DEFENSE FINANCE AND ACCOUNTING SERVICE
ARLINGTON
1851 SOUTH BELL STREET
ARLINGTON, VA 22240-5291

OCT - 6 2006

DFAS-NP

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(FINANCIAL OPERATIONS)
ASSISTANT SECRETARY OF THE NAVY (FINANCIAL
MANAGEMENT AND COMPTROLLER) OFFICE OF
FINANCIAL OPERATIONS
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(FINANCE OPERATIONS)
DIRECTOR, ADMINISTRATION AND MANAGEMENT
COMPTROLLERS, DEFENSE AGENCIES
RESOURCE MANAGERS, DOD FIELD ACTIVITIES
DIRECTOR FOR FINANCIAL MANAGEMENT DIRECTORATE,
INSPECTOR GENERAL, DOD

SUBJECT: Administrative Claims for Annual Leave under Butterbaugh v. Department of Justice, 336 F.3d 1332 (Fed. Cir. 2003) Update

This memorandum explains the updated procedures for filing an administrative claim for restoration of leave (annual or military) or payment for annual leave. The guidance is based on the June 7, 2006, memorandum from the Office of the Under Secretary of Defense, Personnel and Readiness (attachment 1). As a result of recent Merit Systems Protection Board (MSPB) decisions, DoD has determined that claims of DoD employees or former employees may be considered back to October 1, 1980. Originally, the 6-year statute of limitations under the Barring Act was applied to administrative claims. Therefore, employees or former employees may need to file amended claims that seek relief back to the first date they were improperly charged military leave subsequent to September 30, 1980. Procedures for filing an administrative claim with the Defense Finance and Accounting Service (DFAS) are provided (attachment 2) and will be posted on the DFAS web site at http://www.dod.mil/dfas/.

The recent MSPB rulings recognize that the burden of proof lies with the employee to show that he or she had to use annual or other types of leave to cover an absence for military leave as a result of being improperly charged military leave for non-workdays. What this means to an employee is that he or she must have some supporting evidence that he or she was actually charged military leave on non-workdays and that he or she had to use some other form of leave to cover the period of military duty. That evidence could include: civilian time and attendance (TA) records, civilian leave records and copies of the active duty orders for each period of the restoration request, or any other relevant documentation.

Employees and former employees should be advised that claims without supporting evidence may be held until the employee has furnished the evidence, and that DFAS may not

have copies of past TA records or leave records for the following reasons: (1) the National Archives and Records Administration (NARA) rules for retention of TA and leave records do not require that these types of records be retained for more than 6 years; (2) DFAS did not take over civilian pay responsibility for some DoD agencies until 1996, and in most instances, does not have any records that were created by those employing agencies; (3) only the Denver payroll office has records back to 1980, which are limited to employees of the Corps of Engineers. DFAS has a data repository of payroll records, but this repository only contains data from 1996 to present. Therefore, the only historical records for civilian leave and TA that are available at our payroll offices is for the years 1996 to present, with the exception of the records for the COE (attachment 3).

Legally, DFAS cannot unilaterally restore or pay for any mistakenly-charged military leave that cannot be supported by documentation showing the charging of annual leave or leave without pay. Where there is some supporting documentation, DFAS and individual employing agencies may consider settling cases with individual employees or with a group of employees. If an agency enters into a settlement (an agency decision) then DFAS' civilian payroll offices must be provided a copy of the management decision or the settlement agreement to make payments or restoration.

Procedures require that employees or former employees complete the attached claim form (attachment 4) and mark whether this is a new claim or an amended claim. Those who have already filed claims and received compensation or restored leave must file an amended claim for periods that were not already considered or paid for due to the application of the Barring Act rules. All claimants must provide the following documentation to the DFAS payroll office or the claim cannot be processed: a completed claim form with attached copies of the order to active duty or other types of documentation that support the dates for each period of claimed restoration, copies of the civilian time and attendance reports or leave records that shows charges to annual or leave without pay for the periods of active duty or other information to support the claim.

Administrative claims filed directly with DFAS must be submitted to the following address: DFAS-Indianapolis, Civilian Payroll, 8899 East 56th Street, Indianapolis, Indiana, 46249-1900, the central address for all of our payroll offices. This address is where information is imaged and flowed to the appropriate payroll office for processing. The toll free number for faxing is (866) 401-5849. The commercial numbers are: 317-510-9795 through 9798 (DSN 699). The claim form must indicate your current or last payroll office and your current or last employing agency. DFAS payroll office identification (ID) numbers (POIN) can be found on your DFAS Civilian Leave and Earnings Statements or you may use the information provided (attachment 5).

Employees in receipt of restored annual leave have the following time-period for use. Restored annual leave of 416 hours or less must be used by the employee by the end of the leave year beginning within 2 years after the date of restoration or the leave will be forfeited, in accordance with 5 U.S.C. 6304(d)(1)(a) and 5 CFR 630.306. The regulations provide that an agency shall extend this period by one leave year for each additional 208 hours of excess annual leave or any portion thereof that is restored to the employee.

There was a change to the military leave law that became effective on December 21, 2000, which stopped the practice of charging military leave for intervening weekends or non-workdays. The Defense Civilian Payroll System (DCPS) was updated with this change. Agencies and their supervisors and timekeepers were notified of this change and should have stopped charging military leave on those days. Further, some system edits have been implemented into DCPS to help prevent erroneous charging of military leave on an intervening weekend or a non-workday due to timekeeper error. However, if an employee can prove that military leave was mistakenly charged for non-workdays for periods after 2000, he or she should submit a claim with the required documentation.

Payroll offices will continue to process all existing claims and orders including administrative claims, orders and decisions of the Merit System Protection Board, Federal Courts and agency settlements for restored annual leave or adjustments to military leave. They will also continue to provide payroll information and documentation when properly requested by employees, Government agencies, or third parties.

Please provide widest dissemination to all customers. Questions regarding this subject may be directed to Linda Greeley of my staff who can be reached at (703) 607-5047 or via email at Linda.Greeley@DFAS.Mil.

for Patrick T. Bedard
Richard D. Davis
Director, Policy and Performance Management

Attachments:
As stated

cc: Director, Standards and Compliance, Finance Mission Area, DFAS
National Security Agency (Attn: Brenda Zebron)
Dept of Energy (Attn: Jerry Odegard)
Dept of Health & Human Services (Attn: Jim Martin)
Dept of Veterans Administration
Environmental Protection Agency
Service Liaisons

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JUN 7 2006

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
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

## PROCEDURES FOR FILING AN ADMINISTRATIVE CLAIM

Appropriated fund employees of the Department of Defense or other agencies that are or were payrolled by the Defense Civilian Pay System (DCPS) who choose to seek restoration of leave (or former employees[1] who seek payment) for military leave charged for non-workdays, may file an administrative claim with the Defense Finance and Accounting Service (DFAS). If restoration or payment for leave is made for an administrative claim that is filed after these procedures are issued, the claimant will be informed that acceptance of restored leave or payment constitutes a final settlement of all claims, no matter when accrued, which the employee may have against the Government arising from military leave charged for weekends or non-workdays. Restored annual leave of 416 hours or less must be used by the employee by the end of the leave year beginning within 2 years after the date of restoration or the leave will be forfeited, in accordance with 5 U.S.C. 6304(d)(1)(a) and 5 CFR 630.306. The regulations provide that an agency shall extend this period by one leave year for each additional 208 hours of excess annual leave or any portion thereof that is restored to the employee.

According to MSPB rulings, claimants have the burden of showing proof that he or she were harmed by the improper charging of military leave for Reserve duty on intervening weekends or non-workdays. What does this mean to the claimant? Generally, each claimant must prove that annual leave, leave without pay (LWOP) or other types of leave was charged for a period of active duty due to the improper charge to military leave on an intervening weekend or non-workday. How can that be proven? The claimant must submit a copy of the active duty military order(s) or other documentation showing dates of active duty performance that first caused the erroneous charge of military leave on a weekend or nonworkday and the follow-up active duty military order(s) or other relevant documentation, that required the member to be charged annual, LWOP or other types of leave for an absence due to military duty, as well as civilian leave records or other relevant documentation to support these charges to leave.

Employees and former employees should be advised that the Defense Finance and Accounting Service (DFAS) may not have copies of past TA records or leave records for the following reasons: 1) the National Archives and Records Administration (NARA) rules for retention of TA and leave records do not require that these types of records be retained for more than 6 years; 2) DFAS did not take over civilian pay responsibility for some DoD agencies until 1996, and in most instances, does not have any records that were created by those employing agencies; 3) only the Denver payroll office has records back to 1980, which are limited to employees of the Corps of Engineers. DFAS has a data repository of payroll records, but this repository only contains data from 1996 to present. Therefore, the only historical records for civilian leave and time and attendance that are available at our payroll offices is for the years 1996 to present, with the exception of the records for the COE (attachment 3).

[1] Former employees are those who have separated from government employment.

To file an administrative claim with DFAS, claimants must complete the claim form (attachment 4) and provide the information listed below. Former and current employees must provide the following documentation to DFAS: a completed claim form, indicating the specific dates of active duty (FROM/TO) during which annual leave, LWOP or other types of leave was charged for non-workdays or intervening weekends; a copy of the order to active duty or other relevant documentation that supports a call to active duty, a copy of the certificate of attendance (if available) for each period of active duty claimed or other relevant evidence that indicates active duty performance and the subsequent charge of civilian leave because of that active duty.

Employees or former employees whose claims were settled by DFAS may need to file amended claims that seek relief back to the first date they were improperly charged military leave subsequent to September 30, 1980. Their amended claims must be filed only for periods that were not considered or already paid for in their initial claim. They need to follow the same procedures as employees or former employees who have not yet filed claims for payment or restoration of leave. Employees or former employees, whose claim has been filed with DFAS, but not yet processed, will have their claims reviewed and processed or returned if more evidence is needed. Employees or former employees whose claim was returned because of the 6-year statute of limitations originally interpreted by DoD should refile using these procedures.

All claims must be submitted to the DFAS –Indianapolis, Civilian Payroll, 8800 East 56th Street, Indianapolis, Indiana 46249-1900. This is the central post office box for all of our current payroll offices and is where information is imaged and flowed to the appropriate payroll office for processing. The toll free fax number is (866) 401-5849 or the commercial numbers are (317) 510-9795 through 9798 (DSN 699). Employees should indicate their current or last payroll office and their current or last employing agency. To help employees determine their DFAS servicing civilian payroll office, they need to look at their current or former Civilian Leave and Earnings Statement and locate the payroll office identification number (POIN). A listing (attachment 5) will translate that POIN to the civilian payroll office name.

Upon receipt of the completed claim package, the servicing payroll office will audit the records. If the audit finds that intervening weekends or non-workdays did not result in charges to annual, LWOP, or other types of leave, the claimants will have no entitlement to restored leave or payment and the claim will be sent back to the current or former employee stating that there was no harm found for the period(s) of the claim. If the claimant's documentation is not complete, the payroll office will notify the employee whether additional information is needed to prove the claim. The payroll office will hold this claim until the proper information is provided or the claimant notifies the payroll office that he or she has no other documentation to verify their claim. At that time, the payroll office will process the claim to the extent possible and will mark the claim package as suspended for the period where no evidence was provided. If the audit reveals any erroneous charges to annual, LWOP or other types of leave, the employee or former employee will receive a credit to his or her restored annual or military leave account or compensation as a payment.

If the claimant is a current Federal employee paid by DFAS, any erroneous charges to annual, LWOP or other types of leave will be adjusted and credited to the claimant's restored annual leave account. Employees in receipt of restored annual leave must understand that any restored annual leave under this claim must be used by the employee by the end of the leave year beginning within 2 years after the date of restoration or the leave will be forfeited, in accordance with 5 U.S.C. 6304(d)(1)(a) and 5 CFR 630.306.

If the claimant has separated or retired, a payment will be made to the claimant to settle the erroneous charges to annual, LWOP or other types of leave using the agency's current appropriations or one furnished by the agency. All former employees must provide a current mailing address so the payment can be made to them.

Employees who were payrolled by DCPS, but now are employed by another Federal agency and who intend to file a claim with DFAS, must include a mailing address for their current payroll office. This address is required so that the DCPS payroll office(s) will be able to send a corrected Record of Leave Data (SF 1150) with the restored annual leave balance, for recredit by the current payroll office. Note payroll offices will enter the restored annual leave amount in the Restored column under the Summary of Annual and Sick Leave heading and the date of the restored annual leave in block 24 remarks.

Employees who are now payrolled by DCPS, but were employed by another Federal agency and who have filed a claim with that agency, need to ensure that the former agency has the correct DFAS mailing address (stated in this document). Upon receipt of the corrected form SF 1150, the DFAS payroll office will post the restored annual leave to the claimants account.

It should be noted that if a claimant requests restoration of military leave, rather than annual leave, the same information must be provided with the claim and proof of harm must still be shown. If loss of leave is proven, military leave will be restored to the claimant. Any restored military leave is subject to the maximum carry over of 30 days. Any adjustment of military leave that would cause the claimant's balance to exceed the limits set by law would be forfeited.

## CIVILIAN LEAVE RECORDS AND TIME CARD HISTORY

The Defense Finance and Accounting Service (DFAS) has a data repository for civilian pay, leave and time history, however this program was not started until 1996 and goes through to current year. This data repository has captured all the data for each of our three payroll offices and their multiple databases. As mentioned in the memorandum, National Archives and Records Administration's requirements allow for the destruction of civilian leave and time history after 6 years. If DFAS, you or your former agency do not have civilian leave and time history, then the claim may be denied. Provided below is the civilian leave and time history available through DFAS:

| DFAS PAYROLL OFFICES | LEAVE and TIME HISTORY AVAILABILITY |
|---|---|
| CHARLESTON PRO | 1996 through current (data repository) |
| DENVER PRO | 1996 through current (data repository)<br>Corps of Engineers 1980 through current |
| PENSACOLA PRO | 1996 through current (data repository) |

**Attachment 3**

## CLAIM FORMAT

**Administrative Claims for Annual Leave under Butterbaugh v. Department of Justice, 336 F.3d 1332 (Fed. Cir. 2003)**
**Appropriated fund employees**

**NAME**_____ **SSN**_____ **DATE**_____

**NEW CLAIM**_____ **ADMENDED CLAIM**_____

**CURRENT MAILING ADDRESS** _____

**SERVICING PAYROLL OFFICE AND MAILING ADDRESS**_____

**(To be completed only by claimants who are still employed by the Federal government outside of the Department of Defense, who were payrolled by DCPS during the claim period). A corrected SF 1150 will be sent to the current agency for credit to the restored leave account).**

**CURRENT/LAST PAYROLL OFFICE AND CURRENT/LAST EMPLOYING AGENCY**

_____

**(See attachment 3 for translation of the Payroll Office Identification (ID) Number (POIN) shown on your DFAS Leave and Earnings Statement)**

**MAIL TO: DFAS-Indianapolis, Civilian Payroll, 8899 East 56th Streeet, Indianapolis, Indiana, 46249-1900**

**REQUIRED INFORMATION FOR EACH PERIOD OF ACTIVE DUTY ORDERS OR OTHER RELEVANT DOCUMENTATION:**

**ACTIVE DUTY DATES** FROM: _____ TO:_____

**ACTIVE DUTY DATES** FROM: _____ TO:_____

**ACTIVE DUTY DATES** FROM: _____ TO:_____

**REQUIRED SUPPORTING DOCUMENTATION (ATTACH TO CLAIM)** – **Claimant must show that annual leave or LWOP was used in the performance of Reserve duties because the agency deducted military leave for non-workdays or intervening weekends.**

- A copy of the order to military active duty for a continuous period of active duty that includes a weekend or non-workday.
- A copy of the certificate of attendance for each period of active duty listed above.
- A copy of the applicable civilian work schedule (if it was not a standard Monday through Friday) for the period(s) of active duty listed above, showing non-workdays.
- A copy of the time and attendance record or the leave record showing the charges to annual leave or leave without pay.
- Any other relevant documentation, in the absence of the above.

**ADDITIONAL INFORMATION (OPTIONAL)**

- A copy of the leave and earnings statements that indicate charges to military leave which may include a weekend, non-workday or a charge to leave without pay.

I understand and accept that filing this administrative claim means the following: I have not filed a previous claim for the above periods nor have I received any other MSPB or agency settlement for these periods. I acknowledge that acceptance of restoration of leave or payment for leave based upon this administrative claim filed under these procedures will be a final settlement of all claims, no matter when they accrued, that I may have against the Government arising from military leave charged for non-workdays.

I further understand and accept that 1 day of restored annual leave will be given for each weekend day, non-workday, or day of leave without pay (LWOP) charged during my period of active duty performed. Any leave restored to my account must be used by the end of the leave year beginning within 2 years after the date of restoration or the leave will be forfeited, in accordance with 5 U.S.C. 6304(d)(1)(A) and 5 CFR 630.306.

**SIGNATURE OF CLAIMANT**_____ **DATE SIGNED**_____

**PRIVACY ACT STATEMENT: Authority for collection of this information is 5 U.S.C. Section 6311 and E.O. 9397. The purpose for which the information will be used is to administer and process your claim for leave restoration or payment. The information on this form may be disclosed as generally permitted under 5 U.S.C. Section 552a(b) of the Privacy Act, as amended. Providing this information is voluntary, however, failure to supply the required documentation may result in the denial of part or all of your claim.**

**Attachment 4**

# PAYROLL OFFICE IDENTIFICATION (ID) NUMBER (POIN)

| | |
|---|---|
| 97380600 | Charleston Payroll Office |
| 97380700 | Charleston Payroll Office |
| 97381000 | Charleston Payroll Office |
| 97381100 | Charleston Payroll Office |
| 97381400 | Charleston Payroll Office |
| 97381500 | Charleston Payroll Office |
| | |
| 97300800 | Denver Payroll Office |
| | |
| 97380100 | Pensacola Payroll Office |
| 97380500 | Pensacola Payroll Office |
| 97381200 | Pensacola Payroll Office |

Attachment 5