

# Law Review 13031

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## State of Nevada Finally Complies with USERRA

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- 1.1.1.7—USERRA applies to state and local governments
- 1.2—USERRA forbids discrimination
- 1.3.1.1—Left job for service and gave prior notice
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*United States v. State of Nevada*, 817 F. Supp. 2d 1230 (D. Nev. 2011).

*United States v. State of Nevada*, 2012 U.S. Dist. LEXIS 60483 (D. Nev. May 1, 2012).

*United States v. State of Nevada*, 2012 U.S. Dist. LEXIS 60484 (D. Nev. May 1, 2012).

*United States v. State of Nevada*, 2012 U.S. Dist. LEXIS 60486 (D. Nev. April 30, 2012).

In Law Review 0930 (September 2009), I reported that the United States Department of Justice (DOJ) had filed suit in the name of the United States (as plaintiff) against the State of Nevada concerning the State's violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the case of Colonel Arthur Ingram, USAR.[\[1\]](#)

Kathy Augustine was elected Nevada State Controller in 1998 and reelected in 2002. Under Nevada law, she was limited to two terms, so she was not eligible to run again for the same office in 2006. In July 2006, while running for State Treasurer, she was murdered. Her husband was convicted of the murder in 2007 and sentenced to life imprisonment.

In February 2003, shortly after Augustine began her second term, she hired Arthur Ingram as her Chief Deputy Controller. Ingram was a Colonel in the Army Reserve, and on March 23, 2003 (barely a month after he started the Deputy Controller job) the Army ordered him to active duty. He promptly informed the Controller, Ms. Augustine. The Army later amended the order to call him to active duty on June 1, 2003, and he reported as ordered.

After the completion of his involuntary call-up, Ingram remained on active duty voluntarily. He was on active duty continuously from June 1, 2003 until April 25, 2008, except for one week in April 2006 when he was between orders. After leaving active duty in April 2008, Ingram promptly applied for reemployment with the State Controller, who by that time was Kim Wallin (elected to a four-year term in November 2006).[\[2\]](#)

It is clear that Ingram was entitled to reemployment in 2008. He gave prior notice to the State Controller (Augustine) prior to reporting to active duty on June 1, 2003. He kept Controller Augustine and Controller Wallin informed of the various extensions of his active duty service. He did not exceed the five-year limit on the duration

of service, and he was released from active duty without a disqualifying bad discharge. After release, he made a timely application for reemployment.

The State of Nevada and the State Controller argued that Ingram had exceeded the five-year limit because the interim between Ingram's last day at work at the Controller's office and his reporting back to work was a little more than five years. District Judge Larry R. Hicks correctly ruled that it was the *duration of the period of service* and not the *duration of the absence from the civilian job* that is subject to the five-year limit, and Ingram's service from June 2003 to April 2008 was within the limit.[\[3\]](#)

On June 4, 2008 (five years and one day after he had entered active duty, and 40 days after he left active duty), Ingram met with State Controller Wallin, Assistant Controller Mark Taylor, and Deputy Attorney General Doug Walther to discuss his returning to work in the Office of the State Controller. Controller Wallin did not offer Ingram reemployment at that meeting, indicating that she needed to research her rights under USERRA.

On June 17, 2008, Ingram sent Wallin a letter expressing his desire to return to work as the Chief Deputy Controller and his intent to start on July 24, 2008. That same day (June 17), Wallin sent Ingram a letter offering him the lesser position of Chief Accountant in the Office of the Controller, but she made the offer subject to several conditions. On June 25, 2008, Ingram filed a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that the State of Nevada and the Nevada State Controller had violated USERRA.

On July 24, 2008, Ingram reported for work at the Office of the Controller and met with Wallin, Taylor, and Walther. Apparently having been well advised by someone, Ingram indicated that he "would accept any position that [they] were willing to give [him] but [he] was going to pursue his rights under USERRA" and that he still believed that he was entitled to the Deputy Controller position. Controller Wallin then withdrew the offer for Ingram to return to work as Chief Accountant, and the State of Nevada did not offer him any position.

Characterizing the withdrawal of the Chief Accountant position is difficult and controversial. One characterization is that Controller Wallin offered Colonel Ingram the position as a settlement offer—that if Ingram were willing to drop his claim to the Deputy Controller position she would offer him the Chief Accountant position as a compromise. Ingram was not required to accept this settlement offer, and he did not accept it.

Another characterization is to say that Controller Wallin rescinded the offer of the Chief Accountant position as a reprisal against Ingram for his having asserted his USERRA rights and having filed a USERRA complaint with DOL-VETS. Such a reprisal may have constituted a separate violation of section 4311(b) of USERRA, 38 U.S.C. 4311(b).

On December 15, 2008, Controller Wallin sent Colonel Ingram a letter, indicating that his employment was terminated effective January 1, 2007 because his "position terminated when Kathy Augustine's term ended." Kathy Augustine was reelected to a four-year term in 2002 and would have served through December 31, 2006, but for her murder in July 2006.

As I explained in Law Review 13027 (February 2013)[\[4\]](#) and other articles, the 11<sup>th</sup> Amendment of the United States Constitution presents enormous obstacles to effective enforcement of USERRA against state government employers. Under the 1998 USERRA amendment, there are two ways to enforce USERRA against a state government employer. The preferred way, and the way that Colonel Ingram chose in this case, is to file with DOL-VETS and then to request that DOL-VETS refer the case to DOJ. Since DOJ agreed that Colonel Ingram's case had merit, it brought suit on his behalf in federal district court, but the named plaintiff was the United States of America, not Arthur Ingram. The 11<sup>th</sup> Amendment does not bar a suit in federal court against a state brought by the United States, and the 11<sup>th</sup> Amendment problem is thus avoided.

The problem with relying on DOL-VETS and DOJ is that the DOL-VETS personnel who are usually assigned to do these USERRA investigations are not lawyers and have received no particular training in investigations and resist doing complex investigations. All too often, they take the path of least resistance and accept at face value the

factual and legal assertions of attorneys for employers and simply close cases as “no merit” even when the cases do have merit. Indeed, in this case the DOL-VETS Director for Nevada closed the case with a “no merit” letter on October 16, 2008. Fortunately, the “no merit” determination was later reversed within DOL-VETS, and the Ingram case was referred to DOJ with a positive recommendation.

The State of Nevada fought this case tooth and nail, making a series of arguments that Judge Larry R. Hicks firmly rejected, granting summary judgment for DOJ on several issues. Judge Hicks rejected Nevada’s argument that DOJ lacked standing to bring this case. He rejected the argument that Ingram’s pre-service employment was brief and that Ingram had no reasonable expectation that it would continue indefinitely or for a significant time. He rejected the argument that the 2006 election of a new State Controller in Nevada made it “impossible or unreasonable” for the State of Nevada to reemploy Ingram. He rejected the argument that Ingram had exceeded the five-year limit or that he did not have the right to reemployment because he had performed “career” military service. He rejected the argument that Ingram had not given sufficient notice that he was leaving work for service or that he had not made a sufficient application for reemployment. He rejected the argument that applying USERRA to the State of Nevada violates the 10<sup>th</sup> Amendment of the United States Constitution. He rejected the argument that the State of Nevada could somehow rely on the “no merit” letter sent out by the DOL-VETS Director for Nevada. He rejected the argument that Ingram had rejected the offer of the Chief Accountant position. He rejected various other arguments that the State made.

The State of Nevada finally settled this case in July 2012, agreeing to pay Ingram \$262,000 in back pay and to pay an additional \$211,000 to fund Ingram’s state employee pension entitlements from June 2003, when he left his job for military service, through July 2012, when the case was settled. This case is now over, and Colonel Ingram is satisfied with the result.

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**[1]** I regret to inform the readers that Colonel Ingram is not a member of ROA, although he is certainly eligible. We will work on that. Anybody know him?

**[2]** Ingram applied for reemployment with the State Controller. He did not apply separately with the Governor or the State Personnel Office, and this could have harmed his case, in that he was claiming reemployment rights with respect to the State of Nevada generally, not just the Office of the Controller. Let this be a lesson to others. When you leave a job for military service, and when you return from service and seek reemployment, you should give notice separately but simultaneously to each person or office that conceivably is entitled to such notice.

**[3]** It should also be noted that Ingram’s first year of service, from June 2003 to June 2004, was involuntary and did not count toward the five-year limit under 38 U.S.C. 4312(c). But even if that year counted Ingram had not exceeded the limit.

**[4]** I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 853 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.