

## **MSPB Butterbaugh Background**

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 OPM rules, improperly charged employees for military leave prior to 2000. Under 5 U.S.C. §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. Prior to 2000, 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) which sets 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.” Petitioners filed claims with the Merit System Protection Board

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 “[a]s a general matter, employees are not accountable to their employers for time that 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 Justice dissented in a separate ruling.

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