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PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
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DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

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

This memorandum supersedes the Principal Deputy Under Secretary of Defense (Personnel & Readiness) memorandum, same subject, dated April 13, 2005 (attached).

This memorandum provides notification of the impact of the decision in Butterbaugh v. Department of Justice, and two subsequent Butterbaugh-related decisions issued by the Merit Systems Protection Board (MSPB) on February 27, 2006, Garcia v. Department of State, 2006 MSPB 29 and Harper v. Department of Navy, 2006 MSPB 30 (Garcia/Harper). Affected personnel are individuals who were simultaneously Federal employees and (1) Reservists, including Military Technicians, or (2) members of the National Guard who may have been improperly charged military leave in the circumstances described below. Please ensure this memorandum is disseminated as widely as possible within your organization. It has been posted to the CPMS web site at www.cpms.osd.mil.

In Butterbaugh, the United States Court of Appeals for the Federal Circuit reversed the Office of Personnel Management's (OPM) interpretation of section 6323 of title 5, United States Code, and held that, at least since section 6323 was amended in 1980, it has been clear that Federal employees are required to take military leave only for those days 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 implementing regulation, until December 21, 2000, when section 6323 was again amended.

The Butterbaugh case was brought under the Uniformed Services Employment and Restoration Rights Act of 1994 (USERRA), as amended. Under Garcia/Harper, the MSPB held that there is no statute of limitations for claims brought under USERRA's procedures, including claims that allege violations of the Vietnam Era Veterans' Readjustment Act (VRRA) of 1974, USERRA's predecessor statute. The MSPB further held that Butterbaugh-type actions were prohibited under the VRRA, thus extending the potential period of claims for leave back farther than 1994, the date USERRA was enacted. The Garcia/Harper decisions have become final and constitute controlling law.

OPM's prior interpretation of section 6323 may have caused some employees to take leave without pay and/or annual leave to complete a reserve duty obligation. Others may have had their military leave balance under-calculated. As a result of the Garcia/Harper decisions, DoD will process administrative claims back to October 1, 1980, the effective date of the amendment to 5 U.S.C. § 6323(a) interpreted by the Court in Butterbaugh. 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 file claims with the Federal agency 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. DFAS will be amending its Butterbaugh claim procedures to comply with Garcia/Harper.

Those appropriated fund employees who have already filed claims and had their claims adjudicated, may submit amended claims that seek relief back to the first date they were improperly charged military leave after September 30, 1980. Employees who have filed claims that have not yet been adjudicated may also submit amended claims that seek relief back to the first date they were improperly charged military leave after September 30, 1980.

Current or former nonappropriated fund employees who: (1) were charged military leave, and (2) believe they have valid leave claims under Butterbaugh, may 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. As with appropriated fund employees, those employees who have already filed claims and had their claims adjudicated, may submit amended claims that seek relief back to the first date they were improperly charged military leave after September 30, 1980. Employees who have filed claims that have not yet been adjudicated may also submit amended claims that seek relief back to the first date they were improperly charged military leave after September 30, 1980.

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, 31508-3717, and identify their current servicing payroll offices. 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 schedules were 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 statements reflecting the improper charge of military leave, if they have them. Claimants should also mark the envelopes and their claims "Butterbaugh Claim." Current and former DoD nonappropriated fund employees should mail their claim to their nonappropriated fund payroll office.

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

Gail H. McGinn
Performing the duties
of the Principal Deputy

Attachment:
As stated