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United States Government Accountability Office  
Washington, DC 20548

July 28, 2008

Congressional Committees

Subject: *DOD Financial Management: Adjudication of Butterbaugh Claims for the Restoration of Annual Leave or Pay*

This report formally transmits the attached briefing in response to section 1045 of the National Defense Authorization Act for Fiscal Year 2008. The Act required GAO to review and report on the adjudication of claims filed as a result of the 2003 decision by the U.S. Court of Appeals for the Federal Circuit in the case of *Butterbaugh v. Department of Justice*.<sup>1</sup> In that case, the Court decided that federal employees who are members of the military reserves should not have been charged military leave for reserve duty days that occurred outside their civilian work schedule. Under existing federal law, employees are entitled to seek restoration of leave or monetary compensation. On July 8, 16, and 22, 2008, we provided briefings on the status of the adjudication of such claims by the Defense Finance and Accounting Service and selected other agencies to cognizant committee staff to satisfy the mandate. Based on the results of our review, we are not making any recommendations for agency action.

We are sending copies of this report to the appropriate congressional committees. We are also sending copies to the Secretary of Defense, the Under Secretary of Defense (Comptroller), the Director, Defense Finance and Accounting Service, and the heads of the other seven agencies selected for review. This report will also be available at no charge on GAO's Website at <http://www.gao.gov>. Should you or your staff have any questions concerning this report, please contact me at (202) 512-9095 or [rasconap@gao.gov](mailto:rasconap@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were J. Christopher Martin, Senior-Level Technologist; Evelyn Logue, Assistant Director; Darby Smith, Assistant Director; F. Abe Dymond, Assistant General Counsel; Kristi Karls; Jason Kirwan; Nkosi Nantambu; John Vicari; and Tory Wudtke.

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<sup>1</sup> 336 F.3d 1332 (Fed. Cir. 2003).

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# **Adjudication of Butterbaugh Claims for the Restoration of Annual Leave or Pay**

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## **Briefing for the Congressional Defense Committees**

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## Briefing Agenda

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- Introduction
  - Summary of Observations
  - Background
  - Objectives
  - Scope
  - Methodology
  - Observations
  - Agency Views
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## Introduction

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- In 2003, the U.S. Court of Appeals for the Federal Circuit, in *Butterbaugh v. Department of Justice*,<sup>1</sup> decided that federal employees who are members of the military reserves should not have been charged military leave for reserve duty days that occurred outside their civilian work schedule. Under existing federal law, employees are entitled to seek restoration of leave or monetary compensation through various options:
  - Administrative claim – an employee files a claim with the agency with which they were employed during the period that they were wrongfully charged leave
  - File a complaint with the U.S. Merit Systems Protection Board (MSPB)
  - Seek assistance from the Department of Labor or Office of Special Counsel

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<sup>1</sup> 336 F.3d 1332 (Fed. Cir. 2003).

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## Introduction (cont'd)

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- Federal law, enacted in its current form in 1980, grants federal employees who are members of the military reserves or National Guard (reservists) 15 days (120 hours) of military leave annually to perform reserve duty or training
  - For decades, the Office of Personnel Management (OPM) interpreted that entitlement as meaning 15 calendar days, rather than workdays
  - Therefore, employees who were required to attend reserve training or duty over the weekend were charged military leave
  - If employees ran out of military leave, they had to use other types of leave, such as annual leave or leave without pay to complete their military service
  - In January 2001, because of some amendments to the leave laws, OPM modified its guidance to advise agencies to charge military leave only for regularly scheduled workdays
  - The 2008 National Defense Authorization Act (2008 NDAA) requires GAO to report on the Defense Finance and Accounting Service's (DFAS) and selected other agencies' adjudication of claims as a result of the Butterbaugh decision
  - This briefing is intended to satisfy the 2008 NDAA mandate noted above
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## Summary of Observations

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- Agencies are not required to track their Butterbaugh claims or to provide external reports on these claims
    - Agencies provided us available data, but were unable to provide assurances regarding the completeness or reliability of the data
  - Agencies' ability to process claims depends on the availability and quality of the documentation
    - Claimants are expected to submit evidence necessary to support their claim and may request necessary documentation from the agency with which they were employed during the period that they are seeking restored leave or compensation
    - Agencies often could not provide the necessary documentation because they are only required to maintain leave and earnings records for 6 years
    - Lack of documentation has resulted in denial of claims
-



## Summary of Observations

**Table 1: Summary of Available Data on Claims Filed and Provided by Departments/Agencies**

| Claims  | DFAS    | USDA  | DHS   | DOI   | DOJ   | VA     | GSA          | IRS          | Total   |
|---|---------|-------|-------|-------|-------|--------|--------------|--------------|---------|
| <b>Total</b>  | 11,305  | 66    | 75    | 30    | 82    | 203    | 7            | 64           | 11,832  |
| <b>Denied</b>                                       | 3,410   | 9     | 8     | 0     | 11    | 19     | Not provided | Not provided | 3,457   |
| <b>Leave restored (hrs)</b>                         | 81,397  | 2,565 | 7,684 | 2,252 | 5,093 | 11,896 | Not provided | 3,496        | 114,383 |
| <b>Amount Paid</b><br><small>(in thousands)</small> | \$1,919 | \$100 | \$23  | \$0   | \$41  | \$62   | Not provided | Not provided | \$2,145 |
| <b>Outstanding Claims</b>                           | 12      | 16    | 3     | 5     | 1     | 10     | 0            | 2            | 49      |

• Agency data has not been verified. DFAS data is as of June 13, 2008; the data from the other agencies was received during periods ending between March 2008 and June 2008



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## Background

- Until 2001, reservists were often charged military leave for weekends or other non-workdays that occurred within a typical 2-week period of training or other extended reserve duty
- If employees ran out of military leave, they had to use other types of leave, such as annual leave or leave without pay, to complete their military service
- In January 2001, after Congress amended the military leave statute, OPM issued guidance stating that reservists should only be charged military leave for reserve duty performed on their regular civilian workdays



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## Background (cont'd)

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- In 2003, the Court of Appeals for the Federal Circuit, in *Butterbaugh v. Department of Justice*, held that even prior to OPM's 2001 guidance, federal employees should not have been charged military leave for reserve duty days that occurred outside their civilian work schedule
  - Subsequently in June 2004, MSPB held that improperly charging military leave constituted a denial of a "benefit of employment" under the Uniformed Services Employment and Reemployment Rights Act (USERRA), for which employees could be entitled to corrective action or compensation from their respective agencies
    - Under USERRA, such employees may file a claim for restoration of annual leave, or if separated from federal employment, monetary compensation
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## Background (cont'd)

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- In October 2004, OPM issued guidance on adjudicating Butterbaugh claims. The guidance
    - requires documentation of non-workdays within a period of military reserve duty
    - indicates that one day of annual leave should be restored for each non-workday a reservist was charged military leave (up to 4 days per fiscal year)
    - does not specifically require claimants to prove that they had to use annual leave or leave without pay for military duty as a result of being improperly charged military leave
    - states that claims are subject to the Barring Act, which places a 6-year statute of limitations on federal employee leave claims
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## Background (cont'd)

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- In August 2007, the Court of Appeals for the Federal Circuit found<sup>2</sup> that:
  - Improperly charged military leave alone does not constitute a denial of benefits of employment; there must also be a loss of annual or other leave resulting from the improper charging of military leave (i.e., claimant incurred “harm”)
  - Claimants have the burden of proving harm
  - Agencies were not consistent in how they compensated Butterbaugh claimants
  - Agencies may exercise discretion in resolving claims by providing more compensation than an individual has been able to prove as a matter of administrative convenience and to ensure that veterans are given the benefit of the doubt

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<sup>2</sup>Pucilowski v. Dept. of Justice, 498 F.3d 1341 (Fed. Cir. 2007)



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## Background (cont'd)

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- In a separate August 2007 decision, the Court of Appeals held<sup>3</sup> that there is no statute of limitations applicable to USERRA and its predecessor statute<sup>4</sup> for filing claims resulting from improperly charged military leave
  - Claims can be filed as far back as 1980, when the current version of the military leave statute was enacted

<sup>3</sup>Hernandez v. Dept. of the Air Force, 498 F.3d 1328 (Fed. Cir. 2007)

<sup>4</sup>Before USERRA was passed in 1994, reservists' employment rights were protected by the Vietnam Era Veterans' Readjustment Assistance Act of 1974

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## Background (cont'd)

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- If a reservist has not maintained personal copies of relevant records, they can file a request for records with the agency with which they were employed at the time they were wrongfully charged leave
    - Federal record retention regulations only requires agencies to retain payroll records for 6 years, so some records may be unavailable
    - Relevant information generally needed to file a claim includes
      - military service records, including military orders
      - civilian pay records
      - time and attendance, and other related records that would demonstrate that they were engaged in one or more periods of military duty that included non-workdays during the applicable claim period
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## Objectives

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### The 2008 NDAA requires GAO to report on:

- (1) An estimate of the number of members of the reserve components of the Armed Forces, both past and present, who are entitled to compensation
  - (2) An assessment of the current policies, procedures, and timeliness of DFAS in implementing and resolving claims
  - (3) Whether DFAS's decisions regarding Butterbaugh claims follow a consistent pattern of resolution
  - (4) An assessment of whether or not DFAS is providing more compensation than an individual has been able to prove
  - (5) An estimate of the total Butterbaugh compensation for both past and present members of the reserves as a result of court decisions regarding restoration of leave
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## Objectives (cont'd)

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- (6) A comparison of DFAS claims processing with that of other selected federal agencies
  - (7) The number of claims that resulted in pay/leave being restored
  - (8) The number of claims denied by DFAS
  - (9) An estimate of the time required for DFAS and other selected federal agencies to resolve a claim
  - (10) The backlog of claims at DFAS and other selected federal agencies
  - (11) An estimate of the time required for DFAS to resolve outstanding claims
  - (12) The reasonableness of DFAS's documentation requirements for resolving claims
  - (13) A comparison of DFAS's documentation requirements with that of other selected federal agencies
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## Scope

- We focused primarily on DFAS, which has received significantly more claims than other agencies selected for review
  
- In addition, we selected the 7 federal departments/agencies below for limited reviews. Our selection criteria was agencies with the largest civilian workforces and/or those that provide payroll services to other federal entities
  - Department of Agriculture (USDA)
  - Department of Homeland Security (DHS)
  - Department of the Interior (DOI)
  - Department of Justice (DOJ)
  - Department of Veterans Affairs (VA)
  - General Services Administration (GSA)
  - Internal Revenue Service (IRS)
  
- Although the U.S. Postal Service (USPS) has the largest civilian workforce, they follow their own personnel regulations and are not subject to the military leave statute



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## Methodology

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- **DFAS:**
  - Obtained, through interviews, walkthroughs, and documentation reviews, an understanding of policies, procedures, and controls, including supervision and the monitoring and tracking of the adjudication of Butterbaugh claims
  - Obtained available DFAS data on Butterbaugh claims
    - number of claims processed, denied, etc.
    - amount of leave restored and monetary compensation paid
    - estimate of potential future claims



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## Methodology (cont'd)

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- Selected a random sample of 115 DFAS cases for detailed review of available data of DFAS decisions and supporting documentation
  - Available DFAS documentation did not include separate data on claims filed versus requests for documentation needed to support a claim
  - Accordingly, we only reviewed items in our sample that were actual claims filed with DFAS and we did not review other sample items that did not meet this criterion
  - Resulting sample contained 106 cases that were related to claims for restored leave or monetary compensation
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## Methodology (cont'd)

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- Compared DFAS policies, procedures, and data to other agencies and to Court of Appeals and MSPB case law
  - **Other Agencies:**
    - Obtained, through interviews and documentation reviews, an understanding of policies, procedures, and controls, including supervision, monitoring, and tracking of Butterbaugh claims
    - Obtained available agency data on Butterbaugh claims
      - number of claims processed, denied, etc.
      - amount of leave restored and compensation paid
      - estimate of potential future claims
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## Methodology (cont'd)

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- We conducted this performance audit from February 2008 through July 2008 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives



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## Observations

Objective 1: Estimated population of reservists entitled to compensation

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- None of the agencies have reliable estimates of the number of potential claimants
  - The time period (1980 – 2000) from which Butterbaugh claims may arise far exceeds the availability of records to use as a basis for estimates
  - Without records, it is not possible to reliably determine the number of reservists entitled to compensation



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## Observations

### Objective 2: Assessment of DFAS policies, procedures, and timeliness

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- DFAS policies are generally consistent with court and MSPB decisions on USERRA claims entitlement and evidentiary burdens
  - A key component of DFAS policy is the requirement to determine whether claimants incurred “harm” as a result of improperly charged military leave
    - Claimants incur harm if, after having military leave charged for non-workdays, they have to use annual leave or leave without pay for subsequent reserve duty because their military leave has been exhausted
    - For example, if a reservist had 3 continuous weeks of military duty and was charged 16 hours of military leave for each of the 2 intervening weekends in addition to 8 hours per each weekday, the military leave would be used up by the beginning of the third week. The reservist would then incur harm because annual leave or leave without pay would have to be charged for the last 4 days of duty
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## Observations

### Objective 2: DFAS policies, procedures, and timeliness (cont'd.)

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- In April 2005, DOD initially issued a memo notifying defense services and agencies of employees' rights to file Butterbaugh-related claims in accordance with OPM guidance
  - In June 2006, DOD issued revised guidance based on MSPB decisions allowing reservists to file claims as far back as 1980
  - In October 2006, DFAS issued a memo which stated explicitly that claimants must have evidence of harm (use of annual leave or leave without pay resulting from improperly charged military leave)
  - In March - May 2008, DFAS issued several new guidance documents:
    - A desk guide for processing claims
    - Quality assurance procedures to ensure that claims adjudications are fully documented, accurate, and consistent
    - A contingency plan for addressing any future backlog of claims
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## Observations

### Objective 2: DFAS policies, procedures, and timeliness (cont'd.)

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- DFAS claims are processed by payroll personnel
    - DFAS policy requires supervisory review of 10 percent of all of its transactions
    - However, DFAS officials stated that until recently, they were unable to comply with this policy due to staffing limitations
  
  - DFAS officials indicated that initial delays in processing early 2007 Butterbaugh claims were a result of a large backlog of documentation requests rather than actual claims submitted by potential claimants. DFAS hired contractors to address the documentation request backlog
  
  - As of mid-June 2008, DFAS appears to be processing both documentation requests and claims in a reasonable period of time--generally within 1-2 weeks
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## Observations

### Objective 3: Consistency of DFAS decisions

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- DFAS did not have reliable procedures or adequate internal controls to ensure claims were processed in accordance with its policies
  
  - Our analysis of 106 claims disclosed numerous instances in which more compensation was provided to claimants than supported by documentation
    - 64 claimants received more restored leave than was supported by documentation
    - 5 claimants received more pay than was supported by documentation
    - 2 claimants received less restored leave than was supported by documentation
    - 12 claims had sufficient documentation to support DFAS's decisions regarding the claims— 1 of which was approved and 11 that were denied due to insufficient documentation
    - 23 claims lacked sufficient documentation to determine what decision DFAS made regarding the claim
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## Observations

### Objective 4: Whether DFAS provides more compensation than proven

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- As noted in objective 3, our analysis of 106 DFAS claims identified 69 claims for which compensation exceeded the documented harm
  - 64 claimants received more restored leave than was supported by documentation
  - 5 claimants received more pay than was supported by documentation
- However, should the individual file an amended claim, it is possible that a review of pay periods not covered by the original claim may indicate that the compensation or a portion of the compensation is justified



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## Observations

### Objective 4: Whether DFAS provides more compensation than proven (cont'd)

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- DFAS reviewed 56 claims (none of which were in our sample) processed in the September-December 2007 timeframe. DFAS's initial results identified issues similar to those previously noted
    - DFAS found that 48 claims resulted in restored leave or monetary compensation in excess of that supported by claimant documentation
      - 28 claims resulted in 2,006 hours of restored leave
      - 20 claims resulted in potential overpayments of \$45,600
    - DFAS is in the process of validating its results. Upon completion of this effort, DFAS intends to initiate actions to withdraw restored leave and collect overpayments, as appropriate
  - In light of above results, DFAS has begun to perform a supervisory review of all claims processed between January and June 2008
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## Observations

### Objective 5: Estimated compensation

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- According to DFAS officials, DFAS considered an across-the-board settlement rather than incurring the administrative costs to adjudicate individual claims
  - However, based on the rough calculation outlined below, DFAS officials determined that it would be more cost effective to process individual claims than to make an across-the-board settlement. Specifically, DFAS estimated:
    - the average population of reservists to be about 84,400 each year,
    - that each reservist would receive 2 days of pay, or an average of \$300, per year from 1996 through 2000, for a total of \$1,500, and
    - that the resulting Butterbaugh compensation could reach about \$127 million (84,400 reservists x \$1,500 each)
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## Observations

### Objective 5: Estimated compensation (cont'd)

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- Other agencies' estimates:
    - DOI: \$200,000 and 6,214 hours of restored leave (partial estimate based on responses from two bureaus—the National Park Service and the Minerals Management Service)
    - DOJ: 232 hours of restored leave (partial estimate based on response from one component—the Civil Division)
    - DHS, GSA, IRS, USDA, and VA did not provide estimates
  - DFAS and other agencies were unable to provide assurances regarding the reliability of the data used to derive the estimates
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## Observations

### Objective 6: Comparison of claims handling

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- Supervisory review of claims by other agencies:
    - GSA stated that its claims receive supervisory review
    - IRS and some bureaus within DOI, DOJ, & USDA stated that supervisory review is performed on a limited number of claims
    - DHS and VA stated that claims do not receive supervisory review
      - Each of approximately 220 VA locations process their own claims
  - Statute of limitations for filing claims with the agency:
    - DFAS, DHS, DOI, DOJ, GSA, USDA, and VA, process claims as far back as 1980
    - IRS accepted claims going back no more than 6 years from the date of claim, based on OPM guidance
      - IRS told us that claims going back more than 6 years can be filed with the MSPB
  - (Note: documentation requirements are discussed under objectives 12 and 13)
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## Observations

Objective 7: DFAS claims resulting in leave restoration or pay

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- As of June 13, 2008, DFAS documentation showed that it had provided annual leave or monetary compensation for 7,895 claims
    - Restored 81,397 hours of annual leave
    - Paid \$1.9 million in monetary compensation
    - DFAS acknowledged that the above data may be understated because its reporting system did not properly identify all Butterbaugh claims
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## Observations

### Objective 8: Number of claims denied by DFAS

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- As of June 13, 2008, DFAS's internal Butterbaugh claims report showed that it had denied 3,410 claims
    - Reasons for denials:
      - Insufficient documentation to process a claim, such as
        - missing claim form
        - missing leave and earnings statements
        - missing military orders
      - No evidence of harm; i.e., reservist did not provide documentation supporting that they used annual leave or leave without pay for reserve duty
  - Our sample did not identify any claims that were improperly denied
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## Observations

### Objective 9: Estimated time to resolve a claim

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- DFAS officials stated that it now takes 5 to 10 business days to resolve a claim, depending on number of days claimed and available documentation
  - Other agency officials used different metrics to determine the amount of time required to resolve a claim--for example, the number of hours worked to resolve a claim vs. total days lapsed from beginning to end
  - Accordingly, it is difficult to make a meaningful comparison of the length of time required to resolve claims
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## Observations

### Objective 10: Backlog of claims

- As of June 13, 2008, DFAS provided documentation showing that it had 12 outstanding claims
- During the period of March 2008 – May 2008, other agencies reported between 0 and 16 outstanding claims

|                    | DFAS | USDA | DHS | DOI | DOJ | VA | GSA | IRS | Total |
|--------------------|------|------|-----|-----|-----|----|-----|-----|-------|
| Outstanding Claims | 12   | 16   | 3   | 5   | 1   | 10 | 0   | 2   | 49    |



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## Observations

### Objective 11: Estimated time to resolve outstanding claims

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- DFAS officials estimated it would take 1 to 2 weeks to resolve each outstanding claim
  - DFAS's timeliness in the processing of documentation requests and claims appears to have improved
  - Recent DFAS data indicates that it receives about 10-20 claims each week for processing, most of which are denied due to insufficient documentation
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## Observations

### Objective 12: Reasonableness of DFAS documentation requirements

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- DFAS documentation requirements are consistent with MSPB and Federal Court of Appeals decisions
  - Among the agencies we contacted, only DFAS, DHS's Coast Guard, and USDA's Food Safety and Inspection Service require proof of harm
    - Complexities exist in complying with the requirement to prove harm:
      - Harm can be difficult to prove for older periods for which records may not be available
      - An August 2007 court decision provided unclear guidance, saying
        - an employee must prove a loss of annual or other leave to be entitled to compensation
        - however, agencies may exercise discretion and provide more compensation than a claimant is able to prove
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## Observations

### Objective 13: Comparison of documentation requirements

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- Agencies require different levels of documentation
  - All agencies' policies require documentation of military duty
  - Most agencies we contacted require documentation of military leave being charged for non-workdays
    - DFAS, DOJ, GSA, VA, DOI, DHS, and certain components of USDA<sup>5</sup>
  - Other agencies' policies generally do not require documentation of improper charges of military leave:
    - IRS and USDA (except for those identified in the footnote below)
  - DFAS, the Food Safety and Inspection Service within USDA, and the Coast Guard within DHS, are the only entities we identified, based on the documentation provided to us, whose policies require documentation of harm (i.e., loss of annual or other leave due to exhaustion of military leave)

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<sup>5</sup>U.S. Forest Service, Food Safety and Inspection Service, and Rural Development within USDA require documentation of improperly charged military leave



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## Agency Views

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- DFAS and the other seven federal departments/agencies concurred with the facts presented. On the basis of their comments, we made technical changes as appropriate

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