

Court Says When in Doubt, Give Veterans the Benefit

When in doubt, tilt toward the veteran.

That's what the U.S. Court of Appeals for the Federal Circuit has suggested to government agencies in two cases involving federal employees who had served in the military reserves and petitioned for back pay because of improperly charged military leave.

The government has long encouraged civil service employees to join the National Guard and reserves, providing them with 15 days of leave for their annual military training. But agencies have not consistently interpreted the benefit, creating a muddle for judges and federal officials.

In 2003, in a case known as *Butterbaugh*, the appeals court ruled that the government should not count weekends and holidays as leave when the employees were away from their agencies for military training.

Putting that ruling into practice has proved difficult, and federal employees and retirees continue to file claims for back pay. Some federal employees who have served in the reserves and had to use their regular vacation time to cover their military training may be eligible for \$3,000 to \$10,000 in back pay, Mathew B. Tully, a lawyer who has filed claims on behalf of veterans, said. In one recent case, Jose D. Hernandez, a retired civilian aircraft mechanic for the Air Force, alleged that he had been wrongfully charged military leave from 1980 to 2001, causing him to use vacation time, sick leave and leave without pay to perform some of his reserve duties.

The appeals court affirmed a finding of the Merit Systems Protection Board, which hears back pay claims, that leave can be reimbursed for reserve service prior to 1994, when Congress approved the Uniformed Services Employment and Reemployment Rights Act, known as USERRA.

The law prohibits discrimination against individuals who serve in the National Guard and reserves and seeks to minimize disruptions to their lives because of such service. Although some federal laws require back pay claims to be filed within certain time periods, USERRA "does not set out any limitations period for bringing claims under it," the appeals court said.

The court also noted that its approach to issues in the Hernandez case was consistent with "the canon that veterans' benefits statutes are liberally construed in favor of the veteran." In the other case, Alexander F. Pucilowski Jr., a federal air marshal who previously worked as a corrections officer in the Bureau of Prisons, alleged that he was erroneously charged military leave from 1989 to 2001.

Many veterans have trouble finding the documents to prove their claims, and the appeals court faulted the merit board for failing to order federal agencies to correct their records "to reflect a proper accounting of Pucilowski's military leave."

The court let stand a ruling that Pucilowski should be compensated only for five days of military duty that he performed while on leave without pay from his regular job.

Still, even when not legally obligated to provide back pay, "agencies may resolve claims by providing more compensation than an individual has been able to prove," the court said.

Adopting such a stance is appropriate "as a matter of administrative convenience" when records of service time are incomplete, the court said.

"It also helps to ensure that veterans are appropriately given the benefit of the doubt" and "fully enjoy the presumption that veterans' benefits statutes are to be resolved in their favor," the court said.

The opinions in the cases -- Hernandez v. Department of the Air Force and Pucilowski v. Department of Justice-- were written by Circuit Judge Haldane Robert Mayer and released during the last week of August.

Tomorrow, the House Veterans' Affairs subcommittee on economic opportunity will take up an issue of broader interest to veterans. The panel will hold a hearing to look at whether agencies are following laws that encourage the hiring of veterans for federal jobs. Veterans groups have complained that some agencies are not following veteran preference laws. Witnesses scheduled to testify include Meg Bartley, a senior staff attorney with the National Veterans Legal Services Program, and officials from the departments of Defense, Labor and Veterans Affairs and the Office of Personnel Management.