

1 MATTHEW Z. CROTTY
Crotty & Son Law Firm, PLLC
421 West Riverside, Suite 1005
2 Spokane, WA 99201-0300
3 Telephone: 509.850.7011
Facsimile: 509.703.7957

4 THOMAS G. JARRARD
5 The Law Office of Thomas G. Jarrard, PLLC
1020 N. Washington
6 Spokane, WA 99201
7 Telephone: 425.239.7290

8 Attorneys for Plaintiff

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE WESTERN DISTRICT OF WASHINGTON**

11 CRAIG D. HANSON

12 Plaintiff,

13 v.

14 COUNTY OF KITSAP, WASHINGTON;
and DAVID LYNAM, KITSAP COUNTY
15 FIRE MARSHAL; and, JOHN AND JANE
16 DOE, EMPLOYEE-AGENTS AND
FORMER EMPLOYEE-AGENTS OF
KITSAP COUNTY

17 Defendants.
18

NO. CV 3:13-5388-RJB

PLAINTIFF'S MOTION AND
MEMORANDUM FOR PARTIAL
SUMMARY JUDGMENT RE LIABILITY

NOTE ON MOTION CALENDAR: LCR
7(d)(3) - September 27, 2013, Without Oral
Argument

19 **I. MOTION**

20 Motion. Plaintiff moves for partial summary judgment against all defendants as to the
21 issue of liability under Fed. R. Civ. P. 56(a) regarding Mr. Hanson's 38 U.S.C. §§ 4312, 4313,
22 (reemployment), 4316 (benefits & without cause discharge) and 4318 (pension) claims. Order.
23 Mr. Hanson seeks an Order that finds, as a matter of law, that defendant Kitsap County violated
24

25 MOTION AND MEMORANDUM FOR PARTIAL
SUMMARY JUDGMENT RE LIABILITY 3:13-5388-
RJB: 1

CROTTY & SON LAW FIRM, PLLC

421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

1 38 U.S.C. §§ 4312, 4313, 4316, & 4318. Authority. Mr. Hanson bases his motion on the
2 memorandum of authorities contained herein, the Court file, the Declarations of Thomas
3 Jarrard, Craig Hanson, Larry Clark, Tom Richey, Jeffrey Rimack, and Fed. R. Civ. P. 56(a).

4 **II. MEMORANDUM OF AUTHORITIES**

5 **A. Introduction and summary of argument.**

6 Following the events of September 11, 2001, our Country called hundreds of thousands
7 of military reservists away from their employers to serve abroad. Federal law requires those
8 reservists' employers to promptly and properly reemploy the returning veteran to the position of
9 seniority, status, and pay he or she would have obtained notwithstanding the military-caused
10 absence. Stated simply: an employer must treat the returning service-member as if he or she
11 had never left for war. More simply put: if the employer issued the employee a badge and boots
12 before the employee left for war then the employer is required to reissue the badge and boots
13 when the employee returns from war; if the employer gives seniority-based longevity bonuses
14 to the non-military employees then the military employee gets the same longevity bonus.
15

16 Kitsap County and Dave Lynam violated the Uniformed Services Employment and
17 Reemployment Rights Act's (USERRA) by, among other things, not even reissuing Mr. Hanson
18 his badge, boots, nor giving him the proper longevity bonus upon Mr. Hanson's return from
19 Iraq. Yet this case is about more than badges, boots, and bonuses, it is about Kitsap County's
20 repeated failures to follow many of USERRA's reemployment, benefits, and pension provisions.
21 For the reasons stated below, defendants' violations of USERRA cannot be credibly disputed
22 and summary judgment is proper.

23 From March 2007 to November 2009 Craig Hanson worked as a Deputy Fire Marshal 1
24 for Kitsap County. The County issued Mr. Hanson a badge, identification card, personal
25

1 protective equipment, vehicle, boots, and the "DFM 3" call sign. Mr. Hanson also worked, and
2 was paid, "out of class" as a Deputy Fire Marshal 2. As a DFM 2 working "out of class," Mr.
3 Hanson conducted fire investigations, a task requiring extensive training and experience in
4 ascertaining a fire's cause. Significantly, conducting fire investigations allowed Mr. Hanson to
5 receive additional overtime and "out of class" pay.

6 From November 2009 to December 2012 Mr. Hanson deployed to Iraq (and elsewhere)
7 with the Washington Army National Guard. During his absence the County transferred two
8 individuals, Brad Wiggins and Shawn Shepherd, into Mr. Hanson's DFM 1/2 position. Prior to
9 departing, Mr. Hanson gave David Lynam, the Kitsap County Fire Marshal, his badge,
10 identification card, County-issued vehicle, and relinquished his FM3 call sign. Mr. Lynam gave
11 those items to Mr. Wiggins who, in turn, conducted investigations in Mr. Hanson's absence.
12 Mr. Hanson thought that he would get those items (along with the higher-paying fire
13 investigation duties and seniority driven FM3 call-sign) back upon his return from war. Mr.
14 Hanson was wrong.

15
16 Upon Mr. Hanson's December 2012 return to work the County did not treat Mr. Hanson
17 as if he never left for war. The County did not return Mr. Hanson to the DFM 2 position Mr.
18 Hanson would have obtained but for the mobilization. From December 2012 through February
19 2013 Mr. Hanson repeatedly asked Mr. Lynam, for his badge, boots, identification card, vehicle,
20 and FM3 call sign back and for Wiggins and Shepherd to be removed from Mr. Hanson's pre-
21 deployment position. Mr. Hanson bore no animus toward Wiggins and Shepherd, he simply
22 wanted to go back to doing the full work load and pay he had prior to leaving for war as that
23 work load directly impacted Mr. Hanson's monthly pay. Mr. Lynam did not return those items.
24 Mr. Lynam did not remove Wiggins and Shepherd. Mr. Lynam did not allow Mr. Hanson to
25

1 fully resume his fire investigation work with the pay and status Mr. Hanson had before his
2 military leave. As a result Mr. Hanson's post-military leave DFM pay decreased.

3 Instead Mr. Lynam: (a) required Mr. Hanson to apply for the DFM 2 position Mr.
4 Hanson would have obtained but for his mobilization; and then, (b) hired Jackie Blackwood (a
5 co-worker with less seniority than Mr. Hanson and no fire investigative training or experience)
6 into the DFM 2 position; and, by April 2013 (c) barred Mr. Hanson from doing any
7 investigation work at all. Mr. Hanson sought help from the Employer Support for Guard and
8 Reserve (ESGR)¹ regarding Mr. Lynam and the County's actions but still Mr. Lynam did
9 nothing. Those actions, which cannot be credibly disputed, violate USERRA's reemployment
10 provision.

11 The County's USERRA violations did not stop there. The USERRA requires an
12 employer to contribute funds and service credit to an employee's pension plan. Kitsap County
13 failed to do that even though Mr. Hanson asked. Lastly, USERRA requires employers to give
14 service-member employees the same seniority and non-seniority benefits as that employee's
15 peers. Kitsap County violated that provision of USERRA by failing to give Mr. Hanson the
16 longevity bonus the County gives similarly situated employees. Lastly, the defendants violated
17 USERRA's without cause discharge protection provision by improperly demoting Mr. Hanson,
18 without cause, within one year of Mr. Hanson's return to work.

19
20 Summary judgment is appropriate because:
21
22

23 ¹ The ESGR is "a Department of Defense office...established in 1972 to promote cooperation and
24 understanding between Reserve Component Service members and their civilian employers and to
25 assist in the resolution of conflicts arising from an employee's military commitment." See
<http://www.esgr.mil/About-ESGR/Who-is-ESGR.aspx> (last visited August 2, 2013).

1 1. The USERRA reemployment statute, 38 U.S.C. §§ 4312 & 4313, requires an
2 employer to return an employee to a position of seniority, status, and pay equivalent to what the
3 employee would have obtained but for the mobilization. Kitsap County failed to do that by not
4 allowing Mr. Hanson to conduct the fire investigation work (and get paid accordingly) he was
5 doing before military leave and by failing to return Mr. Hanson his call sign, badge, ID card,
6 boots, and vehicle. Further, the County violated USERRA's reemployment statute by not
7 returning Mr. Hanson to a DFM 2 position - - a position Mr. Hanson would have obtained with
8 reasonable certainty but for his military obligation. The County disputes none of this: it
9 answered Mr. Hanson's complaint but pled no Congressionally authorized defense to Mr.
10 Hanson's USERRA reemployment claim.

11 2. The USERRA pension statute, 38 U.S.C. § 4318, requires an employer to
12 contribute to a service-member/employee's defined benefit pension for the timeframe that the
13 employee was on military leave. The County must make such pension contributions (and
14 requisite service credit) within 90 days of the service-member's return from military leave. As
15 of August 28, 2013, the County has not made those pension contributions and service credits.

16 3. The USERRA benefits/discharge-protection statute, 38 U.S.C. § 4316, requires
17 an employer to give a service-member employee the same benefits non-service-member
18 employees receive. One such benefit was the County's longevity bonus. The County did not
19 give Mr. Hanson a longevity bonus (at all) in 2012 and the longevity bonus Mr. Hanson
20 received in 2013 was less than what he would have earned had he remained continuously
21 employed with the County. Additionally, §4316 requires an employer to refrain from demoting,
22 without cause, an employee within one year of that employee's return to work. The County
23 violated §4316 by permanently demoting Mr. Hanson from fire investigation duties and
24
25

1 temporarily reducing Mr. Hanson to part-time status, without cause, during the one year
2 timeframe in which he was protected from without cause demotion.

3 **B. Facts.**

4 1. Kitsap County hired Craig Hanson on March 14, 2007 as a Deputy Fire Marshal 1. (Dkt.
5 23, at ¶2.4; Jarrard Decl. at ¶6) On April 11, 2007, the County issued Mr. Hanson the "DMF 3"
6 call sign - - - a designation which reflected that Mr. Hanson ranked third in seniority behind Fire
7 Marshal Dave Lynam (6/12/06 hire date - call sign "FM 1") and Lynam's second in command
8 Tina Turner (8/7/06 DFM 2 promotion date - call sign "FM 2"). (Hanson Decl. ¶¶1,2 & Ex. B;
9 Jarrard Decl. at ¶5 & Ex. P)

10 2. The County issued Mr. Hanson a badge, boots, personal protective equipment,
11 identification card and vehicle, and, allowed Mr. Hanson to work out of class as a DFM 2.
12 (Hanson Decl. at ¶3; Richey Decl. at ¶4; Dkt. 23, at ¶2.11) As a "working out of class" DFM 2
13 Mr. Hanson conducted both building inspections (i.e. inspections of buildings to see if the
14 building's fire suppression systems complied with the appropriate building codes) and
15 investigations (e.g. analysis and investigation into a fire's cause). (Richey Decl. at ¶4; Hanson
16 Decl. ¶3)

17 3. On or about June 4, 2007, the County asked Mr. Hanson to apply for the DFM 2 opening
18 and Mr. Hanson filled out that application. (Hanson Decl. at ¶3 & Ex. C.) Neither Mr. Hanson
19 nor any other Kitsap County employee were selected for that DFM 2 position due to budgetary
20 reasons, but the County's request that Mr. Hanson apply for a DFM 2 position is consistent with
21 the Kitsap County Fire Marshal, David Lynam's directive that all DFM 1s become DFM 2s as
22 soon as possible. *Id.* at ¶3; Richey Decl. at ¶3.
23
24
25

1 4. Between May 1, 2007, and March 18, 2009, Mr. Hanson completed the "Investigating
2 Motor Vehicle Fires", "Introduction to Evidence", "Fire Dynamics and Modeling", "Fire
3 Department Company Officers Inspector", "Scientific Method of Fire Investigation", "Basic
4 Fire Investigation," "Documenting the Evidence," "Fire Explosion and Investigation", and "Post
5 Flashover Fires" courses. (Hanson Decl. at ¶4 & Ex. D) A former Kitsap County co-worker
6 (with 30 years of emergency management experience) recalls Mr. Hanson to be a "qualified,
7 dedicated, and determined worker..on the fast track" who "aggressively sought out additional
8 opportunities to do additional work and undergo additional training," who was "definitely
9 qualified to perform the work of a DFM 2," and who was sent to fire marshal training ahead of
10 his peers. (Richey Decl. at ¶¶4, 7)

11 5. Although the County did not select Mr. Hanson for the DFM 2 job in June 2007, the
12 County did allow Mr. Hanson to work, "out of class" as a DFM 2 and conduct fire
13 investigations. *Id.* at ¶5; Richey Decl. at ¶4. Between August 19, 2008, and November 12,
14 2009, Mr. Hanson conducted at least 48 fire investigations. (Hanson Decl. at ¶5 & Ex. E.²)

15 6. On February 4, 2008, nearly one year after Mr. Hanson got hired, the County hired
16 Jackie Blackwood, a former Administrative Assistant, as a DFM 1. (Jarrard Decl. at ¶5 & Ex. P;
17 Richey Decl. at ¶5) Ms. Blackwood did not want to be a deputy fire marshal, did not
18 particularly enjoy doing that DFM 1 work, and detested Mr. Hanson's military related absences
19 because those absences increased her work-load. (Richey Decl. at ¶¶6,8,9)

20 7. In August 2009 Mr. Hanson informed the County that he, as a member of the
21 Washington Army National Guard, was being mobilized for military service. (Dkt. 23, at ¶2.13)

22
23
24 ² By April 2013 Mr. Hanson had conducted at least 62 investigations. *Id.*

1 In November 2009, Mr. Hanson began long term military leave. (Dkt. 23, at ¶2.14) During Mr.
2 Hanson's military leave the County hired Brad Wiggins, on November 2, 2009, and Shawn
3 Shepherd, on February 1, 2010, to do the fire inspection and fire investigation work that Mr.
4 Hanson was doing before his 2009 military mobilization. (Jarrard Decl. at ¶6 & Ex. Q; Clark
5 Decl. at ¶5; Rimack Decl. ¶5) County records label both Mr. Wiggins and Mr. Shepherd as
6 "extra help." (Jarrard Decl. at ¶6 & Ex. Q) Prior to leaving for military service Mr. Hanson
7 surrendered his badge, call sign, ID card, and vehicle to Mr. Lynan, who, in turn, gave those
8 items (and designation) to Mr. Wiggins. (Hanson Decl. at ¶¶6, 11)

9 8. Mr. Hanson gave the County advance notice of his intent to return to work at the County
10 and returned to work on December 3, 2012. (Dkt. 23, at ¶¶2.16, 2.17) The County admits that
11 the total length of Mr. Hanson's military service was less than five years. *Id.* at ¶2.16. Mr.
12 Hanson was honorably discharged from the military following completion of his military
13 service. (Hanson Decl. at ¶7 & Ex. F)

14 9. Mr. Hanson's December 3, 2012, return to work was hostile. Mr. Hanson returned to no
15 desk, no chair, no phone, no vehicle, and no fully operable computer. (Hanson Decl. at ¶8) Mr.
16 Hanson's co-workers, Jackie Blackwood, Shawn Shepherd, and Brad Wiggins, refused to
17 interact with Mr. Hanson. *Id.* Mr. Hanson was not given any work to do for at least 3 weeks.
18 *Id.* It was not until late-January 2013 that Mr. Hanson was temporarily returned to the
19 investigation rotation. *Id.*

20 10. Mr. Hanson's co-worker's chilled response to his return troubled him. *Id.* ¶10. On
21 December 4, 2013, Mr. Hanson went to Jason Rice, a Kitsap County Code Enforcement
22 employee, and asked why he was getting the cold shoulder. *Id.* Mr. Rice said "[t]hey are assed-
23
24
25

1 out because you are back people are going to have their hours cut and lose their jobs." *Id.* Mr.
2 Hanson's union representative echoed Mr. Rice's concerns. (Rimack Decl. ¶6)

3 11. On December 5, 2012, Mr. Hanson asked Dave Lynam to attend refresher fire marshal
4 investigation training. (Hanson Decl. at ¶11 & Ex. G) Mr. Lynam denied Mr. Hanson's request.
5 *Id.* On December 5, 2012, Mr. Hanson asked Dave Lynam for his FM3 call-sign (which had
6 been given to Mr. Wiggins) back. *Id.* Specifically, Mr. Hanson requested his "FM3 designation
7 and seniority reinstated [given that] it [had] been suggested that [Hanson] no longer rate[s] that
8 number." *Id.* & Ex. G. Mr. Lynam did not respond to Mr. Hanson's requests. *Id.* at ¶11.

9 12. On December 17, 2012, Mr. Hanson met with Mr. Lynam to (again) request training, his
10 ID card, badge, vehicle, and to be reinstated as a DFM 2. *Id.* at ¶12 & Ex. H. Mr. Lynam
11 (again) denied Mr. Hanson's requests. *Id.*

12 13. The Collective Bargaining Agreement requires the County to equip (with boots) deputy
13 fire marshals who (like Hanson) have investigation responsibilities. (Jarrard Decl. ¶7 & Ex. R)
14 The County did not reissue Mr. Hanson his boots even though Mr. Hanson repeatedly asked.
15 (Hanson Decl. at ¶¶ 13, 16 & Ex. I)

16 14. In late-December 2012 Mr. Hanson requested that Dave Lynam remove Brad Wiggins
17 and Shawn Shepherd from the investigation rotation so he (Hanson) could resume the full work-
18 load and pay that he had prior to his 2009 military mobilization. (Hanson Decl. at ¶14) Mr.
19 Lynam denied the request, kept Wiggins and Shepherd in the inspection/investigation rotation,
20 but belatedly allowed Mr. Hanson to return to reduced investigation work. *Id.* ¶¶8,9. The
21 County's lessening of the investigation opportunities Mr. Hanson had before his 2009
22 mobilization cost Mr. Hanson money: the County pays employees extra to be on stand-by and
23 overtime for on-call investigative work and with fewer investigations Mr. Hanson received less
24
25

1 investigation-related pay then he received prior to going on military orders. *Id.* ¶¶8,9. *See* Clark
2 Decl. ¶¶7,8; Rimack Decl. ¶7; Jarrard Decl. ¶7 & Ex. R.

3 15. On January 3, 2013, Mr. Hanson, in hopes of resolving his reemployment issues, lodged
4 a complaint with the Employer Support for the Guard and Reserve (ESGR). (Hanson Decl. at
5 ¶15 & Ex. J) In that complaint Mr. Hanson asked for his FM3 designation and badge back, to be
6 given his DFM 2 job, and for retraining. *Id.* Although on notice of Mr. Hanson's rights under the
7 law the County took no positive action. *Id.*

8 16. On January 28, 2013, Mr. Hanson (again) asked Mr. Lynam for his badge, boots, and
9 equipment and Mr. Lynam (again) rejected that request. (Hanson Decl. at ¶16 & Ex. K)

10 17. On February 4, 2013, the County, instead of moving Mr. Hanson into a vacant DFM 2
11 position, opened that DFM 2 position up for internal bidding. *Id.* at ¶17 & Ex. L. The DFM2
12 job advertisement required that the applicant have, *inter alia*, "[t]hree years experience in fire
13 prevention and investigation work." *Id.* at Ex. L *citing* HANSON000311 (emphasis added).

14 18. On February 14, 2013, Mr. Hanson again asked Mr. Shepherd and Mr. Wiggins to be
15 taken off of their duties so Hanson could fully return to work. *Id.* at ¶18; Rimack Decl. ¶7. The
16 County did not respond to Mr. Hanson's request so Mr. Hanson asked his union (in
17 January/February 2013) to intervene to get Mr. Wiggins and Shepherd removed so he (Hanson)
18 could fully resume his duties. (Rimack Decl. ¶8; Clark Decl. at ¶6) It was not until the union
19 intervened that the County removed Mr. Wiggins and Shepherd from the rotation; but, instead
20 of placing Mr. Hanson fully back into the investigation rotation the County, on April 24, 2013,
21 refused to reemploy Mr. Hanson to the DFM 2 position, completely removed Mr. Hanson from
22 all investigations and reduced Mr. Hanson from full-time to part-time status. (Hanson Decl.
23 ¶¶18,19; Clark Decl. at ¶¶7,8; Rimack Decl. at ¶9) The County's acts further deprived Mr.
24
25

1 Hanson of the pay and benefits associated with "working out-of-class" -- a status Mr. Hanson
 2 had before his 2009 mobilization but was completely taken from Mr. Hanson in April 2013.
 3 (Rimack Decl. ¶¶9,10, 15; Jarrard Decl. at ¶8 & Ex. S)

4 19. Kitsap County moved Jackie Blackwood, not Craig Hanson, into the full-time DFM 2
 5 position. (Hanson Decl. at ¶19) Although the DFM 2 position required investigative
 6 experience Ms. Blackwood had none, in fact, it wasn't until *after* Ms. Blackwood was hired that
 7 she attended the "Basic Fire Investigation Course". (Jarrard Decl. at ¶9 & Ex. T). The disparity
 8 between Mr. Hanson and Ms. Blackwood's DFM 2 qualifications is further illustrated:

DFM 2 Criteria	Hanson Qualifications	Blackwood Qualifications
Fire investigation training. (HANSON00311)	9 courses (as of 4/24/13 DFM 2 hiring date) SOF ³ ¶4	0 courses (as of 4/24/13 DFM 2 hiring date) SOF¶19.
Fire investigation experience. <i>Id.</i>	3 years and 62 investigations (as of 4/24/13 DFM 2 hiring date) SOF ¶5	0 years and 0 investigations (as of 4/24/13 DFM 2 hiring date) SOF¶19; Rimack Decl. ¶6.
Experience as deputy fire marshal. <i>Id.</i>	6 years SOF¶1	5 years SOF¶6
Experience as a supervisor or lead worker. <i>Id.</i>	> 5 years. E.g. supervised 41 Soldiers during ground combat operations in Iraq (2003-2004); supervised 216-Soldier unit (2005-2008) (Hanson Decl. at Ex. A)	0 years experience
Work history germane to deputy fire marshal 2 position. <i>Id.</i>	> 9 years Fire Sprinkler Fitter Foreman (Richey Decl. ¶¶4-5; Hanson Decl. at Ex. A)	0 years experience
Experience working "out of class" as DFM2. <i>Id.</i>	> 2 years SOF¶2	0 years experience (Rimack Decl. ¶6)

23
 24
 25 ³ SOF = the "Statement of Fact" paragraphs contained in the "fact" section of this brief.

1 20. Indeed, Mr. Hanson's former co-worker declares that "it is reasonably certain that Craig
2 would have become a DFM2 ahead of Jackie [Blackwood]." (Richey Decl. at ¶7)

3 21. In addition to refusing to properly reemploy Mr. Hanson the County, on February 21,
4 2013, refused to make the contributions and service credit necessary to cover the employer
5 pension (and service credit) contributions to Mr. Hanson's PERS 3 account for the November
6 2009 - December 2012 timeframe. (Hanson Decl. at ¶20 & Ex. M) To date the County has not
7 made any employer pension contribution (or service credit) for the November 2009 - December
8 2012 timeframe. (Hanson Decl. at ¶¶20-21)

9 22. In addition to not properly reemploying Mr. Hanson and not properly contributing to his
10 pension account, the County failed to give Mr. Hanson any longevity bonus in 2012 (although
11 Mr. Hanson was eligible for one) and Mr. Hanson's longevity bonus for 2013 improperly failed
12 to account for his three years of military service. (Hanson Decl. at ¶¶22-23) The County's
13 failure to properly apply the 2013 longevity bonus is illustrated as follows: the County gives
14 employees with over five years of service a longevity bonus of 1% of that employee's salary.
15 (Hanson Decl. at ¶22) The longevity bonus is due on the employee's anniversary hiring month.
16 (Jarrard Decl. at ¶¶7,8 & Exs. R & S) Mr. Hanson's anniversary hiring month is March and Mr.
17 Hanson's hourly rate is \$30.40 which equates to a salary of \$62,232.00. (Hanson Decl. at ¶22 &
18 Ex. O) 1% of \$62,232.00 is \$622.32; yet the longevity bonus Mr. Hanson received in March
19 2013 (the anniversary of his March 2007 hiring month) was \$263.47, an amount that accounts
20 for approximately two years of service, not the six-plus years the County should have credited
21 for Mr. Hanson's 2009-2012 military mobilization. *Id.* at ¶22.
22
23
24
25

1 23. Additionally, the \$62,232.00 salary Mr. Hanson received upon return from military
2 leave did not account for the "working out of class" pay increase Mr. Hanson received prior to
3 his 2009 military leave. (Hanson Decl. ¶22; Jarrard Decl. at ¶8 & Ex. S)

4 **C. Argument.**

5 **1. Summary judgment standard.**

6 Summary judgment is proper when "the pleadings. . . together with the affidavits, if any,
7 show that there is no genuine issue as to any material fact and that the moving party is entitled
8 to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
9 (1986). An issue is "genuine" if a sufficient evidentiary basis exists where a fact finder could
10 find for the nonmoving party and a dispute is "material" if it could affect the outcome of the
11 suit. *Anderson, v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing the
12 motion must set forth specific facts showing there is a genuine issue for trial. *In re Barboza*,
13 545 F.3d 702, 707 (9th Cir. 2008). There are no issues of fact as to Mr. Hanson's 38 U.S.C. §§
14 4312, 4313, 4316, and 4318 claims.

15 **2. The USERRA is liberally construed.**

16 Congress passed USERRA in order:

17
18 (1) to encourage non-career service in the uniformed services by eliminating or
19 minimizing the disadvantages to civilian careers and employment which can
20 result from such service; (2) to minimize the disruption to the lives of persons
21 performing service in the uniformed services as well as to their employers, their
22 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.

23 The Act is liberally construed. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9
24 (1991). The Act codifies the U.S. Supreme Court's decision in *Fishgold v. Sullivan Drydock*

1 *Repair, Co.* 328 U.S. 275 (1946) which holds that the returning veteran "must be restored to his
2 former position 'or to a position of like seniority, status, and pay'" and that "[h]e is thus
3 protected against receiving a job inferior to that which he had before entering the armed
4 services." *Id.* at 284. Kitsap County did not restore Mr. Hanson to a "position of like seniority,
5 status, or pay" - - - it didn't even give him his badge and boots back. Such acts were wrong in
6 1946 and are wrong today.

7 **3. *Kitsap County violated USERRA by not promptly and properly reemploying***
8 ***Mr. Hanson to a position of like seniority, status and pay as required by 38 U.S.C. §§***
9 ***4312 and 4313.***

10 In order to enjoy USERRA's re-employment protections, the plaintiff must: (a) be a
11 member of the Armed Forces of the United States; (b) give notice to his employer of the
12 plaintiff's military obligations; (c) receive an honorable discharge from military service; (d) give
13 timely notification, to the employer, of plaintiff's intent to return to work; and, (e) serve less
14 than five years with the military. 38 U.S.C. § 4312. The County does not dispute that Mr.
15 Hanson satisfies points (a) through (e). SOF ¶¶7-8.

16 Once standing is established the employer must re-employ the service-member to a
17 position with the seniority, status, and pay the employee "would have attained with reasonable
18 certainty if not for the absence due to uniformed service." 20 C.F.R. § 1002.191. The employer
19 must "promptly" reemploy the returning service-member into his or her proper pre-service job
20 within 14 days of the employee requesting reemployment. 20 C.F.R. § 1002.181. Although an
21 employer may transfer another employee (like Wiggins or Shepherd) into the position that the
22 service-member vacated during military service, upon the service-member's return the
23 replacement employee/s must be removed and the service member be reemployed to his
24 position "even if reemployment might require the termination of that replacement employee."
25

1 20 C.F.R. § 1002.139(a). Here, Mr. Hanson was not promptly reemployed to the position of
2 like status, seniority or pay he would have obtained but for his military service nor were
3 Wiggins and Shepherd timely removed.

4 There are no triable issues of fact. Mr. Hanson would have retained his DFM 3 call
5 sign (read: rank), identification card, fire marshal badge, boots (which were required by the
6 CBA no less), vehicle and investigative responsibilities if he had not left employment for
7 military service. Mr. Hanson had those items/duties before leaving for military duty in 2009
8 but was denied those items/duties upon his return from military duty in 2012. SOF ¶¶1,2,11-13,
9 15-16. Courts have found an employee's "status"⁴ improperly diminished upon return from
10 military duty under far less egregious facts than this case. *See Duarte v. Agilent Technologies,*
11 *Inc.*, 366 F. Supp. 2d 1039, 1045-1046 (D. Colo. 2005)(finding §4313 "status" violation even
12 though a returning service member's "title, pay, and benefits upon his return from active duty . .
13 . were the same as they had been when he was called-up").

14
15 More importantly, the County's reduction (from January 2013 - April 2013) and denial
16 (from April 2013 onward) of Mr. Hanson's fire investigation duties caused Mr. Hanson to lose
17 money by lessening (and then eliminating) opportunities to earn more for on-call investigations
18 and the opportunity for "working out-of-class" benefits set out in the County's personnel policy.
19 SOF ¶¶14,18, 23. Such acts implicate USERRA's "status" and "pay" prongs. *See id.*

20
21 ⁴ The term "status" is not defined in USERRA and so should be accorded its ordinary and
22 common meaning. *Duarte v. Agilent Technologies, Inc.*, 366 F. Supp. 2d at 1045-1046.
23 However, regulations governing the federal government USERRA reemployment obligations
24 define "status" to mean "the particular attributes of a specific position. This includes the rank or
25 responsibility of the position, its duties, working conditions, pay, tenure, and seniority." 5
C.F.R. § 353.102(2).

1 Further, Mr. Hanson was denied DMF 2 status and promotion upon return. There is no
2 triable issue of fact that Mr. Hanson's escalation into the DFM 2 position was reasonably
3 certain. First, Mr. Hanson had seniority over Ms. Blackwood; he was hired into the deputy fire
4 marshal career field one year before Ms. Blackwood and worked "out of class" as a DFM 2 for
5 years while Ms. Blackwood had no such "out of class" DMF 2 experience. SOF ¶1 & Jarrard
6 Decl. at ¶6 & Ex. Q. Second, the County had Mr. Hanson apply for the DFM 2 position in June
7 2007. SOF ¶3. Third, the DFM 2 position required three years investigation experience: at the
8 time of the April 2013 DFM 2 interview Hanson had three years experience and had conducted
9 62 investigations, Blackwood had no investigative experience at all. SOF ¶19. Fourth, the DFM
10 2 position sought extensive training in fire investigation: at the time of the DFM 2 interview
11 Hanson completed 9 investigation courses; Blackwood completed zero. *Id.* Fifth, Mr. Hanson's
12 co-worker declares that it was "reasonably certain" that Mr. Hanson would have been promoted
13 to DFM 2 over Ms. Blackwood. SOF ¶20. Sixth, Mr. Hanson's prior technical experience as a
14 Fire Sprinkler Pipe Fitter and leadership experience as supervisor of over 40 Soldiers in a
15 combat zone account for significant supervisory experience called for in the DMF2 posting.
16 SOF ¶19.

17
18 **4. *The County pled no defense to Mr. Hanson's re-employment claim.***

19 The USERRA recognizes three affirmative defenses to Mr. Hanson's 38 U.S.C. §4312
20 "re-employment" claim. Those affirmative defenses are: (1) the employer's circumstances
21 changed making re-employment (i) impossible or (ii) unreasonable; (2) re-employing the
22 service member would impose "an undue hardship on the employer" due to a service connected
23 disability or lack of qualifications; or, (3) the employee had no reasonable expectation of re-
24 employment due to the seasonal or temporary nature of the job. 38 U.S.C. §4312(d)(1)(A)-(C).
25

1 Courts hold that Congress does not allow any other defense to a USERRA re-employment
 2 claim. *Petty v. Metro. Gov't of Nashville*, 687 F.3d 710, 720 (6th Cir. 2012)(recognizing that no
 3 authority exists for the proposition that other defenses could apply to USERRA reemployment
 4 claims); *See* 38 U.S.C. § 4312(d)(listing the only affirmative defenses available under the Act
 5 to reemployment claims). The County did not assert any § 4312(d) affirmative defense to Mr.
 6 Hanson's USERRA reemployment claim! (Dkt. 23, at ¶¶5.1-5.9) Since no USERRA re-
 7 employment defense was pled no trial is needed on the claim and Mr. Hanson is entitled to
 8 judgment as a matter of law on his USERRA reemployment claim.

9 ***5. Kitsap County violated 38 U.S.C. § 4318 by denying Mr. Hanson accrued***
 10 ***payments and service credit to his defined benefit pension for Mr. Hanson's military***
 11 ***leave period.***

12 The USERRA prohibits discrimination against military service members with respect to
 13 pension plans. *Steelman v. Oklahoma Pol. Pen. & Ret. Sys.*, 128 P. 3d 1090, 1095 (Okla. Ct.
 14 App. 2005) The term “benefit of employment” is defined by USERRA and specifically includes
 15 any “rights and benefits under a pension plan.” 38 U.S.C. § 4303(2). Those rights and benefits
 16 include employer pension contributions. *See id.* Upon reemployment, an employee must be
 17 treated as if there had been no break in service with respect to participation, vesting, and accrual
 18 of pension benefits. 38 U.S.C. § 4318(a)(2)(A)-(B). Each period of service is, upon
 19 reemployment, deemed to constitute service with the employer for the purpose of determining
 20 the person’s accrual of benefits under the plan. 38 U.S.C. § 4318(a)(2)(B); 20 C.F.R. § 1002.259.
 21 An employer must make its employer pension contribution, and provide service credit, within 90
 22 days of the employee's return to work from military duty. 20 C.F.R. §1002.262(a).

23 In a non-contributory defined benefit plan, where the amount of the pension benefit is
 24 determined according to a specific formula, the employee’s benefit is the same as though he or
 25

1 she had remained continuously employed during military leave. 20 C.F.R. § 1002.265(a). In
 2 other words, an employer must treat an employee who is reemployed after a period of military
 3 service as if the employee remained continuously employed. *Scott v. Absolute Intl.*, No. 06-
 4 1174, 2007 U.S. Dist. LEXIS 68599 at *6 (W. D. Pa. Sep. 17, 2007); 20 C.F.R. § 1002.262(a).

5 Throughout his employment with Kitsap County Mr. Hanson participated in the
 6 Washington State Department of Retirement System, PERS⁵ Plan 3 (“Plan 3”). SOF¶21. Plan 3
 7 is a 401(a)⁶ *defined benefit plan* with a separate defined contribution component.⁷ Mr. Hanson is
 8 not “required or permitted to contribute to”⁸ the defined benefit plan; the Plan 3 defined benefit
 9 is funded by contributions made only by the employer and is based on a percentage of the
 10 employee’s salary.⁹ As such, the employer must make its employer-pension contributions within
 11 90 days of the employee's return to work. 20 C.F.R. §1002.262(a). The defined benefit
 12 contribution component of Plan 3 is not a matching fund, and it is not contingent upon the
 13

14
 15
 16 _____
 17 ⁵ PERS means the Washington Public Employees' Retirement System created by chapter 41.40
 18 RCW. WAC § 415-02-030 (28).

19 ⁶ Under the Internal Revenue Code a governmental plan is a Section 401(a) retirement plan
 20 established and maintained for the employees of a state or political subdivision. 26 U.S.C. §
 21 414(d).

22 ⁷ See RCW 41.34.030; WAC § 415-02-030(10); and RCW § 41.40.780 that provides:

23 (1) RCW 41.40.780 through 41.40.850 and 41.40.930 apply only to plan 3
 24 members.

25 (2) Plan 3 consists of two separate elements: (a) A defined benefit portion
 covered under this subchapter; and (b) a defined contribution portion covered
 under chapter 41.34 RCW.

(3) Unless otherwise specified, all references to "plan 3" in this subchapter
 refer to the defined benefit portion of plan 3.

⁸ 20 C.F.R. § 1002.262(a).

⁹ Under Plan 3, the employer contribution rate is the fraction (percent) of payroll a member's
 employer contributes to a retirement system each month. WAC § 415-02-030 (8).

1 employee making, or derived from, any employee contributions or elective deferrals.¹⁰ When
 2 Mr. Hanson retires, his defined benefit is to be paid based upon the number of years of his public
 3 service (i.e. the service credit) and the average of his final compensation.¹¹

4 Mr. Hanson requested that Kitsap County make the proper contributions to his defined
 5 benefit pension. *SOF ¶¶21*. The County refused. *Id.* Instead, the County told Mr. Hanson it
 6 would make the employer contribution to Mr. Hanson’s defined benefit plan, *if* Mr. Hanson first
 7 “buys back” the defined contributions he could have made if he had not been away for military
 8 service. *Id.* In other words, Kitsap County “will only pay” its obligation to Mr. Hanson’s *defined*
 9 *benefit* plan when Mr. Hanson voluntarily pays into his *separate defined contribution* plan. Such
 10 a requirement violates USERRA and *Fishgold*. 38 U.S.C. § 4318(b)(1)-(3); 20 C.F. R. §
 11 1002.262 (a) & (d). To wit:

12 He shall be "restored without loss of seniority" and be considered
 13 "as having been on furlough or leave of absence" during the period
 14 of his service for his country, with all of the insurance and other
 15 benefits accruing to employees on furlough or leave of absence.
 16 Thus he does not step back on the seniority escalator at the point
 17 he stepped off. He steps back on at the precise point he would have

18 ¹⁰ The Washington State Public Employees’ Retirement System (PERS) – Publishes a Plan 3
 19 Member Handbook which also *describes the defined benefit plan in layperson’s terms as:*

20 Your future defined benefit is funded by contributions made by
 21 your employer and is based on a percentage of your salary or
 22 wages. They are not matching funds and you cannot withdraw
 23 them if you leave public service.

24 *available at www.drs.wa.gov/member/handbooks/pers/plan-3/pers3hbk.pdf at p.5.* In contrast, to
 25 the provisions of 38 U.S.C. § 4318(b)(2), none of the requirements which govern the employer’s
 defined benefit contribution to Plan 3, *see* RCW §§ 41.40.805 (4); 41.45.060, 061, 067, 150 and
 155, relate in any way to the separate *defined contribution* portion covered under chapter 41.34
 RCW.

¹¹ RCW § 41.40.790; WAC § 415-02-030(10).

1 occupied had he kept his position continuously during the war.
2 *Fishgold*, 328 U.S. at 284 - 285.

3 Additionally, the County denied Mr. Hanson proper service credit for the 2010-2012 time
4 he was absent for military service. (Hanson Decl. at ¶22 & Ex. N *citing* PERS 3 statements,
5 dated August 28, 2013, which show no service credit) Plan 3 states that an individual shall
6 receive equivalent service credit for all “retroactive payments to an individual by an employer on
7 reinstatement of the employee in a position.”¹² The service credit denial improperly extends the
8 time period by which Mr. Hanson's plan vests by at least three years. (Jarrard Decl. ¶10 & Ex. U)

9 Here Kitsap County is doing what USERRA and *Fishgold* forbid: requiring Mr. Hanson
10 "to step back on the seniority escalator" at the point he occupied in November 2009 and not
11 make the pension contributions (or service credits) that should have been made to Mr. Hanson
12 within 90 days' of Mr. Hanson's return to work.

13 **6. *Kitsap County Violated 38 U.S.C. § 4316 by: (a) denying Mr. Hanson his***
14 ***longevity bonus; and, (b) demoting Mr. Hanson upon his return to work.***

15 **a. Denial of Longevity Bonus.**

16 An employee absent from work because of military duty is entitled to all benefits that the
17 employer "generally provide[s]" to other employees on leave or furlough who have similar
18 seniority, status, and pay. 38 U.S.C. § 4316(b). After reemployment, the employee is further
19 entitled to the seniority, rights, and benefits to which he was entitled on the date he left for active
20 duty, as well as any other seniority or seniority-based rights and benefits that he would have
21 attained if he had remained continuously employed since that military duty report date. 38 U.S.C.

22
23
24
25 ¹² RCW § 41.40.010(8)(b)(i).

1 § 4316(a); 20 C.F.R. § 1002.210. A "seniority-based right or benefit" is one that "accrues with,
2 or is determined by, longevity in employment." 20 C.F.R. § 1002.212.

3 Kitsap County policy provides a 1% salary "longevity bonus" for employees who were
4 hired after 1998 and who work for the County for more than five years. (Jarrard Decl. ¶¶7, 8 &
5 Exs. R & S) The employee receives the longevity bonus on the employee's "anniversary date"
6 (i.e. the anniversary of the date the employee got hired at the County). *Id.* The award is based
7 solely upon the employee's time working at the County. *Id.* The longevity bonus is a seniority-
8 based benefit.

9 Mr. Hanson did not receive a longevity bonus, at all, for 2012 even though he was
10 eligible for such a bonus as he had worked at the County for five years as of March 2012.
11 (Hanson Decl. at ¶¶1, 22) The County improperly calculated Mr. Hanson's 2013 longevity
12 bonus. Mr. Hanson's hourly rate is \$30.40/hour which equates to a \$62,232.00 salary.¹³
13 (SOF¶22 comparing \$30.40/hr rate (HANSON00003) with \$63,232.00/year Fire Marshal 1
14 salary (HANSON000517) as set out in the CBA.) Mr. Hanson's hiring anniversary date is March
15 2013. SOF¶22. On March 2013 Mr. Hanson received a \$263.47 longevity bonus; but, 1% of
16 \$62,232.00 is \$622.32, not \$263.47. *Id.* The County violated USERRA by not paying a 2012
17 longevity bonus and by not including the three years Mr. Hanson was away on military orders
18 (2009-2012) in awarding his 2013 longevity bonus. The time Mr. Hanson was away on military
19 orders must count to each bonus. 20 C.F.R. § 1002.212.

20
21 **(b) Defendants violated § 4316 by demoting Mr. Hanson upon his return to work**
22

23
24 ¹³ Again, this does not take into account the fact that Mr. Hanson's return to work salary is more
25 than \$62,232.00 given that the \$62,232.00 salary does not take into account Mr. Hanson's pre-
leave working out of class pay. SOF¶23.

1 In addition, 38 U.S.C. § 4316(c)(1)¹⁴ provides protections from discharge without cause
 2 for one year following proper reemployment.¹⁵ Demoting a returning service member is the
 3 same as discharge without cause. *Foor v. Torrington Co.*, 170 F.2d 487, 490 (7th Cir. 1948)("it is
 4 crystal clear that a demotion is equivalent to a discharge.")(citing *Fishgold*, 328 U.S. at 286 (The
 5 guarantee against discharge "from such position" is broad enough to cover demotions. The
 6 veteran is entitled to be restored to his old position or to a "position of like seniority, status, and
 7 pay.")); *Paredes v. Pillsbury Co.*, 259 F. Supp. 493, 495 (C.D. Cal. 1966) (a demotion to a lesser
 8 status position, even at the proper rate of pay, is tantamount to discharge). *Paredes* involved a
 9 veteran returning to work at the appropriate rate of pay but being placed in a position requiring
 10 less skill and responsibility. *Paredes*, 259 F.Supp. at 494-495. *Paredes* held that the veteran's
 11 demotion to that lower position was, in effect, a discharge. *Id.*

12
 13 The County did not wait one year. It immediately demoted Mr. Hanson upon Mr.
 14 Hanson's return to work. Before 2009 Mr. Hanson conducted a full load of investigation and
 15 inspection work as a DMF 1/2. Clark Decl. ¶¶7,8; SOF¶2 Mr. Hanson's work load was so large
 16 that the County hired Wiggins and Shepherd to do Mr. Hanson's work in Hanson's absence.
 17 SOF¶7. But upon returning to work the County did not remove Wiggins and Shepherd even
 18 though Mr. Hanson repeatedly requested the County do so. SOF¶¶14,18. It was not until late-
 19 April 2013, and after Mr. Hanson's union got involved, that the County began the process of
 20

21 ¹⁴ Mr. Hanson's military service was in excess of the 180 day requirement of 38 U.S.C.
 22 4316(c)(1), and, thus he is entitled to protection from discharge for one year after the date of
 23 reemployment.

24 ¹⁵ 38 U.S.C. § 4316 further provides that the period of protection from discharge does not begin
 25 to run until the employee is placed into a position with the benefits and status they would have
 obtained but for their absence due to military obligations. *O'Mara v. Peterson Snd. & Grvl. Co. Inc.*, 498 F.2d 896, 898 (7th Cir. 1974); 70 Fed. Reg. 75,246, 75, 279 (Dec 19, 2005).

1 removing Wiggins and Shepherd. SOF ¶¶18; Clark Decl. ¶¶7,8. Yet in late April-2013 the
2 County temporarily reduced Mr. Hanson's hours from 40/week to 36/week. Clark Decl. ¶8. And
3 even after Wiggins and Shepherd were removed the County (in addition to not returning Mr.
4 Hanson's FM3 call-sign, badge, and ID card) still did not let Mr. Hanson conduct investigative
5 duty and, by April 2013, barred Mr. Hanson from conducting any investigative duty at all.
6 SOF ¶18.

7 The County's acts are akin to what the *Paredes* court found to trigger liability under the
8 law. Partial summary judgment regarding Mr. Hanson's §4316 without cause discharge claim is
9 proper.

10 III. CONCLUSION

11 Mr. Hanson's motion for partial summary judgment regarding liability should be
12 granted.
13

14 DATED this 30th day of August 2013.

15 /s Matthew Crotty
MATTHEW Z. CROTTY
Crotty & Son Law Firm, PLLC
421 West Riverside, Suite 1005
Spokane, WA 99201
Telephone: 509.850.7011

18 /s Thomas G. Jarrard
THOMAS G. JARRARD
The Law Office of Thomas G. Jarrard, PLLC
1020 N. Washington
Spokane, WA 99201
425-239-7290

22 Attorneys for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2013,

1. I served the foregoing via the Court's CM/ECF system:

Jacquelyn Moore Aufderheide jaufderh@co.kitsap.wa.us, TObourn@co.kitsap.wa.us,
bfredsti@co.kitsap.wa.us, cbruce@co.kitsap.wa.us, dameyer@co.kitsap.wa.us,
thamilto@co.kitsap.wa.us

Deborah Ann Boe dboe@co.kitsap.wa.us, bfredsti@co.kitsap.wa.us,
cbruce@co.kitsap.wa.us, dameyer@co.kitsap.wa.us, kmartens@co.kitsap.wa.us,
lhughes@co.kitsap.wa.us, thamilto@co.kitsap.wa.us, tosbourn@co.kitsap.wa.us

Matthew Z. Crotty matt@crottyandson.com, matthew.z.crotty@msn.com

Thomas G. Jarrard tjarrard@att.net

2. I have caused to be hand-delivered the document to the following participants at the addresses listed below: none.

CROTTY & SON LAW FIRM, PLLC

Matthew Z. Crotty

MATTHEW Z. CROTTY
WSBA #39284, ISB #8653
421 W. Riverside Ave. Ste 1005
Spokane, WA 99201
Telephone: (509) 850-7011
Email: matt@crottyandson.com