UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

OCT 13 2004

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: **KAY COLES JAMES**
Director

SUBJECT: **Administrative Claims for Annual Leave as a Result of Decision in *Butterbaugh v. Department of Justice***

This memorandum provides guidance to assist agencies in processing employees' administrative claims for annual leave as a result of the decision in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003)). In a July 24, 2003, decision, the U.S. Court of Appeals for the Federal Circuit ruled that, pursuant to 5 U.S.C. 6323, employees were required to take military leave only on days on which they were required to work and that agencies should have allowed 15 workdays of military leave for reserve training (instead of 15 calendar days, as the language in this section was previously interpreted and applied prior to the court's ruling). Therefore, the court ruled that agencies should not have charged military leave for nonworkdays that occurred within the period of military duty prior to the change in the military leave law that became effective on December 21, 2000. On this date, 5 U.S.C. 6323(a) was amended to include a new paragraph (3), which for the first time allowed employees to take military leave on an hourly basis. Following enactment of this amendment, employees were no longer required to take leave for nonworkdays.

The plaintiffs in *Butterbaugh* maintained that, because they were charged military leave for nonworkdays within their period of military duty, they exceeded their allowance of 15 days of military leave each fiscal year and were forced to take leave without pay and/or annual leave to complete their annual reserve training. In response to the *Butterbaugh* decision and in anticipation of the additional claims that will result, we are issuing this guidance on the procedures for processing employees' administrative claims for crediting annual leave as a replacement for military leave that was charged on nonworkdays. Agencies should inform employees of the holding under the *Butterbaugh* decision in order to give notice to potential claimants. You may use this memorandum to notify employees of this decision.

Under the Barring Act of 1940 (codified at 31 U.S.C. 3702), a leave claim against the Government must be received by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues. Therefore, agencies may accept claims filed after July 24, 2003 (the date the *Butterbaugh* decision was issued), for crediting additional leave for military leave charged on nonworkdays between the date 6 years prior to the claim filing date (the beginning of the 6-year claims period) and December 21, 2000 (the date of the

change in the military leave law). For example, if an employee filed a claim on August 1, 2004 (after the court's decision and prior to the issuance of this guidance), the agency must consider any period of military service between August 1, 1998, and December 21, 2000. If an employee files a claim on January 15, 2005, the agency will consider any period of military service between January 15, 1999, and December 21, 2000, in crediting annual leave.

As in all leave claims, the burden of proof is on the employee. An employee making a claim must supply a copy to his or her employing agency of the employee's orders, certification of attendance, or other documentation indicating that he or she engaged in one or more periods of active military duty that included nonworkdays during the applicable claims period described in the preceding paragraph. Employees will be credited for 1 day of annual leave for each nonworkday occurring within a period of active duty for which he or she was charged military leave. A maximum of 4 days of annual leave may be credited for each fiscal year.

Any annual leave credited as a result of an employee's claim must be placed in a restored leave account in accordance with 5 U.S.C. 6304(d)(1)(a) and OPM's regulations at 5 CFR 630.306, and the restored leave must be used by the employee by the end of the leave year in progress 2 years after the date of restoration. (For employees who receive annual leave credit in leave year 2004, the time limit for using the recredited leave will be the end of leave year 2006, which is January 6, 2007.) Employees who have retired or separated may file a claim with their former agency and must receive a lump-sum payment for any annual leave recredited as a result of that claim, paid at the rate of pay the employee was earning at the time of his or her separation or retirement.

Employees should contact their agency human resources offices for information on procedures for filing a claim. For additional information on crediting annual leave to members of the Reserves or National Guard, agency Chief Human Capital Officers and/or Human Resources Directors may contact their assigned OPM Human Capital Officer.

cc: Chief Human Capital Officers
Human Resources Directors