

## **Ruling Allows Reservists to Petition for Back Pay**

The "Butterbaugh" saga continues.

A federal board has ruled that a new cohort of National Guard and military reservists may petition for back pay because of improperly charged military leave.

A recent ruling by the Merit Systems Protection Board, an independent agency that helps oversee the civil service system, could make 200,000 to 300,000 current and former federal employees eligible for pay and leave reimbursement going back to 1980, said Mathew B. Tully, a lawyer who represents military reservists.

Before the board's decision, Guard and reserve members were not entitled to file financial claims prior to 1994, when Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA).

But the board said other laws apply in disputes over military leave, including the Vietnam Era Veterans' Readjustment Assistance Act of 1974. "We find an agency's improper charging of military leave, which an employee was entitled to receive in connection with absences for purposes of reserve training, was prohibited by VRRRA prior to USERRA's enactment," the board said.

As a general matter, the board said, "Congress has never imposed limitation periods on the adjudication of claims under these statutes."

The case involved Marc Garcia, a special agent for the State Department's Bureau of Diplomatic Security and a reservist. From 1987 to 2001, Garcia claimed, he had been forced to use vacation, sick time and leave-without-pay from his State Department job to perform military duty.

The ruling is among the most recent in a series of cases known as Butterbaugh, the title of a 2003 federal appeals court case. For decades, the government said the "15 days" of paid military reserve training guaranteed in law for federal employees were calendar days. Under that practice, most federal employees were charged leave according to the time they were away for National Guard and reserve training rather than the number of workdays missed at their agencies.

As a result, the employees were charged military leave for weekends and holidays when they were not scheduled to work at their civilian government jobs.

The Butterbaugh ruling said that the government was wrong to measure by calendar days and that federal employees in the Guard and reserves should not be charged for leave for "non-workdays" when they were away for military service.

Congress tried to deal with the issue in 2000. It amended the law on military leave, making it clear that federal employees were not to be charged for weekends while away for reserve training.

Tully, founding partner at Tully, Rinckey & Associates PLLC in Albany, N.Y., called the Garcia decision "a very big case," adding, "It opens up the door." His firm, he said, has been winning back-pay claims of between \$2,000 and \$5,000 for reservists.

#### A Resolution on REITs

An advisory council representing government employees has adopted a resolution opposing the addition of a real estate investment fund to the Thrift Savings Plan.

James W. Sauber, chairman of the Employee Thrift Advisory Council, said the resolution, adopted 11 to 0 with one abstention on Tuesday, will be sent to members of Congress. Fifteen unions, management associations and employee groups make up the council.

Last year, Rep. Jon C. Porter (R-Nev.), with bipartisan support, introduced a bill that would add a real estate investment option to the TSP, a 401(k)-type plan for the armed forces, civil service and postal service. Porter and others say that adding real estate investment trusts (REITs) would help TSP participants diversify their accounts. The bill has more than 145 co-sponsors.

Sauber said the employee group was concerned "about adopting a fund that the agency doesn't want." He said the Federal Retirement Thrift Investment Board, which oversees the TSP, is opposed to adding a fund "at this time."

The board is undertaking a review of all its investment policies later this year. Andrew M. Saul, the board chairman, has indicated that he is wary of adding a REIT option, noting that the TSP practice has been to offer broad-based stock and bond index funds that track the markets rather than any particular industry.