalator' because of military service." *Wrigglesworth* at 1138. USERRA's anti-discrimination provision prohibits an employer from denying

reemployment or any other benefit of employment to a person on the basis of membership in a uniformed service, performance of service, or obligation of service. 38 U.S.C. § 4311(a). Therefore, the Department properly credited Portis-Reed with seniority credit during that period when she was involved with uniformed military service.

Based upon a review of all of the parties' arguments, the evidence submitted, and the relevant case law, the arbitrator finds that the Grievant and Union have failed to meet their burden of demonstrating that there has been a violation of the Agreement.

**AWARD**

(A) The grievance is procedurally arbitrable.

(B) The grievance is substantively arbitrable.

(C) The grievance is denied on its merits.

Pursuant to Section 7.07(C), the arbitration expenses are shared equally by the parties

Respectfully submitted to the parties this __21st__ day of December 2010,

_____Robert G. Stein_____
**Robert G. Stein, NAA Arbitrator**