NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3314-24

IN THE MATTER OF BRIAN G. MCDEVITT, ATLANTIC CITY POLICE DEPARTMENT.

APPROVED FOR PUBLICATION
October 29, 2026
APPELLATE DIVISION

Submitted October 19, 2026 – Decided October 29, 2026

Before Judges Sabatino, Perez Friscia and Torregrossa-O'Connor.

On appeal from the New Jersey Civil Service Commission, Docket No. 2024-1913.

Steven S. Glickman, LLC, attorney for appellant City of Atlantic City (Steven S. Glickman, Jeffrey J. Berezny, and Scott J. Krumholz, on the briefs).

Jennifer Davenport, Attorney General, attorney for respondent Civil Service Commission (Deborah E. Wassel, Assistant Attorney General, of counsel; Brian D. Ragunan, Deputy Attorney General, on the brief).

O'Brien Belland & Bushinsky, LLC, attorneys for respondent Brian G. McDevitt (Mark E. Belland, on the brief).

The opinion of the court was delivered by

SABATINO, P.J.A.D.

This appeal presents a legal dispute over the relationship between the federal Uniformed Services Employment and Reemployment Rights Act

("USERRA"), 38 U.S.C. §§ 4301-4335, and New Jersey's military-leave statutes and regulations. Appellant, the City of Atlantic City, challenges a final decision of the New Jersey Civil Service Commission reversing respondent Brian G. McDevitt's removal from the Atlantic City Police Department ("ACPD"), ordering his reinstatement, and awarding related relief.

The principal issues presented on appeal are (1) whether USERRA's five-year cumulative-service limit preempts more expansive state-law military-leave protections, and (2) whether New Jersey law provides a public employee with protected unpaid military leave beyond that five-year USERRA period.

Based on the pertinent statutes and regulations and canons of interpretation involving military status, we conclude that USERRA does not preempt state laws that afford greater protection than USERRA's five-year floor. We further construe New Jersey law to provide such extended protection to McDevitt, an Air Force veteran who the City discharged after his military leave totaled approximately 5.43 years.

We therefore affirm the Commission's final agency decision reinstating McDevitt and providing him with other remedies to make him whole.

I.

The material facts are undisputed. Brian G. McDevitt has been a member of the United States Air Force National Guard since July 3, 2000. He began employment as a police officer with the ACPD in August 2012.

During his ACPD employment, McDevitt was called to active military service on several occasions, and he advised ACPD each time he was called up.[1] During those deployments, the City continued to make pension contributions on his behalf to the Police and Firemen's Retirement System, and McDevitt continued to accrue seniority for sick, vacation, and personal leave under a collective negotiations agreement with McDevitt's police union.

The City also granted McDevitt military leave with pay for up to ninety workdays per calendar year, consistent with N.J.S.A. 38A:4-4, and paid him the difference between his military pay and his regular ACPD pay for the remaining portion of each deployment pursuant to City policy.

Between August 15, 2013 and September 26, 2022, McDevitt accrued 1,982 days (or approximately 5.43 years) of military leave. By letter dated December 13, 2022, the City advised McDevitt that his current military orders

[1] It is unclear from the record, however, the extent to which some, if any, of McDevitt's military service was voluntary versus compulsory in accordance with his service obligation.

exceeded what it construed to be the five-year cumulative service limit under USERRA and directed him to advise the City by December 28, 2022 whether he would return to work, retire, or resign.

By letter dated December 28, 2022, counsel for McDevitt responded that McDevitt intended to remain an ACPD officer and to fulfill his military deployment orders, asserting that his continued leave was protected under New Jersey law and regulations. The City replied by letter, reiterating its position that McDevitt had exceeded the five-year cumulative service limit under USERRA and stating that he must return to work, resign, or retire by February 1, 2023. Counsel for McDevitt again responded on January 31, 2023, reiterating that McDevitt's continued leave was protected under New Jersey law and that he intended to return to the ACPD upon completion of his military deployment.

On May 2, 2023, the City served McDevitt with a Preliminary Notice of Disciplinary Action ("PNDA") seeking his removal from employment with the ACPD. The PNDA charged McDevitt with insubordination, conduct unbecoming a public employee, and having "abandoned his . . . position" with the ACPD, based on the City's position that, after being directed to return to work, retire, or resign, he failed to do so and remained absent from duty. The

letter further listed the "recommended penalty" as "Termination/Resignation not in good standing."

McDevitt waived his right to a departmental hearing, and on January 26, 2024, the City issued a Final Notice of Disciplinary Action ("FNDA") removing him from employment.

McDevitt filed a timely appeal of the City's FNDA decision with the Commission in March 2024. The matter was transmitted to the Office of Administrative Law, where it was assigned to Administrative Law Judge ("ALJ") Tama B. Hughes. In a case management call with the ALJ, the parties represented they intended to file cross-motions for summary decision. The matter thereafter proceeded on stipulated facts and written submissions.

On February 7, 2025, the ALJ issued an initial decision granting McDevitt's motion for summary decision, denying the City's cross-motion, and dismissing the ACPD's internal administrative charges against McDevitt. The ALJ concluded that New Jersey's military-leave statutes and regulations protected McDevitt's leave and were not preempted by USERRA. The City then filed exceptions with the Commission.

On March 20, 2025, the Commission issued a written decision adopting the ALJ's determination, noting that, upon de novo review, it agreed with the ALJ's legal analysis and conclusions.

As for remedy, the Commission reversed the City's removal of McDevitt, and ordered his reinstatement with mitigated back pay, benefits, and seniority, subject to the treatment of certain periods of military service as approved unpaid leave after the ninety-day paid threshold in each year. The Commission further awarded counsel fees. Although its decision would not become final until any outstanding issues concerning back pay or counsel fees were resolved, the Commission made clear that "under no circumstances should [McDevitt's] reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute."

Soon thereafter, the outstanding counsel-fee issue was resolved, thereby rendering final the Commission's March 20, 2025 decision. The City appealed.

In its brief on appeal, the City argues the Commission's decision should be reversed because (1) USERRA preempts federal, state, and local laws as they relate to USERRA's five-year cumulative service limit on employee military-leave benefits; and (2) the terms of New Jersey's relevant military-leave statute, N.J.S.A. 38A:4-4, do not provide for an unlimited cumulative service limit that supersedes USERRA's five-year cumulative service limit.

In our forthcoming analysis, we review the City's arguments de novo, as they entail legal issues of statutory and regulatory interpretation. Cumberland

Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016) (citing State v. Parker, 212 N.J. 269, 278 (2012)); see also Bd. of Educ. of Sparta v. M.N. ex rel. A.D., 258 N.J. 333, 342-43 (2024) (explaining that no deference is owed to a state agency's interpretation of federal statutes or regulations).

II.

We begin with a discussion of USERRA. That federal statute explicitly declares its purposes in 38 U.S.C. § 4301, as follows:

> (a) The purposes of this chapter [38 U.S.C. §§ 4301 et seq.] are:
>
> (1) to encourage service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.
>
> [38 U.S.C. § 4301 (emphasis added).]

Given those purposes set forth by Congress, the operative portions of USERRA most pertinent here are codified in Sections 4312 and 4302. Section 4312 mandates:

> (a) Subject to subsections (b), (c), and (d) and to section 4304 [38 U.S.C. § 4304], any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter [38 U.S.C. §§ 4301 et seq.] if-
>
> (1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
>
> (2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
>
> (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).
>
> [38 U.S.C. § 4312 (emphasis added).]

Section 4302 reinforces those rights, and their relationship with other federal or state laws, as follows:

> (a) Nothing in this chapter [38 U.S.C. §§ 4301 et seq.] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more

> beneficial to, or is in addition to, a right or benefit provided for such person in this chapter [38 U.S.C. §§ 4301 et seq.].
>
> (b) This chapter [38 U.S.C. §§ 4301 et seq.] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter [38 U.S.C. §§ 4301 et seq.], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.
>
> [38 U.S.C. § 4302 (emphasis added).]

Meanwhile, in Section 4303(2), USERRA broadly defines the term "benefit" in this manner:

> (2) The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.
>
> [38 U.S.C. § 4303(2) (emphasis added).]

These statutory provisions within USERRA are explained in associated federal regulations. Specifically, 20 C.F.R. § 1002.7, entitled "How does

USERRA relate to other laws, public and private contracts, and employer practices?" clarifies that:

> (a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.
>
> (b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.
>
> (c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.
>
> (d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA.

> For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.
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> [20 C.F.R. § 1002.7 (emphasis added).]

The City argues that USERRA and the companion federal regulation preempt the ability of New Jersey state law to provide job protection to servicemembers on military leave greater than the five-year cumulative period set forth in 38 U.S.C. § 4312. This preemption argument is plainly incorrect.

The law recognizes three different kinds of federal preemption: (1) "when Congress explicitly preempts state law" (known as express preemption); (2) when federal regulation is "so pervasive that no room remains for the States" (known as field preemption); or (3) when "state law actually conflicts with federal law" (known as conflict preemption). In re Alleged Failure of Altice USA, Inc., 253 N.J. 406, 417 (2023) (internal citations omitted). As the Commission correctly reasoned, none of those three species of preemption apply here to prevent New Jersey law from affording greater military-leave protection than the five-year minimum federally prescribed by USERRA.

First, without question, USERRA does not expressly preempt State laws that provide greater, rather than lesser, protection than the five-year period set forth in Section 4312. In fact, just the opposite is true, as reflected in the text of Section 4302 we quote above.

Literally, as Section 4302(a) states, "[n]othing in [USERRA] shall supersede, nullify or diminish any . . . State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in [USERRA]." The preemptive language that follows in Section 4302(b) plainly only "supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided [by USERRA]." Ibid. The City's argument in its brief asserting—without citation—that "the expansion [of] USERRA benefits by States, municipalities, and/or employers does not permit those entities to expand the 5-year cap" is wrong.

Second, there is no basis for the application of field preemption here. "Field preemption" does not apply because Congress expressly left room in USERRA for supplemental state protections. The Commission correctly applied in this regard the "presumption against preemption" applied in Kansas

v. Garcia, 589 U.S. 191, 208 (2020) and the related principle that "pre-emption is not to be lightly presumed." See Ridgefield Park v. N.Y. Susquehanna & W. Ry. Corp., 163 N.J. 446, 454 (2000) (quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 615 (1999)). There is no textual or analytic basis here to overcome the well-established "assumption that the historic police powers of the State [are] not to be superseded by [a] [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." Altice, 253 N.J. at 426 (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)) (alterations in original).

Third, there is no actual conflict between New Jersey law and the federal statute. As we will discuss, infra, in Part III, the applicable New Jersey statutes and regulations do not authorize employers in this state to afford servicemembers less than the federal five-year minimum.

Case law from the federal courts similarly refutes the City's preemption arguments. For example, in Gross v. PPG Indus. Inc., 636 F.3d 884 (7th Cir. 2011), the Court of Appeals for the Seventh Circuit stated that USERRA does not "supersede, nullify, or diminish" any benefit, and "establishes a floor, not a ceiling." Id. at 891 (quoting 20 C.F.R. § 1002.7). Similarly, in Crews v. City of Mt. Vernon, 567 F.3d 860 (7th Cir. 2009), the Seventh Circuit held that

"USERRA also encourages military service by authorizing employers to go above and beyond the minimum requirements of the statute."[2] Id. at 867.

For these abundant reasons, we affirm the Commission's sound rejection of the City's preemption arguments.

III.

We turn to the City's alternative argument that New Jersey law does not protect a servicemember from discharge once that employee has passed the federal five-year minimum mandated by USERRA. The relevant New Jersey statute and regulations are as follows.

In N.J.S.A. 38A:4-4, our Legislature provided that:

> a. A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other instrumentality of the State or of a county, school district or municipality who is a member of the organized militia shall be entitled, in addition to pay received, if any, as a member of the organized militia, to leave of absence from his or her respective duties without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year. Any

[2] We recognize an additional purpose recited in USERRA is "to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers." 38 U.S.C. § 4301(a)(2). But that passage continues with the goal of providing the servicemembers prompt reemployment "upon the completion of such service." Ibid. (emphasis added).

> leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time.
>
> b. Leave of absence for such military duty shall be in addition to the regular vacation or other accrued leave allowed such officers and employees by the State, county or municipal law, ordinance, resolution, or regulation.
>
> [N.J.S.A. 38A:4-4 (emphasis added).]

Notably, the text of this statute expresses no temporal limitation on the length of military leave it protects. The words of the enactment dictate that a servicemember "shall be entitled" to a leave of absence "without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty." N.J.S.A. 38A:4-4(a) (emphasis added). There is no reference to the federal five-year floor of USERRA, or that it should somehow be treated in our state as a ceiling, only that leave in excess of 90 days is without pay (unless, as here, the employer by policy or contract provides additional benefits).

Additionally, both the Commission and the former New Jersey Department of Military and Veterans' Affairs[3] ("DMAVA") have issued regulations implementing this statute. The DMAVA regulations, at N.J.A.C.

[3] In 2026, the former New Jersey Department of Military and Veterans' Affairs was split into two separate departments, but that occurred after these regulations were enacted.

5A:2-2.1, state in relevant part that certain employers, including municipalities within the state, "are required to grant leaves of absence to members of the organized militia in accordance with N.J.S.A. 38A:4-4," and that "[a]ny leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time." (Emphasis added).

Although the administrative history of this DMAVA regulation does not expressly address the question of whether or not service members are entitled to unlimited-duration unpaid service leave, it is stated under the "purpose" section at 34 N.J.R. 2890(a) (2002) that the "State of New Jersey is committed to the accomplishment of the State and Federal mission of furnishing trained National Guard units and individuals as an integral part of the first line of defense of this State and Nation in accordance with State and Federal Law." Ibid. Although the regulation also "clarified the existing obligations of public employers," 34 N.J.R. 2890(a), its manifest primary focus was on benefiting servicemembers.

The Commission's separate regulation, N.J.A.C. 4A:6-1.11, essentially states that, with respect to government employees, (1) National Guard members are entitled to 90 days paid military leave; (2) Reserve members are entitled to 30 days paid military leave; (3) employees who enter service "in time of war or emergency" are entitled to "leave of absence without pay for the

period of such service and three months after discharge,"[4] and, importantly, that (4) "[a]n employee is entitled to a leave of absence without pay for such other military duty not covered by [(1), (2), or (3)] above." (Emphasis added).

Consistent with these regulations, the proper reading of the text of N.J.S.A. 38A:4-4 is that it specifies no limit for unpaid military service leave, because it provides for such leave without mentioning a limit, as it does for paid leave.

That said, we need not decide in this case whether the statute or regulations must be read to confer unbounded leave and a perpetual right of reemployment. All we need to resolve here is whether, on these facts, McDevitt's additional 0.43 years of military leave above the USERRA five-year minimum justified the City's discharge of him because of supposed "insubordination" and "conduct unbecoming a public employee." Those inapt characterizations of his absence while he was serving our country are antithetical to the declared purposes of our federal and state military leave laws.

[4] Although McDevitt's leave occurred during the still-ongoing "National Emergency by Reason of Certain Terrorist Attacks" pursuant to Presidential Proclamation 7463 issued September 14, 2001, he joined the Air Force before that emergency. No party has raised this issue.

The determinations of the ALJ and the Commission restoring McDevitt's employment and benefits were manifestly correct, and we affirm them in all respects.

Affirmed.

I hereby certify that the foregoing is
a true copy of the original on file in
my office.

M. C. Harley

Clerk of the Appellate Division