

Law Review 151:

Federal Employees Who Took Military Leave before 2001 May Be Entitled to Compensation

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A federal appeals court, in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), has ruled that the Justice Department, which was following Office of Personnel Management (OPM) rules, improperly charged employees for military leave before 2001.

Under 5 U.S.C. Sect. 6323(a)(1), federal employees who are Reservists are allowed 15 days of annual paid leave for Reserve or National Guard training. (The court used the terms Reservist and Reserve training to include National Guard members and their obligations.) The petitioners in this case are full-time employees of the Justice Department, Bureau of Prisons at the Federal Correctional Institution in Loretto, Pa.

Before 2001, the Justice Department, as had other federal agencies, included days employees were not scheduled to work but would be at Reserve training when calculating how much leave an employee used. For example, the court noted that "an employee (with a Monday–Friday workweek) attending Reserve training from one Friday through the next would be charged for eight days of military leave, even though the employee was absent for only six workdays." The court also noted that this policy was applied unevenly, in that non-workdays at the beginning or the end of military leave were not counted, but non-workdays that fell during the military leave were counted. Under the example above, an employee whose workweek ran Thursday to Monday had more leave counted against him than an employee whose workweek ran Monday to Friday.

In 2000, Congress amended subsection 6323(a)(3) that sets forth the minimum charge for leave. Subsequently, OPM "determined that, in light of the new subsection, ... Sect. 6323(a)(1) could no longer be interpreted to charge non-workdays against federal employees' military leave."

Petitioners filed claims with the Merit System Protection Board (MSPB), claiming that, because of the calculations of military leave, they were forced to use vacation or unpaid leave in order to meet their Reserve training obligations. They argued that the Justice Department's policy violated the 1994 Uniformed Services Employment and Reemployment Act "by denying them a benefit of employment based on their military service."

Based on its interpretation of the statute, MSPB ruled that the Justice Department had properly calculated the four employees' military leave and that petitioners were not denied a benefit of their employment. In its ruling, MSPB concluded that Congress had intended to count calendar days against the 15-day allowance, not just workdays.

In a ruling dated July 24, 2003, the U.S. Court of Appeals for the Federal Circuit overturned the MSPB's decision. The court ruled that agencies should have interpreted the statute to allow 15 workdays of leave for Reserve training. The court stated that "as a general matter, employees are not accountable to their employers for time they are not required to work...[there is] no reason why federal employees need military leave for days on which they are not scheduled to work."

MSPB had argued that Congress knew or should have known how agencies were applying the requirements of the statutes and because Congress did not amend the statute, it must have therefore approved of its application. The court disagreed with this contention, stating "...congressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention."

The court reversed the MSPB's decision and remanded the case for further proceedings. One judge dissented in a separate ruling.

*Note: Tully & Associates, PLLC will provide legal services at **no cost to the employee** for any federal civilian employee eligible for compensation due to this recent court decision. They may be contacted by calling 518-218-7100. Available online at: <http://www.fedattorney.com/>.*

Mr. Tully is an ROA Life Member and is serving as a captain in the New York Army National Guard.

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