



OFFICE OF THE UNDER SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

APR 13 2005

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
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DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Administrative Claims for Annual Leave as a Result of the Decision in
Butterbaugh v. Department of Justice, 336 F.3d 1332 (Fed. Cir. 2003)

This memorandum provides notification of the possible impact of the decision in Butterbaugh v. Department of Justice on individuals who, beginning in 1980, were simultaneously Federal employees and (1) **Reservists, including Military Technicians, or (2) members of the National Guard** and who may have been improperly charged military leave in the circumstances described below. Please ensure that it is disseminated as widely as possible within your organization. This notification has been posted to the CPMS web site at www.cpms.osd.mil, along with the attached Office of Personnel Management (OPM) memorandum dated October 13, 2004, addressing the same subject.

In Butterbaugh, the United States Court of Appeals for the Federal Circuit reversed OPM's interpretation of section 6323 of title 5, United States Code and held that, at least since 1980, section 6323 has required Federal employees to take military leave only on days on which they are required to work in their civilian jobs. Accordingly, agencies should have allowed 15 *workdays* of military leave for reserve training each year, instead of 15 *calendar* days, as was the practice, in accordance with OPM's interpretation, until December 21, 2000, when section 6323 was amended.



OPM's prior interpretation of section 6323 may have forced some employees to take leave without pay and/or annual leave to complete a reserve duty obligation. The OPM memorandum referenced above contains guidance regarding the timeframe within which Butterbaugh leave claims must be filed by individuals who believe they were aggrieved by its prior interpretation of the law and how far back in time such claims may reach. It states that individuals must file claims with the agency responsible for the asserted erroneous leave charges no later than six years from the date or dates they believe they were improperly charged leave.

Please be aware that OPM has stated that its guidance applies solely to administrative compensation claims brought under the Barring Act, codified at section 3702 of title 31, United States Code, and is not intended to address whether claims may be filed under different laws. In addition, the Barring Act applies only to **appropriated fund employees**. Therefore, current federal employees, as well as those who have retired or separated from the federal government, who: (1) were charged military leave while they were **appropriated fund employees**, and (2) believe they have valid leave claims under Butterbaugh, may choose to file claims under the Barring Act with the federal agency or DoD component that charged them leave. If the responsible entity was a Military Department or other DoD component, individuals who choose to file a claim are encouraged to use the claims process set up by the Defense Finance and Accounting Service (DFAS) instead of filing with the DoD component. A description of how to file with DFAS is set forth below.

The Barring Act does not apply to **nonappropriated fund employees**. However, current or former **nonappropriated fund employees** who: (1) were charged military leave, and (2) believe they have valid leave claims under Butterbaugh, may choose to file claims for military leave under procedures established by the nonappropriated fund instrumentality (NAFI) responsible for the leave charges. See paragraph 3.1 of DoD Directive 5515.6, "Processing Claims Arising out of Operations of Nonappropriated Fund Activities," October 25, 2004, requiring NAFIs to establish claims procedures.

Current and former DoD **appropriated fund employees** filing claims arising from leave charges by DoD components should mail their claims to DFAS Payroll Office, PO Box 33717, Pensacola, FL, 32508-3717, and identify their current servicing payroll office. The claim should specify each non-workday that the claimant was charged military leave. Employees who did not work Monday through Friday should indicate what their work schedule was during the applicable timeframe(s). Employees should indicate whether, as a result of being charged military leave on a non-work day, they used annual leave or leave without pay to fulfill reserve duty. Supporting documentation should include a certificate of attendance for each period of active duty. Claimants are encouraged to provide their civilian leave and earnings statement reflecting the improper charge of military leave (if they have them). Claimants should also mark the envelopes

and the claims, "Butterbaugh Claim." Current and former DoD **nonappropriated fund** employees should mail their claim to their nonappropriated fund payroll office.

As an alternative to filing under the Barring Act or under NAFI claims procedures, a current or former **appropriated or nonappropriated** fund employee/Reservist may choose to file a Butterbaugh claim under the Uniformed Services Employment and Reemployment Act of 1994, as amended (USERRA), codified at sections 4301-4333 of title 38, United States Code. It is currently unclear how far back in time a USERRA claim may reach. This question is in litigation in cases pending before the Merit Systems Protection Board (MSPB), and we therefore cannot provide guidance concerning the time period in which a USERRA claim must be filed.

Information about filing claims under USERRA is available on the Internet in the "E-Laws" section of the Department of Labor's home page at www.dol.gov. An interactive system, "The USERRA Advisor," answers many of the most frequently asked questions about USERRA.

If you have any questions about the procedures for filing claims under the Butterbaugh decision, you may contact your servicing human resources specialist.


Charles S. Abell
Principal Deputy

Attachment:
As stated



OFFICE OF THE DIRECTOR

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OCT 13 2004

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:

KAY COLES JAMES
Director

A handwritten signature in black ink, appearing to read "Kay Coles James", written over the printed name and title.

SUBJECT:

Administrative Claims for Annual Leave as a Result of
Decision in *Butterbaugh v. Department of Justice*

This memorandum provides guidance to assist agencies in processing employees' administrative claims for annual leave as a result of the decision in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). In a July 24, 2003, decision, the U.S. Court of Appeals for the Federal Circuit ruled that, pursuant to 5 U.S.C. 6323, employees were required to take military leave only on days on which they were required to work and that agencies should have allowed 15 workdays of military leave for reserve training (instead of 15 calendar days, as the language in this section was previously interpreted and applied prior to the court's ruling). Therefore, the court ruled that agencies should not have charged military leave for nonworkdays that occurred within the period of military duty prior to the change in the military leave law that became effective on December 21, 2000. On this date, 5 U.S.C. 6323(a) was amended to include a new paragraph (3), which for the first time allowed employees to take military leave on an hourly basis. Following enactment of this amendment, employees were no longer required to take leave for nonworkdays.

The plaintiffs in *Butterbaugh* maintained that, because they were charged military leave for nonworkdays within their period of military duty, they exceeded their allowance of 15 days of military leave each fiscal year and were forced to take leave without pay and/or annual leave to complete their annual reserve training. In response to the *Butterbaugh* decision and in anticipation of the additional claims that will result, we are issuing this guidance on the procedures for processing employees' administrative claims for crediting annual leave as a replacement for military leave that was charged on nonworkdays. Agencies should inform employees of the holding under the *Butterbaugh* decision in order to give notice to potential claimants. You may use this memorandum to notify employees of this decision.

Under the Barring Act of 1940 (codified at 31 U.S.C. 3702), a leave claim against the Government must be received by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues. Therefore, agencies may accept claims filed after July 24, 2003 (the date the *Butterbaugh* decision was issued), for crediting additional leave for military leave charged on nonworkdays between the date 6 years prior to the claim filing date (the beginning of the 6-year claims period) and December 21, 2000 (the date of the

change in the military leave law). For example, if an employee filed a claim on August 1, 2004 (after the court's decision and prior to the issuance of this guidance), the agency must consider any period of military service between August 1, 1998, and December 21, 2000. If an employee files a claim on January 15, 2005, the agency will consider any period of military service between January 15, 1999, and December 21, 2000, in crediting annual leave.

As in all leave claims, the burden of proof is on the employee. An employee making a claim must supply a copy to his or her employing agency of the employee's orders, certification of attendance, or other documentation indicating that he or she engaged in one or more periods of active military duty that included nonworkdays during the applicable claims period described in the preceding paragraph. Employees will be credited for 1 day of annual leave for each nonworkday occurring within a period of active duty for which he or she was charged military leave. A maximum of 4 days of annual leave may be credited for each fiscal year.

Any annual leave credited as a result of an employee's claim must be placed in a restored leave account in accordance with 5 U.S.C. 6304(d)(1)(a) and OPM's regulations at 5 CFR 630.306, and the restored leave must be used by the employee by the end of the leave year in progress 2 years after the date of restoration. (For employees who receive annual leave credit in leave year 2004, the time limit for using the recredited leave will be the end of leave year 2006, which is January 6, 2007.) Employees who have retired or separated may file a claim with their former agency and must receive a lump-sum payment for any annual leave recredited as a result of that claim, paid at the rate of pay the employee was earning at the time of his or her separation or retirement.

Employees should contact their agency human resources offices for information on procedures for filing a claim. For additional information on crediting annual leave to members of the Reserves or National Guard, agency Chief Human Capital Officers and/or Human Resources Directors may contact their assigned OPM Human Capital Officer.

cc: Chief Human Capital Officers
Human Resources Directors