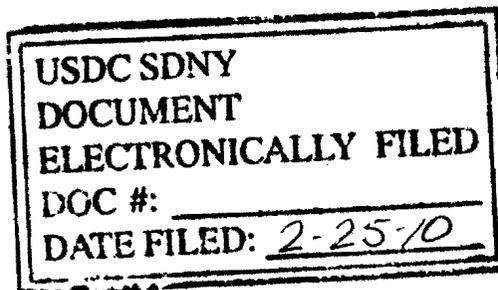


*RAKOFF, J*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
EMILIO PENNES,

Plaintiff,

- against -

NEW YORK CITY DEPARTMENT  
OF CORRECTION,

Defendant.  
-----X

**STIPULATION AND ORDER**

09 Civ. 4241 (JSR)

WHEREAS plaintiff, Emilio Pennes ("Pennes"), commenced this action in the United States District Court for the Southern District of New York, by Complaint filed April 30, 2009 (the "Action"), alleging that defendant, the New York City Department of Correction ("NYCDOC"), violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq.* ("USERRA") by discriminating against Pennes because of his military service and by failing to promote him to the position of Deputy Warden, based upon his military service;

WHEREAS NYCDOC has denied any and all liability arising out of Pennes' allegations; and

WHEREAS as a result of settlement discussions, Pennes and NYCDOC have resolved their differences and have agreed that this action should be settled by entry of this Stipulation and Order ("Stipulation and Order") to avoid the time, expense, and uncertainty of litigation. It is the intent of the parties that this Stipulation and Order be a final and binding settlement in full disposition of any and all claims alleged in the Complaint filed in this case;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

**STIPULATED FACTS**

1. Pursuant to USERRA, the parties acknowledge the jurisdiction of the United States District Court for the Southern District of New York over the subject matter of this Action and of the parties to this case for the purpose of entering this Stipulation and Order and, if necessary, enforcing this Stipulation and Order.

2. Venue is proper in this district for purposes of this Stipulation and Order and any proceedings related to this Stipulation and Order. NYCDOC agrees that all statutory conditions precedent to the institution of this lawsuit have been fulfilled.

**FINDINGS**

3. Having examined the terms and provisions of the Stipulation and Order, the Court finds the following:

- a. The Court has jurisdiction over the subject matter of this action and the parties to this action.
- b. The terms and provisions of this Stipulation and Order are lawful, fair, reasonable, and just. The rights of NYCDOC and Pennes are protected adequately by this Stipulation and Order.
- c. This Stipulation and Order conforms with the Federal Rules of Civil Procedure and USERRA, and is not in derogation of the rights and privileges of any person. The entry of this Stipulation and Order will further the objectives of USERRA, and will be in the best interests of the parties.

**NON-ADMISSION**

4. This Stipulation and Order, being entered with the consent of Pennes and NYCDOC, shall not constitute an adjudication or finding on the merits of the Action and shall not be construed as an admission by NYCDOC of any violations of USERRA, or any other law, rule or regulation dealing with or in connection with equal employment opportunities.

**INJUNCTIVE PROVISIONS**

5. NYCDOC shall not fail or refuse to reassign or promote any employee based on the military service obligation, application for military service, or past or present military service of such individual or employee, in violation of USERRA.

6. NYCDOC shall not take any action against any person, including but not limited to Pennes, that constitutes retaliation or interference with the exercise of such person's rights under USERRA because such person gave testimony or assistance or participated in any manner in any investigation or proceeding in connection with this case.

**REMEDIAL REQUIREMENTS**

7. Without admitting the allegations set forth in the Complaint, and in settlement of Pennes' claims in this Action, NYCDOC shall, within thirty (30) days from the date of entry of this Stipulation and Order, reassign Pennes to the position of Deputy Warden effective June 20, 2007, subject to all rights and remedies NYCDOC has with respect to employees serving in the position of Deputy Warden. The current annual rate of pay for the position of Deputy Warden is \$111,466, plus benefits.

8. Within 60 days from the date of entry of this Stipulation and Order, NYCDOC

shall also pay Pennes his full retroactive pay, and including any necessary adjustments to Pennes' pension or retirement benefits, and payments to account for differences in holiday pay and annuity fund contributions, to reflect his effective promotion date of June 20, 2007. NYCDOC will pay Pennes retroactive pay and benefits for the period beginning on June 20, 2007, up until the date that Pennes is actually reassigned to Deputy Warden, less those employee tax withholdings and employee contributions on the monetary payment as required by law, which NYCDOC timely shall pay to the appropriate governmental agencies on behalf of Pennes. NYCDOC shall separately pay to the appropriate governmental agencies the appropriate employer's contribution due on the monetary payment; i.e., the employer's contribution shall not be deducted from any part of the monetary payment to Pennes.

NYCDOC shall pay the required amount to Pennes by mailing a check addressed as follows:

Emilio Pennes  
29 Cypress Street  
New City, NY 10956

NYCDOC shall provide documentary evidence of having paid Pennes by mailing a photocopy of the check evidencing payment together with proof of mailing to the following address within twenty-one (21) days of payment to Pennes:

David J. Kennedy  
Chief, Civil Rights Unit  
United States Attorney's Office  
Southern District of New York  
86 Chambers Street  
New York, NY 10007

9. For and in consideration of the relief being provided to him as described in paragraphs 7 and 8 of this Stipulation and Order, Pennes releases and discharges NYCDOC from the claims identified in the Complaint filed in this case and the complaint Pennes filed with the Department of Labor, complaint number NY-2007-00039-20-G ("DOL Complaint"). Pennes further agrees to release additional claims that were not asserted in this case, but that Pennes could have asserted, arising out of the events alleged in the Complaint or DOL Complaint. Because such non-USERRA claims are beyond the jurisdiction of the Department of Justice's enforcement authority in this case, and also beyond the scope of the Department of Justice's limited representation agreement with Pennes, Pennes acknowledges that he has been advised to consult with a private attorney before executing this Stipulation and Order. In addition, Pennes acknowledges in accordance with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), he: (i) enters into this Stipulation and Order voluntarily and with full understanding and knowledge of its consequences; (ii) has been advised to consult with an attorney before executing this Stipulation and Order; (iii) has been provided with at least a twenty-one (21) day period to review and consider whether to sign this Stipulation and Order; and (iv) has been advised that he has seven (7) days following execution to revoke it (the "Revocation Period"). This Stipulation and Order will not be effective and enforceable until the Revocation Period has expired. This release and discharge of claims is subject only to NYCDOC's compliance with the terms of this Stipulation and Order.

**DISPUTE RESOLUTION AND COMPLIANCE**

10. The Court shall retain jurisdiction and shall have all available equitable powers, including injunctive relief, to enforce this Stipulation and Order, for the time period specified in

paragraph 16. Upon motion of either party, the Court may schedule a hearing for the purpose of reviewing compliance with this Stipulation and Order. The parties shall engage in good faith efforts to resolve any dispute concerning compliance prior to seeking review by the Court. The parties shall be required to give notice to each other twenty (20) business days before moving for review by the Court.

**MISCELLANEOUS**

11. All parties shall bear their own costs and expenses of litigation, including attorneys' fees.

12. If any provision of this Stipulation and Order is found to be unlawful, only the specific provision in question shall be affected and the other provisions will remain in full force and effect.

13. The terms of this Stipulation and Order are and shall be binding upon the present and future directors, employees, agents, administrators, heirs, successors, representatives and assigns of NYCDOC.

14. This Stipulation and Order constitutes the entire agreement and commitments of the parties. Any modifications to this Stipulation and Order must be mutually agreed upon and memorialized in writing signed by Pennes and NYCDOC.

**EFFECTIVE DATE**

15. The effective date of this Stipulation and Order shall be the date upon which it is entered by the Court.

16. This Stipulation and Order shall expire without further order of this Court two years from the effective date.

17. In consideration of and subject to the foregoing, this Action is hereby dismissed with prejudice and without costs, expenses, or fees in excess of the amounts specified above.

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
Counsel for Plaintiff

By:



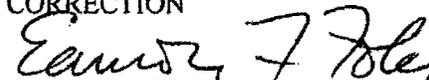
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EMILIO PENNES  
Plaintiff

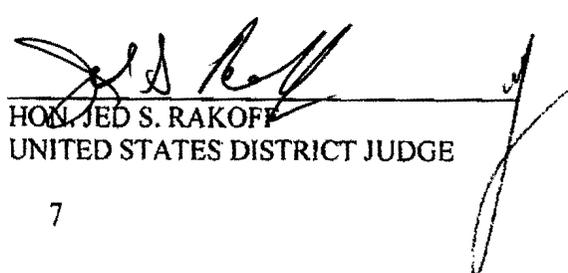
NEW YORK CITY DEPARTMENT OF  
CORRECTION

By:



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Tel. No.: (212) 788-0781  
[efoley@law.nyc.gov](mailto:efoley@law.nyc.gov)

APPROVED and ORDERED this 24<sup>th</sup> day of February, 2010



HON. JED S. RAKOFF  
UNITED STATES DISTRICT JUDGE