

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :
Plaintiff, :
 : CIVIL NO.: 1:11-CV-2004
v. : (Chief Judge Yvette Kane)
 :
PENNSYLVANIA DEPARTMENT :
OF CORRECTIONS, :
Defendant. :

ORDER

AND NOW, this 19th day of July 2012, based on the joint motion of the Parties and the attached settlement agreement representing that they have resolved all the claims in this action, IT IS HEREBY ORDERED as follows:

1. This case is dismissed without costs and prejudice to any party reinstating the action within 60 days of the date of this order, upon a showing of good cause, if settlement is not consummated; and
2. In addition to its 60-day order, upon the agreement of the Parties as set forth in their joint motion and attached settlement agreement, this Court shall retain jurisdiction over the settlement agreement for the purpose of enforcing its terms and provisions pursuant to Federal Rule of Civil Procedure 41(a)(2).

s/ Yvette Kane

Yvette Kane
Chief United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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|---------------------------|---|---------------------------|
| UNITED STATES OF AMERICA, | : | |
| | : | |
| Plaintiff, | : | |
| | : | CIVIL NO.: 1:11-CV-2004 |
| v. | : | (Chief Judge Yvette Kane) |
| | : | |
| PENNSYLVANIA DEPARTMENT | : | |
| OF CORRECTIONS, | : | |
| | : | |
| Defendant. | : | |

SETTLEMENT AGREEMENT AND RELEASE

1. Plaintiff, United States of America, commenced this action in the United States District Court for the Middle District of Pennsylvania, alleging that Defendant, the Pennsylvania Department of Corrections, violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* (“USERRA”), when it refused to retroactively promote David C. Fyock (“Fyock”), a former U.S. Army reservist, from Corrections Officer 1 to Corrections Officer 2 based on his high score on a makeup promotional examination following a military deployment.

2. As a result of settlement discussions, the United States and the Pennsylvania Department of Corrections (collectively, the “Parties”) have resolved their dispute and have agreed that this action should be resolved by this Settlement Agreement (“Agreement”). It is the intent of the Parties that this Agreement be a

final and binding settlement in full disposition of any and all claims which have been or could have been asserted in the Complaint filed in this action.

STIPULATIONS

3. The Parties acknowledge the jurisdiction of the United States District Court for the Middle District of Pennsylvania over the subject matter of this action and over the Parties to this action for the purpose of this Agreement. Further, the Parties agree and acknowledge that the Court shall retain jurisdiction, if necessary, to enforce any provision or term of this Agreement. If necessary, the Court shall have available all equitable powers and injunctive relief under USERRA to enforce this Agreement.

4. Venue is proper in this district for purposes of enforcement of this Agreement and any proceedings related to this Agreement. While denying any and all wrongdoing alleged in the Complaint, and without constituting an admission of liability, the Pennsylvania Department of Corrections agrees that all conditions precedent to the institution of this action have been fulfilled. Further, the Parties agree and acknowledge that venue is proper with the Court over any proceeding to enforce any provision or term of the Agreement.

5. The Parties stipulate and agree to 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 Agreement are lawful, fair, reasonable and just. The rights of the United States, Fyock, and the Pennsylvania Department of Corrections are adequately protected by this Agreement.
- c. This Agreement conforms to the Federal Rules of Civil Procedure and USERRA, and is not in derogation of the rights and privileges of any person.
- d. This Agreement will further the objectives of USERRA and other applicable law, and will be in the best interests of the Parties.

NON-ADMISSION

6. This Agreement is being entered into with the consent of the Parties, and shall not constitute an adjudication or finding on the merits of the action or be construed as an admission by the Pennsylvania Department of Corrections of any violations of USERRA.

COMPLIANCE WITH USERRA

7. The Pennsylvania Department of Corrections shall comply with all provisions of USERRA concerning Fyock and shall not take any action against Fyock that constitutes retaliation or interference with the exercise of his rights under USERRA or any person because such person gave testimony or assistance or participated in any manner in any investigation or proceeding in connection with this case.

REMEDIAL RELIEF

8. Without admitting the allegations set forth in the complaint, and in settlement of the claims of the United States on behalf of Fyock, who, by his signature to the release attached as Appendix A, has accepted the relief offered to him under this Agreement, the Pennsylvania Department of Corrections agrees to provide the relief specified in Paragraphs 9-13, below.

9. The Pennsylvania Department of Corrections shall promote Fyock to the position of Corrections Officer 2 (Sergeant) effective on the first day of the first pay period following the effective date of this Agreement. The Pennsylvania Department of Corrections shall certify to the State Civil Service Commission that all time that Fyock completed as an acting CO2 (sergeant) as of the effective date of this Agreement will be included with any time in grade earned toward the minimum experience and training (MET) requirement to take the CO3 (lieutenant) exam. As of June 11, 2012, Fyock has completed 658 hours as an acting CO2.

10. The Pennsylvania Department of Corrections shall place Fyock in a 6:00 a.m. to 2:00 p.m. work shift, with weekly pass days (i.e., days off) on Tuesday and Wednesday. Any further work schedule changes will be in accordance with the Collective Bargaining Agreement.

11. Fyock's previously authorized vacation days for 2012 shall remain effective.

12. The Pennsylvania Department of Corrections shall pay Fyock \$3,917.00 in back pay. The Pennsylvania Department of Corrections shall make all appropriate income tax withholdings and other statutory deductions from the \$3,917.00 in back pay at the time of payment. The Pennsylvania Department of Corrections shall separately pay all applicable federal, state, and local employer-side taxes and shall not deduct its portion of such taxes from the amount paid to Fyock.

13. The Pennsylvania Department of Corrections shall make the payment described in Paragraph 12 within thirty (30) days following the effective date of this Agreement by direct deposit, consistent with current payroll processes.

14. Within fourteen (14) days of compliance with each of Paragraphs 9, 10, 11, 12, and 13 of this Agreement, the Pennsylvania Department of Corrections shall provide written confirmation of its compliance to the United States by overnight delivery service to the attention of:

Timothy S. Judge
Assistant United States Attorney
United States Attorney's Office
Middle District of Pennsylvania
William J. Nealon Federal Building
235 North Washington Avenue, Suite 311
P.O. Box 309

Scranton, PA 18501

MISCELLANEOUS

15. The Parties shall bear their own costs and expenses in this action, including attorney's fees.

16. The Parties shall engage in good faith efforts to resolve any dispute regarding this Agreement prior to seeking enforcement by the Court. The Parties shall give notice to each other fourteen (14) days before filing an action with the Court for enforcement.

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

18. The terms of this Agreement are and shall be binding upon the United States and upon the present and future elected and appointed officials, officers, directors, employees, agents, representatives, successors and assigns of the Pennsylvania Department of Corrections.

19. This Agreement constitutes the entire agreement and commitments of the Parties. Any modifications to this Agreement must be mutually agreed upon and memorialized in writing signed by the United States and the Pennsylvania Department of Corrections.

20. The effective date of this Agreement is July 9, 2012.

For Plaintiff United States of America

PETER J. SMITH
United States Attorney

By:

/s/ Melissa A. Swauger
/s/ Timothy S. Judge

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/s/ Brian Thompson

BRIAN THOMPSON

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Pennsylvania Department of Corrections

State Correctional Institution at Mercer

801 Butler Pike

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Telephone: (724) 662-1837

Facsimile: (724) 662-1940

APPENDIX A

INDIVIDUAL RELIEF AND RELEASE OF CLAIMS

I, David C. Fyock, for and in consideration of acceptance of the relief offered to me by the Pennsylvania Department of Corrections, pursuant to the provisions of the Settlement Agreement (“Agreement”) filed with the United States District Judge in United States of America v. Pennsylvania Department of Corrections, Civil Action No. 1:11-CV-2004, forever release and discharge the Pennsylvania Department of Corrections and all current, former and future agents, employees, officials, designees, predecessors and successors in interest of the Pennsylvania Department of Corrections from all legal statutory and equitable claims that have been or could have been asserted in the Complaint filed in the above-captioned civil action and the complaint filed with the U.S. Department of Labor in USERRA Case No. PA-2010-00063-20-R-I-A.

I understand that the relief to be given to me does not constitute an admission by the Pennsylvania Department of Corrections of the validity of any claim raised by me or on my behalf, nor does it constitute a finding of any wrongdoing or liability under applicable federal law or regulation.

This release constitutes the entire agreement between the Pennsylvania Department of Corrections and me, without exception or exclusion.

I acknowledge that a copy of the Agreement in this action has been made available to me.

I HAVE READ THIS RELEASE AND UNDERSTAND THE CONTENTS THEREOF, AND I EXECUTE THIS RELEASE OF MY OWN FREE ACT AND DEED.

Signed this 2nd day of July __, 2012.



DAVID C. FYOCK