

U.S. Merit Systems Protection Board

Information Sheet No. 7

Military Leave (Butterbaugh) Appeals

Purpose

The purpose of this information sheet is to provide general guidance and background information. It does not represent an official statement approved by the Board itself, and is not intended to provide legal counsel or to be cited as legal authority. Instead, it is intended only to help the public become familiar with the MSPB and its procedures. In all instances, however, the Board's regulations and current case law control with respect to the matters discussed here.

What is the Butterbaugh decision?

In *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1333-34 (Fed. Cir. 2003), the U.S. Court of Appeals for the Federal Circuit held that agencies were not entitled to charge employees' military leave accounts for days when they would not otherwise have been required to work at their Federal civilian jobs. Under 5 U.S.C. § 6323, federal employees who work for agencies that are covered by this section are to be given up to 15 days of paid leave a year to attend training sessions required of them as members of military reserves or the National Guard. Until § 6323 was amended in 2000, the Office of Personnel Management interpreted it as providing 15 calendar days of leave each year, rather than 15 work days, and federal agencies therefore generally followed the practice of charging employees' military leave accounts for absences on non-workdays (e.g., weekends and holidays) when those days fell within a period of absence for military training. In *Butterbaugh*, the court said that this was improper.

What can the Board do?

If a Federal agency incorrectly charged military leave for non-workdays so that you were required to use annual leave or leave without pay for any period for which you should have been able to use military leave, the Board may order compensation for the resulting lost wages or benefits. In addition, the Board may order the correction of military leave records by your civilian employing agency, the Defense Finance and Accounting Service (DFAS), and any other relevant agency.

Who has the burden of proof?

The employee (called the appellant) has the burden of proving by a preponderance of the evidence that he was denied a benefit of employment in violation of 38 U.S.C. § 4311(a) by being improperly charged military leave he should not have been required to use, and being forced to use annual leave or leave without pay in order to fulfill his military obligations.

What kind of evidence do I need to present?

The appellant needs his military pay records or military orders in order to prove which days he performed active military duty. He also needs his civilian pay records, such as leave and earning statements or leave slips, to prove that he was required to use annual leave or leave without pay on days when he should have been able to use military leave.

How can I get this information?

The Board has a procedure called "discovery" through which an appellant can obtain relevant evidence or information which might lead to the discovery of admissible evidence. For more information on Discovery, refer to MSPB Information Sheet 5, Discovery.

In addition, you should contact your employing agency for assistance in obtaining your civilian pay records and DFAS for assistance in obtaining your military pay records. Procedures for filing an administrative claim with DFAS are posted on the DFAS web site at <http://www.dod.mil/dfas/>.

Can I file a claim elsewhere?

Some agencies have established administrative claims procedures for their employees to obtain relief. You should ask your servicing Personnel Office whether such a claims procedure exists for your agency. Filing with the agency may make filing an appeal unnecessary. If you wish to file an appeal after using the agency process, however, you may still do so because the law that allows you to appeal, called the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) contains no filing time limit.