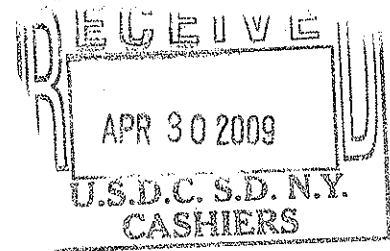


JUDGE RAKOFF

09 CV 4241

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EMILIO PENNES, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 NEW YORK CITY DEPARTMENT :
 OF CORRECTION, :
 :
 :
 Defendant. :
-----X

COMPLAINT
09 Civ. _____
ECF CASE

Plaintiff Emilio Pennes ("Pennes"), by his undersigned attorneys from the U.S. Department of Justice pursuant to 38 U.S.C. § 4323, alleges as follows:
1. This civil action is brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 et seq. ("USERRA").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 38 U.S.C. § 4323(b) and 28 U.S.C. § 1331.
3. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) because defendant

New York City Department of Correction (“NYCDOC”) maintains its principal place of business in this district. Additionally, venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district.

PARTIES

4. Pennes is an employee of NYCDOC who resides in New City, New York, within the jurisdiction of this Court.

5. NYCDOC is located within the jurisdiction of this Court and is an employer within the meaning of 38 U.S.C. § 4303(4)(A) and 38 U.S.C. § 4323(i).

FACTUAL ALLEGATIONS

6. Pennes has been a member of the United States Army Reserve since 1985 and currently holds the rank of lieutenant colonel.

7. In 1987, Pennes began work at the NYCDOC. From August 20, 1999 to the present, he has held the position of Assistant Deputy Warden.

8. Since 1985, Pennes has performed his Army Reserve duties and has been called to active duty on multiple occasions. For example, from November 14, 2004 to November 13, 2005, he served in Iraq, in the area of Tikrit. Upon his return to the United States, he resumed his position as Assistant Deputy Warden with NYCDOC.

9. On February 6, 2007, Pennes was ordered to active duty in support of Operation Enduring Freedom. As part of that activation, Pennes was ordered to Orlando, Florida, where he commanded an administrative unit whose purpose was to provide medical and psychological support to soldiers returning from Iraq.

10. Before Pennes was activated on February 6, 2007, he had applied for a promotion

to the position of Deputy Warden with NYCDOC.

11. On or about March 15, 2007, the secretary to NYCDOC Assistant Commissioner Alan Vengersky called Pennes in Florida to advise him that NYCDOC would like to interview him for the position of Deputy Warden. The secretary advised Pennes that the interviews were scheduled for March 29, 2007.

12. Pennes explained that he could not appear for an interview on March 29, 2007 because he was on active duty with the military in Florida. Pennes explained, however, that he had previously been approved for leave to be in New York City from March 23 to March 26, 2007, and he could appear for an interview then. NYCDOC refused to permit Pennes to interview on these dates.

13. By memorandum dated March 26, 2007, Pennes asked Assistant Commissioner Vengersky whether he could have a telephonic interview or a video conference interview. NYCDOC refused to interview Pennes by phone or videoconference, and refused to change the date of the interview.

14. NYCDOC interviewed 12 other candidates for the position, but did not interview Pennes.

15. By memorandum dated April 6, 2007, Assistant Commissioner Vengersky forwarded to the Chief of the Department a list, ranking 13 candidates for the position of Deputy Warden. The list was separated into four different bands based upon the candidates' performance in the application process. Pennes was ranked first out of 13, and only one other candidate was ranked in the first band with Pennes. Next to Pennes' name on the list was an asterisk, which directed the reader to text at the end of the memorandum that stated: "Emilio

Pennes was banded sufficiently high for an interview, but could not attend the interview as he is serving in the military.”

16. The Chief of the Department passed over Pennes, who was ranked at number one, and selected the next seven applicants, ranked numbers two through eight, for promotion to the position of Deputy Warden.

17. On July 21, 2007, in accordance with Section 4322(a)(1) of USERRA, Pennes filed a complaint against NYCDOC with the Veterans’ Employment and Training Service of the United States Department of Labor.

18. NYCDOC violated Section 4311 of USERRA, among other ways, by discriminating against Pennes by failing to permit him to interview for the Deputy Warden position and thereby failing to promote him to the position of Deputy Warden based upon his military service.

19. NYCDOC’s actions were willful under Section 4323(d)(1)(C) of USERRA.

20. As a result of NYCDOC’s unlawful discrimination, Pennes suffered the loss of a promotion as well as earnings and other benefits of employment in an amount to be presented at trial.

PRAYER FOR RELIEF

WHEREFORE, Pennes prays that the Court enter judgment against NYCDOC, its officers, agents, employees, successors and all persons in active concert or participation with it, as follows:

A. Declare that NYCDOC’s failure to promote Pennes was motivated by his military service and was therefore in violation of USERRA, 38 U.S.C. § 4311;

B. Order that NYCDOC fully comply with the provisions of USERRA by offering to promote Pennes to Deputy Warden, the position that he would now occupy if NYCDOC had not improperly denied his promotion, and by paying Pennes all amounts due to him for loss of wages and benefits caused by NYCDOC's violation of USERRA;

C. Enjoin NYCDOC from taking any action against Pennes that fails to comply with the provisions of USERRA;

D. Award Pennes liquidated damages in an amount equal to the amount of lost wages and other benefits suffered by reason of NYCDOC's willful violation of USERRA, pursuant to 38 U.S.C. § 4323(d)(1)(C);

E. Award Pennes prejudgment interest on the amount of lost wages and other benefits due; and

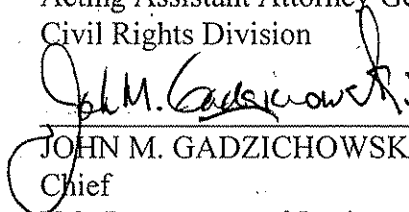
F. Grant such other relief as may be just.

JURY DEMAND

Plaintiff demands trial by jury.

LORETTA KING
Acting Assistant Attorney General
Civil Rights Division

By:




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Dated:

April 30, 2009
New York, New York

LEV L. DASSIN
Acting United States Attorney

By:



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