**OCB AWARD NUMBER: 2110**

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| **SUBJECT:** | **ARB SUMMARY # 2110** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **27-29-20090318-0006-02-12** |
| **DEPARTMENT:** | Rehabilitation and Correction |
| **UNION:** | SEIU/District 1199 |
| **ARBITRATOR:** | Robert G. Stein |
| **GRIEVANT NAME:** | Kimberly Etchison |
| **MANAGEMENT ADVOCATE:** | Allison Vaughn |
| **2ND CHAIR:** | Marissa Hartley |
| **UNION ADVOCATE:** | Joshua D. Norris |
| **ARBITRATION DATE:** | September 29, 2010 |
| **DECISION DATE:** | December 21, 2010 |
| **DECISION:** | Denied |
| **CONTRACT SECTIONS:** | Article 7—Grievance Procedure; Article 26.09—Military Leave of Absence; Article 28—Seniority |
| **OCB RESEARCH CODES:** | Arbitrability-Procedural—94.09; Grievance Procedure—93.01; Military Leave—105.06 |
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**HOLDING: Grievance DENIED. The Arbitrator found that the Employer properly recognized accrued seniority for the period during which Ms. Portis-Reed served in the uniformed service.**

The Grievant alleged that the Employer improperly credited Vanessa Portis-Reed, another DRC employee, with all her seniority credits after returning to the Department. Vanessa Portis-Reed was employed at the Dayton Correctional Institution and had worked at several of the Department’s locations since March of 1993. On December 17, 2007, Ms. Portis-Reed submitted a letter of resignation to serve in the active duty or reserve components of the United States Armed Forces. Instead of retiring from the military, Ms. Portis-Reed extended her enlistment with the Reserves. The work assignment for Ms. Portis-Reed was unstable and involved too many relocations; so she decided to return to Dayton and seek reemployment with the Department. On October 3, 2008, Ms. Portis-Reed called the Personnel Director at Dayton Correctional and submitted a letter indicating that she was applying for reemployment with the Department pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Ms. Portis-Reed was rehired on December 28, 2008. The Department restored Ms. Portis-Reed to her previous position as Case Manager as if she never left the Department. On March 28, 2009, the Grievant filed a grievance alleging that Ms. Portis-Reed should not have received all her Union seniority credits after her voluntary resignation on December 17, 2007, because she returned to the Department more than one year later.

The Union arguedthat it complied with the timeliness provisions of the contract when it filed the grievance on March 28, 2009 based on a March 5, 2009 e-mail indicating that the seniority status of Ms. 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 also argued that the arbitrator should determine whether the Employer in fact did or did not erroneously apply or interpret the provisions of USERRA. The Union argued that Ms. Portis-Reed intentionally and deliberately waived her USERRA rights in order to gain access to her retirement funds from the Ohio Public Employers Retirement System. Ms. Portis-Reed was familiar with the provisions and the ability to utilize military leave and return to work after her duty assignment was complete, but she voluntarily resigned from her position with no intention of returning. Ms. Portis-Reed forfeited her USERRA employment rights because she wanted to focus on her military career as an historian, thereby allegedly excusing the Employer from any obligation to reinstate her. The Employer violated Article 26.09 and 28 by reinstating Ms. Portis-Reed.

The Employer arguedthat 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 because the Grievant filed an identical grievance on January 23, 2009, thus making the instant grievance untimely. The Employer also argued that the Grievant did not have standing to file a grievance challenging another bargaining unit member’s seniority unless or until it directly impacted the Grievant or until the issue is ripe. The Employer argued that federal case law reiterates that the plain language of the statute does not preclude reemployment in light of resignation for military service even with withdrawal of pension funds. The decision by Ms. Portis-Reed 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.

The Arbitrator foundthat the grievance was procedurally arbitrable. It was reasonable for the Grievant to wait until the quarterly-updated seniority record was released by the Employer to file her grievance. The proper application of USERRA was mandatory in this case because the Agreement’s language requires that “the provisions of State and Federal law shall prevail for all aspects of military leave….” The arbitrator has authority or jurisdiction to review and resolve such issues. The general rule is that a resignation from civilian employment to enter military service does not deprive a veteran of employment rights. A resignation, rather than military, leave did not waive Ms. Portis-Reed’s reemployment rights. The Employer properly recognized accrued seniority for the period during which Ms. Portis-Reed served in the uniformed service.