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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

<p>DANIEL T. MITCHELL, Plaintiff, vs. THE CITY OF NORTHFIELD, VINCENT MAZZEO, JERRY MCGEE, and ROBERT JAMES</p>	<p>Civil Action No. Amended Complaint and Demand for Jury Trial</p>
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JURISDICTION

The District Court has jurisdiction over plaintiff's USERRA claims under 38 U.S.C. § 4323(b) and 28 U.S.C. § 1331.

VENUE

Venue lies under § 28 U.S.C. 1391 (b), (c), and 31 U.S.C. § 1732 (a) because Defendants transact business and all parties are located in Northfield, New Jersey.

PRELIMINARY STATEMENT

The reserves and National Guard make up about 45 percent of the military's total manpower and are divided into seven branches: The Army, Navy, Marines, Air Force, and Coast Guard each have their own dedicated reserve force. Then there is the Air National Guard and Army National Guard.

The Army and other reserves are always under the president's control. Not so with National Guard units. Though the federal government picks up much of the bill, both Air Force and Army National Guard units are assigned to and primarily controlled by states, which actually gives them greater freedom on the home front.

Plaintiff Daniel T. Mitchell is a highly decorated combat veteran of the New Jersey Air National Guard and United States Air Force, having served in support of Operation Desert Storm and Operation Enduring Freedom.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that establishes rights and responsibilities for uniformed service members and their civilian employers.

USERRA is a federal law intended to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard or other uniformed services: (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. The law is intended to encourage uniformed service so that the United States can enjoy the protection of those services, staffed by qualified people,

while maintaining a balance with the needs of private and public employers who also depend on these same individuals.

USERRA prohibits an employer from denying employment benefits to a member of the armed services because of his military obligation. 38 U.S.C. § 4311(a). A violation of USERRA occurs if the employee's military status is a motivating factor in the employer's actions, unless the employer can prove that the action would have been taken in absence of the employee's military obligation. 38 U.S.C. § 4311(c)(1).

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to perform service in the uniformed services. USERRA affects employment, reemployment and retention in employment, when employees serve in the uniformed services. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

Section 4313(a)(2)(A) of USERRA provides that a person entitled to reemployment under Section 4312 of USERRA shall be reemployed in the position of employment in which such person would have been employed if the continuous employment of such person had not been interrupted by military service or a position of like seniority, status, and pay, the duties of which the person is qualified to perform. The term "status" as used in Section 4313 is not defined under USERRA and, therefore, must be accorded its ordinary and common meaning. *U.S. v. Markey*, 393 F.3d 1132,1136 (10th Cir. 2004). Additionally, both USERRA and its predecessor statutes are to be liberally construed for the benefit of those who left private life to serve their country. *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1997); *Garrett v. Circuit City Stores, Inc.*, 338 F.Supp.2d 717, 722 (N.D. Tex. 2004). *See also* H.R. Rep. No. 103-65 at 23 (1993),

reprinted in 1994 U.S.C.C.A.N. 2449, 2456 ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced").

The exceptions to the five-year limit include initial enlistments lasting more than five years, periodic United States National Guard and reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

Returning service-members are to be reemployed in the job that they would have attained had they not been absent for military service, this is known as the "escalator principle" (See *FISHGOLD v. SULLIVAN DRYDOCK & REPAIR CORP.*, 328 U.S. 275 (1946)), with the same seniority, status and pay, as well as other rights and benefits determined by seniority.

Plaintiff Daniel Mitchell, a senior and highly qualified police officer employed by the City of Northfield, asserts this claim for discrimination in violation of both § 4311(a) and-(b). Section 4311(a) provides that "[a] person [such as Mitchell] shall not be denied . . . any benefit of employment by an employer on the basis of [his membership in the National Guard]." § 4311(a). Also, Northfield retaliated against him in violation of § 4311(b) by refusing to promote Plaintiff to the rank of Captain, changing the promotional process for the Captain's position and by refusing to consider Plaintiff for promotion to the position of Chief of Police because of his military status. Indeed, then-Mayor Vincent Mazzeo, now State Assemblyman, 2d Dist., told Plaintiff and others that Plaintiff's military obligations interfered with his police officer duties and cancelled the promotional process to change it to exclude Plaintiff from the Captain's promotional process. Defendants continue to discriminate against Plaintiff due to his military

obligations by shutting him out from consideration for the recently open and available position for Chief of Police.

Plaintiff is the most senior, the most qualified and most trained police officer within the Northfield Police Department-he clearly meets all objectively based job requirements and statutory requirements to hold the ranks of Captain and Police Chief.

Defendants in this case have expressed discontent over the fact that Plaintiff's military Guard status and time away from the Northfield police operations is voluntary, and not involuntary.

As is explained in Law Review 30 (Oct. 2001), Law Review 161 (Mar. 2005), Law Review 0719 (May 2007), and Law Review 0760 (Nov. 2007), USERRA most definitely applies equally to voluntary and involuntary military service. While it may be more palatable to employers when the service is involuntary, the policy of the Army Reserve, has been to rely primarily upon involuntary call-ups to meet the needs of the Global War on Terrorism (GWOT), now known within DOD as Other Contingency Operations (OCO). The Air National Guard and Air Force Reserve, on the other hand, rely primarily upon individual members to volunteer to meet the mission.

When a service relies primarily upon volunteerism, it can create a disproportionate burden on some civilian employers. Under the National Guard's policy, the required service will usually be on a predictable schedule (like one year in five) and the burden will be spread more equitably among civilian employers of National Guard and Reservists. However, the nature of the service, voluntary or involuntary, is not the most important take-away. The most important point is *communication*. At all times relevant in this case, Plaintiff properly notified Defendants

in advance of any military obligation pursuant to § 4312(a)(1). Plaintiff also properly complied with his obligations to report back to work promptly. § 4312(e) Plaintiff has at all times met his obligations to lessen the burden on Northfield due to his military required absences.

Our country continues to rely upon the National Guard and Reserve for major contributions in today's conflict, private employers must develop and implement policies and practices to maintain the support and good will of civilian employees. The actions of Defendants are contrary to the purposes and intent of USERRA. Importantly, and most disturbing, are the discriminatory practices by Northfield in refusing to recognize its obligation to our Country and its' citizens to work together with employee members of the military reserve and Guard to strike a balance in an effort to achieve the higher, common goal of national security.

PARTIES and KEY WITNESSES

1. Plaintiff, Daniel T. Mitchell is a highly decorated combat veteran of the New Jersey Air National Guard and United States Air Force, having served in support of Operation Desert Storm and Operation Enduring Freedom.
2. Plaintiff, Daniel T. Mitchell (**Mitchell and/or Plaintiff**) is also a Member of the Northfield Police department since 1994. He has been the Acting Captain of Northfield Police Department since December 17, 2012.
3. Defendant, the City of Northfield (**Northfield**) is a municipality formed and operated under the laws of the State of New Jersey and governed by Title 40 of the New Jersey Statutory Code. Northfield is a city in Atlantic County, New Jersey, United States with a population of 8,624 according to the 2010 US Census.

4. Northfield operates under the City form of New Jersey municipal government, led by a Mayor and a seven-member City Council, who are chosen in partisan elections held each year in the November general election. A Mayoral election is held every four years. The City Council consists of six members elected from wards to three-year terms on a staggered basis with two seats up for election each year, and one member elected at-large to a four-year term in office.
5. Defendant, Vincent Mazzeo (**Mazzeo**) is an American Democratic Party politician who has served in the New Jersey General Assembly since January 2014, representing the 2nd Legislative District. Prior to his election to the Assembly, Mazzeo had served as the mayor of Northfield, New Jersey (Mayor 2007-14). Prior to serving as mayor, Mazzeo was the president of the Northfield City Council (City of Northfield Council 2003-07).
6. James O'Neill (**O'Neill**), is the acting mayor of the City of Northfield, having assumed that position on or about 2014 when current Mayor Erland Chau, (Mayor November 2014-present) is unable to actively exercise the duties of mayor.
7. Defendant Jerry McGee (**McGee**) was the mayor of the City of Northfield after having been appointed by the council in February 2014 to fill the seat on an interim basis after Democrat Vince Mazzeo had resigned to take his seat in the New Jersey General Assembly.
8. Erland Chau (**Chau**) is the current mayor of the city of Northfield. (Mayor 2015-present)
9. Defendant Robert James (**James**), was the Chief of Police for the City of Northfield. James was the Chief of Police of the Northfield Police Department from 2006 through July 2014. In or about July 2011 the City of Northfield entered into a Shared Services

Agreement with the City of Linwood for shared police services. In July 2011, James assumed command of the Linwood Police Department as well under the Shared Services Agreement.

10. Colin Hickey (**Hickey**) is the current Chief of Police of the City of Northfield and Linwood under the Shared Services Agreement between the two municipalities as referenced above. Hickey became a police officer with Linwood in 1989, promoted to Sergeant in 2001 and to the rank of Lieutenant in 2006. He has never held the position of Captain. Hickey has announced his retirement from Chief of Police and employment with Northfield and Linwood, effective March 1, 2015.
11. Arthur Fadden (**Fadden**) was an employee-police officer of the City of Northfield having attained the rank of Captain in 2011 and retired from that position on March 30, 2013.
12. Keith Bonchi, (**Bonchi**) is the former City of Northfield Solicitor, holding this position from on or about 2007 through 2013.
13. Steven P. Scheffler (**Scheffler**) is a private practice attorney licensed to practice law in the State of New Jersey and mutual friend to Plaintiff and Vincent Mazzeo.
14. Norman Meyers, (**Meyers**) at all times relevant, is the Business Administrator, Mainland Local 77 Police Benevolent Association, the collective bargaining representative for Plaintiff and other similarly situated police officers of the Northfield Police Department.

STATEMENT OF FACTS

Plaintiff's Background, Experience and Qualifications

15. Plaintiff Daniel T. Mitchell is a highly decorated combat veteran of the New Jersey Air National Guard and United States Air Force, having served in support of Operation Desert Storm and Operation Enduring Freedom.
16. In 1994, Plaintiff Daniel T. Mitchell became employed as a Member of the Northfield Police department, serving as patrolman.
17. In 2002 Plaintiff was promoted to the rank of Sergeant.
18. In 2007 Plaintiff was promoted to the rank of Lieutenant.
19. Plaintiff has over 7 years experience in Northfield Police Administration and currently is the only experienced Administrator other than Chief of Police. Plaintiff is experienced in all aspects of Police Department; Patrol, Detective Bureau, Sergeant, Lieutenant. He has previously worked with DEA, ACPO, surrounding Municipal, County, and State Law Enforcement agencies. Moreover, Plaintiff has held the " Consistent Top Performer and Productivity Leader" title from 1994-2006 as Patrolman, in 1998 Northfield Police Officer of the Year, and, was the Squad Sergeant for top performing squad (every year) from 2002-2006. Plaintiff attended the FBI National Academy. Plaintiff attended the West Point Command and Leadership, New Jersey
20. Plaintiff's military training, experience and recognitions include, but is not limited to, Air National Guard First Sergeant Career Field Functional Manager (June 2014 to present); New Jersey Air National Guard -Chief Master Sergeant - Security Forces Training Superintendent (177th Security Forces Squadron, January 2012 – June 2014);

Enlisted Association of the National Guard of New Jersey, State Association President (October 2011-June 2014); First Sergeant, New Jersey National Guard (March 2006-January 2012); First Sergeant Career Field Functional Area Manager, National Guard Bureau-Office of the Command Chief; Anti-terrorism officer-Criminal Investigator-Team Leader/Instructor, 177th Security Forces Squadron-New Jersey Air National Guard (February 2002-March 2006).

21. Plaintiff possesses Law Enforcement and Military Administrator skills, with exceptional organizational, interpersonal, and public relations skills that develop strong rapport with individuals at all levels. Plaintiff has an outstanding record of achievement. He is able to build and direct an organization through team building, empowerment, creativity, effective management and motivation to maximize efficiency and production. Plaintiff is adept at analyzing and resolving problems and developing and instituting needed procedures and responses. In short, he possesses sound professional attitude with pride in organizational excellence and personal performance and the qualifications to hold either the rank of Captain or Chief of the Northfield Police Department and/or Linwood Police Department.

Plaintiff is Qualified and Best Suited for the Open and Available Captain's Position, but Blocked From Becoming Captain

22. In or about 2011 a vacancy existed within the department for a member to be promoted to the rank of Captain. Mitchell and Lt. Arthur Fadden applied for this promotion.
23. Northfield Police Department promotions are regulated by Northfield Ordinance 61-11 and Northfield Ordinance 61-22 – 61-27.

24. City of Northfield Ordinance 61-11 determines eligibility for promotion, specifically “All members of the Police Department shall be eligible for promotion to the next superior rank upon completion of three years of active service in the Department. Promotions to Lieutenant and Captain, respectively, shall each require one additional year of active service in the Department. Any eligible member of the Department may submit to the Chief of Police a written request to be considered for any vacancy or opening in the next superior rank.”
25. Pursuant to Ordinance 61-11, Mitchell and Faden were the only officers eligible for the promotion to the rank of Captain.
26. City of Northfield Ordinance 61-26, Para. L, states, “The Chief and Mayor shall have the responsibility of selecting the officer to be promoted from among the three top-scoring candidates. Both Mitchell and Faden voluntarily waived in writing a written and oral examination given by an “Examination Committee” due to being the only two eligible candidates and the “rule of three” in effect.
27. Both Mitchell and Faden agreed to allow the Chief of Police to establish the promotional list based upon merit and fitness and make recommendation to the Mayor. Furthermore, a “promotional examination need not be” a written test. (Rox v. Dep't of Civil Service, 141 N.J. Super. 463, 467 (App. Div. 1976). The Chief of Police was qualified to determine the manner in which the ranking was conducted and did provide for a uniform assessment of the candidates' qualifications. The process was an agreed-upon scoring process among both Mitchell and Faden.
28. The above proposal was presented to City Solicitor Keith Bonchi for legal review. Bonchi approved based upon both eligible candidates agreeing in writing to waive the

written examination. Subsequently, a ranking (list) was made by the Chief of Police and Faden was promoted.

29. Ordinance 61-26, Para. M requires, **“all test results will remain effective for a period of three years. Therefore, if any additional promotions are made within that three-year period of time, said promotions shall be made from the next top three individuals on the promotional list.”** Mitchell remained the only eligible candidate for any future vacancy to Captain of Police.
30. Chief James notified all members of the Northfield Police Department via email that Captain Faden formally announced his retirement on June 21, 2012. Faden’s effective date of retirement was April 1, 2013.
31. Chief James notified all members that was also looking to plan the promotional process for the ranks of sergeant and lieutenant. Furthermore, James advised Mitchell privately that he would be promoted to Captain upon Faden being “off the books.”
32. Mitchell assumed all duties and responsibilities of the Captain of Police effective December 17, 2012 (Captain Faden’s terminal leave start date). **Chief James announced on January 31, 2013 at the Departmental Meeting that Mitchell would be recommended for promotion to Captain of Police upon Faden being “off the books” April 1, 2013.**
33. On or about February 6, 2013, Chief James notified all members of the Northfield Police Department that Mayor Mazzeo had cancelled “all scheduled promotional testing for February 26th (Sergeant’s promotional examination) and February 28th (Lieutenants’ promotional examination). At this time, there was no reference made as to Mitchell’s promotion to Captain nor was there any indication that it would be placed on hold. James sent an email which stated in pertinent part, “Mayor Mazzeo... wishes to review the

current promotion ordinance/process in depth.” The tests had been scheduled for vacancies other than that of Captain of Police.

34. In or about this time and following the effective retirement date for Fadden of April 1, 2013, Plaintiff should have been promoted to the rank of Captain because: i.) Mitchell was the only eligible member for the vacancy of Captain of Police (Ord. 61-11); ii.) Mitchell was still considered to be the only eligible for promotion based off of the still effective September 2011 Promotional Eligibility List, which reads in relevant part, **“all test results will remain effective for a period of three years. Therefore, if any additional promotions are made within that three-year period of time, said promotions shall be made from the next top three individuals on the promotional list.”** (Ord. 61-26, Para M).
35. Mitchell participated in a fair promotional process in September of 2011. City Solicitor Bonchu rendered a legal opinion that only two members were eligible for promotion (Faden, Mitchell) based on City Ordinances and all parties (Faden, Mitchell, Chief James, Mayor Mazzeo, City of Northfield Municipal Government, City Solicitor) were satisfied with the results. The results of that process did not expire until September 2014.
36. At the time, Mitchell was the most qualified, trained, and experienced member of the Police Department.
37. Defendant Mayor Mazzeo did not promote Plaintiff because he had “concerns with the amount of military time” used by Plaintiff. Mazzeo asked Mitchell at this time, “How much longer do you have with the military?”

38. Sergeant and Shop Steward Scott Pollack communicated regularly through text messages and cell phone communications with Mayor Mazzeo, his friend and with Chief James about Plaintiff and his military status and its impact upon the promotional process.
39. Indeed, when inquiries were made to Mazzeo as to the reasons he cancelled the promotional testing, Plaintiff was informed by Mazzeo that his obligations to the Northfield Police Department should take priority over his military service. Plaintiff was informed that Mazzeo felt Plaintiff's service in the military interfered with Plaintiff's position with the Northfield police.
40. On or about August 12, 2013 Plaintiff met with Mazzeo to discuss the discriminatory treatment of Plaintiff as a result of his military service as a sergeant in the United States Air National Guard. Mazzeo made it clear that he was dissatisfied with Plaintiff's level of commitment to serving the Northfield police department due to the amount of time he spent serving his country.
41. Subsequent to that meeting on September 30, 2013 at the direction of then Mayor Mazzeo, Chief James announced promotional testing for the command level ranks of the department would be held on November 19, 2013 for the level of lieutenant and captain.
42. The directive provided by Mazzeo unfairly and in a manner designed to discriminate against Plaintiff, a veteran and member of the United States Air Force, changed the procedures previously in place to determine the promotion to the rank of captain. Mazzeo changed the rules in order to block Plaintiff from the promotion he should have received.
43. Because Mazzeo knew Plaintiff was the only eligible member for the vacant position of Captain of Police per Northfield Ordinance 61-11 & 61-26, Mazzeo changed the rules for

promotion to the rank of captain in order to discriminate and punish the Plaintiff because of his service in the military.

44. Defendant James collaborated and joined Mazzeo in preventing and/or blocking Plaintiff from becoming a permanently appointed Captain of Police within the Northfield Police Department.

Plaintiff's OPRA Requests

45. In an effort to document the discriminatory actions of Mazzeo, Plaintiff began documenting Mazzeo's actions and sought disclosure of the interdepartmental communications from Mazzeo directed to the Chief and others as a part of Mazzeo's scheme to prevent Plaintiff from ascending to the earned rank of Captain.
46. In an effort to document the discriminatory actions of Mazzeo the Plaintiff began documenting Mazzeo's actions and sought disclosure of the interdepartmental communications from Mazzeo directed to the Chief and others as a part of Mazzeo's scheme to prevent Plaintiff from ascending to the earned rank of Captain as punishment for serving our country in the military.
47. The request prepared August 11, 2014, submitted September 17, 2014 asked for production of: [A]ll records, documents, and communications (inclusive of but not limited to letters, notes, emails, text messaging) contained within public or personal domain as a public employee or elected official, authored or received by Mayor Vincent Mazzeo, Chief Robert James, or any other person (excluding labor counsel) referencing police promotion to Captain of Police, employee Lt. Daniel Mitchell, or Northfield City ordinances 61-11 or 61-24 between December 1, 2012 and April 30, 2013 Chief James

authored an email to a Mr. Fred Reeves during this time frame referencing Mayor Mazzeo's desire to 'change the promotional ordinance.' Any and all documents referencing said promotional ordinance change should be included. Also requested were any documents which discuss any plans to promote/not promote Lt. Daniel T. Mitchell to Captain of Police.

48. The request prepared September 11, 2014, submitted September 17, 2014 asked for production of: [A]ll records, documents, and communications (inclusive of but not limited to letters, notes, emails, text messaging) contained within public or personal domain as a public employee or elected official, Councilman James O'Neil, Mayor Vincent Mazzeo, Chief Robert James, Mayor Jerry McGee, any other person (excluding labor counsel) referencing police [promotion] or Northfield City ordinances 61-11 or 61-24 between December 1, 2013 and June 1, 2014. Councilman O'Neill authored emails during this time frame and as time as Mayor inquiring why promotions were not made. Furthermore, O'Neill inquired and desired to make promotions, well within his authority as sworn Mayor of City of Northfield.
49. A response to the above requests was received by Mr. Mitchell on September 24, 2014. A large portion of the content of the documents provided, specifically emails, was redacted.
50. The redacted material does not satisfy the disclosure required by N.J.S.A. 47:1A-5.f.
51. Additionally Plaintiff has knowledge of electronic mail which was not disclosed with the materials provided on September 24, 2014. It is anticipated that the documents not produced and / or inappropriately redacted will substantiate Plaintiff's claim.

52. It is anticipated that the documents inappropriately withheld and/ or inappropriately redacted will support anticipated legal claims.

53. The government records produced by the custodian did not include any e-mails generated from Mazzeo regarding the averments in this complaint, despite the fact that Mazzeo was copied on several of the electronic messages.

54. On information and belief Mazzeo is in possession of government records which should have been disclosed in accordance with the Open Public Records Act and knowingly and willfully denied access to the records under the totality of the circumstances.

Chief James Retires; Plaintiff Attempts to Retire Knowing His Future Promotional Opportunities are Foreclosed

55. On or about June 30, 2014, knowing that Chief James was retiring on June 30, 2014, and knowing that his military orders were now a barrier to future advancement within the Northfield Police Department, he requested the Northfield CFO to consider a separation agreement proposed by Plaintiff. The CFO and City Clerk met with Plaintiff and advised Plaintiff that they would take Plaintiff's proposal to City council for consideration. On or about May 27, 2014 the governing body discussed the proposal in Executive Session. Plaintiff was never provided with a response.

56. Thereafter, the Police Benevolent Association (PBA), Plaintiff's union, attempted on multiple occasions to discuss Plaintiff's promotion to the rank of captain with-then Mayor Jerry McGee. Mayor McGee refused to discuss anything concerning Plaintiff and the promotional position denied to him. At this time, however, Plaintiff was Acting

Captain. The Defendants, however, refused to promote him to the position on a permanent basis.

57. Prior to Mayor Mazzeo's departure for the Northfield City government, a mutual friend to Mazzeo and Plaintiff by the name of Steven Scheffler was trying to mediate between Mazzeo and Plaintiff regarding the promotional issue. Sheffler was a prior City Solicitor to the City of Northfield. Scheffler told Plaintiff that in one of his discussions with Mazzeo that Mazzeo had told him that he "had concerns with the amount of military time" Plaintiff used and he "didn't know what side [Mitchell] was on."

58. Mazzeo also met with Plaintiff's Local Union representative, Norm Meyers, with the meeting last about 5 minutes ending by Mazzeo telling Meyers, "I'm not promoting Mitchell!"

Hickey Becomes Chief; Announces Retirement; Plaintiff is By-Passed for two Chief of Police Promotional Opportunity

59. On July 1, 2015, Colin Hickey took over as Chief of Linwood and Northfield under the Shared Services Agreement upon the retirement of James. Hickey is the current Chief of Police of the City of Northfield and Linwood under the Shared Services Agreement between the two municipalities..Hickey became a police officer with Linwood in 1989, promoted to Sergeant in 2001 and to the rank of Lieutenant in 2006. He has never held the position of Captain.

60. Plaintiff was not afforded the opportunity to compete for the Chief's position....need more info....

61. Hickey has announced his retirement from Chief of Police and employment with Northfield and Linwood, effective March 1, 2015.
62. More info about Dan's new job with the National Guard and when that began and how long it will last; and the Chief examination process after James and now after Hickey. Dan to supply...

LEGAL CLAIMS

COUNT I

Uniformed Services Employment and Reemployment Rights Act

63. The above paragraphs are repeated at length as if set forth herein.
64. The Uniformed Services Employment and Reemployment Rights Act ("USERRA") provides, in relevant part, as follows: A person who is a member of ... 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 ... or obligation. 38 U.S.C. § 4311(a). It elaborates further: "An employer shall be considered to have engaged in actions prohibited ... under subsection (a), if the person's membership ... 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." *Id.* at § 4311(c).
65. Thus the statute, by its terms, prohibits discriminatory actions where a person's military status is simply *a* motivating factor, not *the* sole motivating factor.
66. An employee making a USERRA discrimination claim shoulders "the initial burden of showing by a preponderance of the evidence that the employee's military service was 'a

substantial or motivating factor' in the adverse employment action." *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed.Cir.2001) (quoting *National Labor Relations Bd. v. Transportation Management Corp.*, 462 U.S. 393, 400–01, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983)abrogated by *Director, Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (on other grounds)). "If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *Sheehan*, 240 F.3d at 1013. "The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence." *Id.* at 1014 (citations omitted).

67. Under USERRA, discriminatory motive *505505 may be reasonably inferred from a variety of circumstantial factors (as discrimination is rarely open or notorious), including: proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id.* In order to determine whether "the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered," including the employer's explanation for the actions taken. *Id.* Once the employee has met this burden, "the burden shifts to the employer to prove the affirmative defense that

legitimate reasons, standing alone, would have induced the employer to take the same adverse action.” *Id.*

68. Plaintiff sets forth evidence of both direct and circumstantial evidence which establishes a prima facie case of discrimination and retaliation under USERRA as described in more detail above.

69. Moreover, Plaintiff has met his burden of proving that his Military Obligations were a motivating factor in Defendant's decision not to promote him to Captain and/or Chief of Police.

70. The Supreme Court has stated that USERRA is “very similar to Title VII,” which of course “prohibits employment discrimination ‘because of ... race, color, religion, sex, or national origin’ and states that such discrimination is established when one of those factors ‘was a motivating factor for any employment practice, even though other factors also motivated the practice.’ ” *Staub v. Proctor Hosp.*, 200 U.S. 321, 131 S.Ct. 1186, 1191, 179 L.Ed.2d 144(2011) (citing 42 U.S.C. §§ 2000e–2(a), (m)). However, analysis of USERRA claims is a two-pronged burden shifting analysis. *Hart v. Hillside Twp.*, CIV.A. 03–5841, 2006 WL 756000 (D.N.J. Mar. 17, 2006)*aff'd sub nom. Hart v. Twp. of Hillside*, 228 Fed.Appx. 159 (3d Cir.2007). This is markedly different from the three-pronged *McDonnell Douglas* burden shifting analysis used in Title VII cases, where the burden of persuasion always remains with the employee. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. burden of persuasion then shifts to the Township to prove it had legitimate, nondiscriminatory reasons for making its decision.

71. The burden shifts to the Defendant, however, the *Defendant Cannot Meet Its Burden of Proving that it Had Legitimate Reasons.*

72. As a direct and proximate result of Defendants unlawful actions, Plaintiff has been discriminated against in violation of USERRA and seeks recompense for the unlawful conduct including but not necessarily limited to make-whole economic damages, equitable relief to promotion to the rank of Captain, pain and suffering damages for the angst, emotional upheaval and aggravation, stress and uncertainty caused by Defendants' unlawful actions,

WHEREFORE, Plaintiff seeks damages to vindicate his rights under the laws and remedy the egregious loss and damages inflicted upon him by Defendants, including, but not necessarily limited to compensatory damages, emotional distress, bodily harm and injury, physical illness, economic damages, injunctive and equitable relief, everyday and daily stress caused by Defendants illegal acts, punitive damages and any other damages the Court deems fair and just.

DEMAND FOR JURY TRIAL

Plaintiff herewith demands a trial by jury on all issues so triable.

MY RIGHTS LAWYERS, LLC

By: /s/ Michelle J. Douglass
Michelle J. Douglass, Esq.
Attorney for Plaintiff

Date: March 24, 2015

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<p>DANIEL T. MITCHELL,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>CITY OF NORTHFIELD, VINCENT MAZZEO, JERRY MCGEE AND ROBERT JAMES,</p> <p style="text-align: center;">Defendants.</p>	<p>UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE CIVIL NO. 15-cv-01499-NLH-LMW</p> <p style="text-align: center;">Civil Action</p> <p>SETTLEMENT AGREEMENT and GENERAL RELEASE</p>
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This Settlement Agreement and General Release (hereinafter "this Agreement") entered into and by and among DANIEL T. MITCHELL ("Mitchell" or "Plaintiff"), Releasor, and the CITY of NORTHFIELD ("Northfield" or "Defendant"), Releasee, collectively known as "the Parties."

Whereas, Releasor, as Plaintiff, filed a Complaint against Releasee in the United States District Court for the District of New Jersey, Camden Vicinage, entitled DANIEL T. MITCHELL v. CITY OF NORTHFIELD, VINCENT MAZZEO, JERRY MCGEE AND ROBERT JAMES, bearing Civil No. 15-cv-01499-NLH-LMW, and has asserted claims against Releasee; and,

Whereas, the Parties wish to settle all controversies among them involving Plaintiff, including Plaintiff's claims bearing Civil No. 15-cv-01499-NLH-LMW, and any and all related

claims which could have been asserted, whether they are presently known or unknown,

Whereas, Releasee denies each and every allegation made by Plaintiff, and enters into this agreement for reasons other than the merits of Plaintiff's claims; and,

Whereas, Plaintiff stands by the merits of his claims against Releasee and agrees that the merits of his claims against Releasee are disputed and have not been adjudicated by any Court; and

Whereas defendants Vincent Mazzeo, Jerry McGee and Robert James have previously been dismissed;

Now, and for the consideration of the agreements, covenants, and conditions herein contained, the adequacy and sufficiency of which is expressly acknowledged by the Parties hereto, the Parties agree as follows:

1. **SETTLEMENT PAYMENTS.**

- a. After Releasor's execution and presentation of the attached Release and Stipulation of Dismissal with Prejudice, plaintiff shall be paid the total amount of Two Hundred Thousand dollars (\$200,000.00), which payment shall constitute consideration for the execution of this agreement and any other documents necessary to resolve and compromise this matter, with finality and with prejudice.
- b. Releasee takes no position on the allocation of the settlement amount, which represents a global settlement of all claims presented and which could have been presented. All prayers for relief are dismissed with prejudice in consideration for the sum tendered.
- c. Plaintiff agrees that, but for this Settlement Agreement and General Release, he would not be entitled to the aforesaid payment.

- d. The settlement amount shall be paid by Releasee in the form of two checks, one check payable to Daniel T. Mitchell in the amount of One Hundred Thirty Thousand dollars (\$130,000.00) and the other check payable to Michelle Douglass, Esq. in the amount of Seventy Thousand (\$70,000.00). The City of Northfield shall issue to Mr. Mitchell and Ms. Douglass 1099 Misc. forms in 2017.
- e. No payment shall be released without an executed Release and Settlement Agreement and signed Stipulation of Dismissal with Prejudice for the matter bearing Civil No. 15-cv-01499-NLH-LMW.

ADDITIONAL TERMS.

- a. The City of Northfield will permanently promote Daniel T. Mitchell to the rank of Captain effective retroactive to April 1, 2013 and shall submit all necessary paperwork to the State of New Jersey Pension Board no later than June 1, 2016.
- b. Daniel T. Mitchell will retire upon being promoted to the permanent rank of Captain, with the parties intending that his retirement take effect no later than June 1, 2016. The parties understand, acknowledge, and agree that, due to circumstances beyond the control of both parties, the June 1, 2016 date may need to be changed, and agree to cooperate with one another to accomplish the goal of having Mitchell retire as soon as practicable. Mitchell's retirement is also contingent upon Northfield paying the amount of \$200,000 as specified in paragraphs 1(a) and 1(d) above. As soon as practicable upon receipt of notice from the Pension Board of his retirement date, Northfield will remit to Mitchell his accrued time of 50.625 weeks.

- c. The City of Northfield agrees to cooperate with Mitchell regarding the paperwork to be completed in order to effectuate Mitchell's retirement as Captain effective June 1, 2016.
- d. Daniel T. Mitchell agrees to purchase service credit for his military service through the pension system for the required amount to enable him to retire with 25 years service credit. That amount is currently estimated to be approximately \$55,000.
- e. The City of Northfield agrees that upon Daniel T. Mitchell purchasing service credits to buy back military time to satisfy the 25 years service credit under PFRS, and upon proof that Mitchell is considered a 25-year service credit employee for purposes of retirement as a 25-year member of PFRS, Northfield shall provide, at no cost to Mitchell, except for any contribution required by law, such medical benefits as are due by law and as provided for by the City in compliance with Resolution No. 122-78 and N.J.S.A. 40A:10-23 upon retirement of 25 years or more of service credit in the Police and Fireman's Retirement System (PFRS). The health benefits coverage shall be the same as then currently being provided to active employees.

2. **DISMISSAL OF ACTION.**

Plaintiff understands and agrees that counsel for Releasee will file with the United States District Court for the District of New Jersey, Camden Vicinage an executed Stipulation of Dismissal. The Parties understand and agree that the terms of the aforesaid Dismissal are

expressly incorporated by reference within the Settlement Agreement and General Release as if fully set forth herein.

3. **RELEASE.**

In consideration for the payment and other consideration provided for in this agreement, Plaintiff, personally and for his estate and/or his heirs, waives, releases, and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against Releasee and any and all of its officers, officials, employees (present and former), and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event, or omission of any kind occurring before the execution of this Agreement, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law, expressly including but not limited to any potential claim relating to the following (including any amendments thereto):

- a. The National Labor Relations Act;
- b. Title VII of the Civil Rights Act of 1964;
- c. Sections 1981 through 1988 of Title 42 of United States Code;
- d. The Employment Retirement Income Security Act of 1974;
- e. The Immigration Reform Control Act;
- f. The Americans with Disabilities Act;
- g. The Age Discrimination in Employment Act of 1967;
- h. The Fair Labor Standards Act;
- i. The Occupational Safety and Health Act;

- j. The Family and Medical Leave Act of 1993;
- k. The Equal Pay Act;
- l. The New Jersey Law Against Discrimination;
- m. The New Jersey Minimum Wage Law;
- n. The Equal Pay Law for New Jersey;
- o. The New Jersey Worker Health and Safety Act;
- p. The New Jersey Family Leave Act;
- q. The New Jersey Conscientious Employee Protection Act;
- r. The Uniformed Services Employment and Reemployment Act;
- s. Any anti-retaliation provision of any statute or law;
- t. Any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any provision of any federal or state constitution, any public policy, contract, tort or common law, or any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorney's fees and litigation costs).

Plaintiff acknowledges that he has twenty-one (21) days to review and consider this Release, which waives Plaintiff's rights and claims under the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and that his execution of this Release prior to the expiration of that time period constitutes an express waiver to the consideration period. It is expressly understood by and among the Parties that this Agreement shall not serve to bar plaintiff from pursuing relief under the Worker's Compensation Act for claims known and unknown as of the date of this Agreement and which are separate from claims encompassed in the civil action filed under Civil No. 15-cv-01499-NLH-LMW.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.**

Plaintiff waives his right to file any charge or complaint on his own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against Releasee except as such waiver is prohibited by law. It is expressly understood by and among the Parties that this Agreement shall not serve to bar plaintiff from pursuing relief under the Worker's Compensation Act for claims known and unknown as of the date of this Agreement and which are separate from claims encompassed in the civil action filed under Civil No. 15-cv-01499-NLH-LMW.

5. **CONFIDENTIALITY.**

The Parties agree that this Release contains no confidentiality agreement. However, the parties agree as an honorable undertaking among themselves not to discuss or divulge the terms of the settlement, except as required by any state or federal law, including OPRA requests for documents related to the settlement.

6. **NON-DISPARAGEMENT.**

The Parties agree not to make any disparaging statements concerning one another, or to defame one another in any manner to any person or entity. The Parties agree not to authorize any person or entity to make any disparaging statements about one another or to defame one another to any person or entity.

7. **DEFENSE/INDEMNIFICATION.**

Releasor agrees to defend Releasee in any action brought by any source as a result of Releasor's allocation of the settlement amount and to indemnify and hold Releasee harmless from any judgment, penalty, fine or other financial assessment against Releasee stemming from such action.

Releasor's counsel agrees to be solely responsible for any and all judgement searches required by law, including, but not limited to child-support Orders, and to defend and indemnify Releasee in any action of any description resulting from a judgment against plaintiff entered prior to the date of this Release.

8. **NO ADMISSION OF LIABILITY.**

It is expressly understood that neither the execution of this agreement, nor any other action taken by Releasee in conjunction with Plaintiff's alleged claims or this settlement, constitute admission by Releasee of any violation of any law, duty or obligation and that Releasees specifically deny any liability to Plaintiff or to any other person.

9. **ENTIRE AGREEMENT.**

This Agreement contains the sole and entire Agreement between the Parties. Plaintiff represents and acknowledges that, prior to executing this Agreement, he consulted with his attorney and that he has had ample time to do so, and that he obtained the advice of his counsel prior to making the decision to execute this Agreement, and that he has not relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement.

No other promises or agreements shall be binding unless in writing, signed by the Parties hereto, and expressly stated to represent an amendment to this Agreement.

10. **SEVERABILITY.**

The Parties agree that if any Court declares any portion of this Agreement unenforceable, the remaining portion or portions shall be fully enforceable.

Plaintiff hereby understands and agrees that he has sought and received the advice of his attorney prior to executing this Agreement, and that he has had ample time to do so and that he knowingly and voluntarily has decided to settle his claims against Releasee after thoroughly reviewing this Agreement with his attorney.

Daniel T. Mitchell, Plaintiff and Releasor

STATE OF NEW JERSEY :

: ss

COUNTY OF _____:

Sworn to and subscribed before me this _____ day of 2016	