

Federal Employees and Their Rights to Improperly Charged Military Leave

By LT Marc J. Soss, SC, USNR

In 2003, the U.S. Court of Appeals opened its eyes to the injustice impacting federal employees who also serve as members of the Reserve or National Guard. Prior to the ruling and dating back to 1980, federal employees were improperly required to use military leave on days when they would not have been required to work in their civilian jobs. As a result, the court's ruling in *Butterbaugh v. Department of Justice* directly impacted the manner in which military leave is today charged to federal civilian employees.

OLD LAW

Prior to 21 December 2000, the Office of Personnel Management (OPM) charged federal civilian employees with use of their annual military leave entitlement (15 days as authorized by 5 U.S.C. 6323(A)) for military training on non-work (Saturday, Sunday, and holidays) days that occurred during periods of military duty. This interpretation resulted in employees losing the ability to utilize their full 15 days of paid military leave to cover absences for training. In many cases, the service members were forced to use annual leave or leave without pay to perform their military training.

In 2000, Congress amended subsection 5 U.S.C. 6323(a)(3) which set forth the minimum charge for leave. Subsequently, the Office of Personnel Management "determined that, in light of the new subsection . . . §6323(a)(1) could no longer be interpreted to charge non-workdays against federal employees' military leave."

FEDERAL EMPLOYEE LEAVE

Under 5 U.S.C. §6323(a)(1), federal employees who serve as members of the Reserve or National Guard are entitled to 15 days (120 hours) of annual paid leave for training. During the period of military leave, the employee is entitled to both his or her full civilian salary and military pay. The paid leave accrues on 1 October of each year. The employee may use the accrued annual or military leave as they may elect (5 CFR 353.208, as implemented under USERRA).

BARRING ACT OF 1940 (37 U.S.C. 3702)

The Act:

The Barring Act (the "Act"), established into law in 1940 and codified at 31 U.S.C. 3702, provides in part that every claim

against the United States cognizable by the General Accounting Office shall be forever barred unless received in said office within six years after the date such claim first accrued. The claim must be in writing, and include the signature and address of the claimant (4 CFR 31.2). The claimant then has the burden to prove: (1) they are an "appropriated fund employee" (current, retired, or separated federal employee); (2) the claim was filed within the limitation period; and (3) the liability of the United States (5 CFR 178.104(a), 178.105).

Submitting a claim under the Barring Act of 1940:

Federal employees (current, retired, and former) who: (1) were charged military leave while they were appropriated fund employees, and (2) believe they have valid leave claims, may file a claim with the federal agency or DoD component that charged them leave. The claim must include the following: (i) a copy to his or her employing agency orders; and (ii) documentation substantiating that he or she engaged in one or more periods of military duty, including non-workdays, during the applicable claims period. If the employer was a Military Department or DoD component, the employee may elect to file a claim under the DFAS claims process in lieu of the DoD process.

Under the Act, a leave claim must be received within six years after the claim accrued by the agency that conducted the activity from which the claim arose. For crediting purposes, the six-year look back period commences upon the claim filing date (the beginning of the six-year claims period) and 21 December 2000 (the date of the change in the military leave law).

BUTTERBAUGH V. DEPARTMENT OF JUSTICE

The Case:

The case of *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003) originated in 1998 when the Office of Personnel Management ("OPM") charged a full-time OPM civilian employee and Reservist with military leave for days when they were not scheduled to work in their civilian jobs. The OPM then denied their request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. §§ 4301-4333). After years of legal wrangling, the U.S. Court of Appeals reversed the OPM decision and found that applicable statutory law did not provide for charging employees military leave for days when they were

not scheduled to work in their civilian jobs, pursuant to 5 U.S.C. 6323, and that OPM decision was based on an erroneous interpretation of statute. The Court's ruling authorized all impacted employees to request a credit of annual leave as a replacement for military leave charged on non-workdays prior to 21 December 2000.

Submitting a claim under Butterbaugh:

A claim for credit of annual leave must meet the following requirements: (1) be in writing; and (2) include documentation (military orders, certificate of attendance, or other similar documentation) evidencing your engagement in active military duty (including non-workdays) during the claims period. Claims should be submitted to the Bureau of the Public Debt in Parkersburg, WV.

Alternatively, the employee may file a claim under the Barring Act with the Defense Finance and Accounting Service (DFAS). If this option is selected, the employee's current servicing payroll office, each specific non-workday that the claimant was charged leave must be identified and the claims should indicate if annual leave or LWOP for military duty was used as a result of the erroneous leave policy. Claims brought

under the Barring Act, are limited to six years from the date in which the claim is filed. If the claim is approved, the employee will be credited one day (maximum of four days for each fiscal year) of annual leave for each day of annual leave that was used as a result of the erroneous leave policy.

CLAIM BENEFITS

Current Federal Employees:

An employee credited with annual leave will have it placed into a restored leave account (5 U.S.C. 6304(d)(1)(a) and OPM regulations at 5 CFR 630.306). The employee will be required to use the restored leave by the end of the leave year in progress two years after the date of restoration.

Former and Retired Federal Employees:

They will receive a lump-sum payment for any annual leave recredited as a result of their claim. The payment will be paid at the rate of pay the employee was earning at the time of his or her retirement or separation. ↓

CORRECTION TO ARTICLE

What Happens to SGLI When You Are Transferred from a Pay Status?

By Tom McAtee

In the September 2005 issue, we erroneously published the name and phone number of Bonni Borosky (DFAS-CL) as the POC for SGLI premium payment questions. Below is the correct information:

If transferred to a VTU (provided that unit is required to conduct a minimum of 12 drills per year), within 90 days of transfer, you should receive a Premium Notice from DFAS Cleveland. Premium Notices are issued quarterly. Failure to pay the premium 60 days after due date will result in loss of SGLI coverage with reinstatement only as approved by the Secretary of the Department of Veterans Affairs. For questions relating to SGLI premium payments, please contact DFAS Customer Service at 1-888-332-7411. Checks should be made payable to DFAS-CL or the Department of Defense and mailed to:

DFAS Cleveland Center
Code ATLOC
1240 East Ninth Street
Cleveland, OH 44199

SGLI coverage and debt information may be now viewed on myPay. Please note that changes to SGLI coverage are not made by DFAS-CL. Contact your servicing PSD to make changes to your coverage. Additional information regarding SGLI/VGLI eligibility and benefits can be found at www.insurance.va.gov. ↓

Elimination of Officer Photograph

The officer photograph in the official service record has been eliminated by NAVADMIN 224/05 effective 8 September 2005. Since physical standards are documented in fitness reports and photos can be rapidly transmitted electronically, there was no compelling reason to keep the requirement for the photo in the service record. If photographs are required for specific programs, it will be handled through the application process on a case-by-case basis. ↓