

## **Number 90, September 2003: Key Employee Program**

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Q: I am an air traffic controller with the Federal Aviation Administration (FAA), and a member of the Tennessee Air National Guard. I recently received a letter from my supervisor stating that my request for military leave for an upcoming training requirement would not be approved because I have been designated a key federal employee by Presidential Executive Order 11161 and FAPM Letter 230-1. Can the FAA refuse to grant my military leave based on these citations?

A: Absolutely not. Presidential Executive Order 11161 essentially transfers the FAA to the Department of Defense (DoD) in the event of war and is not a controlling guideline for the applicability of the key federal employee determination found in 10 U.S. Code 10153.

FAPM Letter 230-1 is an internal policy of the FAA for the purpose of determining positions that the FAA considers to be key positions. This process is critical for making a request to DoD that certain persons in positions deemed by the agency to be key, as defined in 32 C.F.R. Part 44, be transferred to the Standby Reserve. It in no way supersedes the requirement of the FAA to submit its request to DoD to transfer you to the Standby Reserve, and is actually a guideline for following DoD directives.

DoD Directive 12.7, "Screening the Ready Reserve," is a guideline in which all federal agencies must make a request to DoD to ask that an employee, whom the agency believes is key under the definitions found at 32 C.F.R. Part 44, be transferred to the Standby Reserve as defined in 10 U.S. Code 10153. It is clear that the provisions of USERRA found at 38 U.S. Code Chapter 43 apply to any federal employee who hasn't actually been transferred to the Standby Reserve by DoD.

DoD Directive 12.7 also refers to the process by which an agency may appeal a DoD denial to move an individual to Standby Reserve. That process is found in 44 C.F.R. Part 333, which authorizes the director of the Federal Emergency Management Agency to adjudicate any differences between DoD and other federal agencies.

I would also like to point out that 10 U.S. Code 10146(c) states that a member of the U.S. Army National Guard or the Air National Guard may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority of the state.

Until and unless DoD transfers you to the Standby Reserve, the FAA must recognize your military leave status so long as you are on bona fide military orders.

\*Mr. Denson is the general counsel for the Tennessee Military Department, which includes the state's Army National Guard, Air National Guard, and Emergency Management Agency. He is also the state ombudsman for Tennessee in the DoD program referred to as the National Committee for Employer Support of the Guard and Reserve (ESGR). These views are Mr. Denson's personal views and not necessarily those of his employer.