

LAW REVIEW¹ 18081
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**The Returning Veteran Who Meets the USERRA Conditions Is Entitled to Pay
Raises that he or she Would Have Received with *Reasonable Certainty*, but for
the *Call to the Colors***

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- 1.1.1.7—USERRA applies to state and local governments
- 1.3.2.2—Continuous accumulation of seniority—escalator principle
- 1.3.2.5—Rate of pay after reinstatement
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***Jeong Ko v. City of LaHabra*, 2017 U.S. Dist. LEXIS 48101 (C.D. Cal. March 30, 2017).³**

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ This is a recent decision by Magistrate Judge Patrick J. Walsh of the United States District Court for the Central District of California.

Jeong Ko (JK) graduated from high school in 1988 and enlisted in the Army. After he left active duty, he affiliated with the Army Reserve (USAR). In 2006, 18 years after he graduated from high school, he attended and graduated from the police academy and became a probationary police officer for the City of LaHabra, California.

In LaHabra, a probationary police officer starts out at Step A (the lowest step) on the pay scale. After six months as a probationary police officer, JK was rated as “needs improvement” and therefore he did not receive a pay raise to Step B. JK was rated as “needs improvement” again at the nine-month point, so he did not receive a pay raise and his probationary period was extended by another six months. In November 2007, at the 15-month point of his probationary employment, he was rated as “meets standards” and he was promoted from probationary to permanent status and he received a pay raise from Step A to Step B.

In LaHabra, police officers receive annual performance evaluations. The individual officer’s evaluation determines whether he or she receives a “merit-based” pay raise, but the evidence showed that 98% of officers are rated at least at the “meets standards” level and receive these merit-based pay raises. Of the 2% who do not receive these raises, most are probationary police officers.

On 4/28/2008 (five months after he received the “meets standards” rating and was promoted from probationary to permanent status), JK was called to active duty and deployed to Afghanistan. In September 2009, he was released from active duty, returned home to LaHabra, and made a timely application for reemployment at the police department. It was not disputed that he met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴

JK returned to work in September 2009, but the city waited until April 2010 (seven months after his return to work) to evaluate his performance and consider him for a merit pay raise. At that time, the city gave him an evaluation for a 12-month period that included the five months before he was called to active duty in April 2008 and seven months after he returned to work in September 2009.

In that special performance evaluation, JK was rated as “exceeds standards” for the 12-month period, and JK received a step increase in April 2010. JK contended that under USERRA’s escalator principle he was entitled to the step increase as of September 2009, when he returned to work. After a detailed trial, Judge Walsh found that it was reasonably certain that

⁴ JK left his civilian job to perform uniformed service, and he gave the city notice. He served honorably and did not receive a disqualifying bad discharge from the Army. He did not exceed the cumulative five-year limit on the duration of his period or periods of uniformed service relating to his employer relationship with the city. After he was released from active duty, he made a timely application for reemployment. Please see Law Review 15116 (December 2015) concerning the five USERRA conditions.

JK would have been rated at “meets standards” or above in November 2008, 12 months after he was promoted from probationary to permanent status, but for his call to active duty. Thus, Judge Walsh found that JK was entitled to the step increase in September 2009, when he returned to work after his 17 months in Afghanistan.

I think that Judge Walsh got it right. Based on evidence that 98% of police officers receive “merit” pay raises each year, and based on the fact that JK was rated at “exceeds standards” for the five months before his mobilization and the seven months after he returned to work, it is fair to say that it is “reasonably certain” that JK would have been rated at least at the “meets standards” level in November 2008 if he had not been away from his civilian job, serving our country in Afghanistan, at that time. As I have explained in Law Review 18080 (August 2018), the returning veteran is not required to prove that it is absolutely certain that he or she would have received the pay raise or promotion but for the call to the colors. It is only necessary for the veteran to show that it is *reasonably* certain that he or she would have received that benefit.

Judge Walsh awarded JK \$22,457.09 in back pay, representing the difference between the amount he should have been paid and the amount that he was paid for the period between September 2009 and April 2010. Judge Walsh declined to find that the city violated USERRA willfully and declined to award liquidated damages (double damages) to JK.

I agree that the city did not violate USERRA willfully, because the law was not entirely clear at the time. Now that this case has been decided, the city must learn its lesson and apply that lesson the next time a city employee leaves his or her civilian job for voluntary or involuntary military service. If the city fails to pay the returning veteran at the appropriate rate the next time this issue arises, the city should be held liable for liquidated damages in that case.⁵

Judge Walsh also found that JK would have been promoted to Step F on the pay scale before May 2012, but for his call to the colors. By the time this case went to trial, JK had retired from the police department. JK’s final rate of pay, before his retirement, is relevant in computing the amount of his monthly pension check.

Judge Walsh ended his decision as follows: “The court retains jurisdiction to make such further orders as may be proper or necessary to effectuate the provisions of this judgment.”

⁵ See *Petty v. Metropolitan Government of Nashville-Davidson County*, 687 F.3d 710 (6th Cir. 2012).