

Leave Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: Langley Research Center
National Aeronautics and Space
Administration
Hampton, Virginia

Claim: Request Correction to the Amount of
Military Service Creditable for Leave
Accrual

Agency decision: Denied

OPM decision: Granted. No corrective action.

OPM contact: Robert D. Hendler

OPM file number: 06-0021

/s/ Robert D. Hendler

Robert D. Hendler
Classification and Pay Claims
Program Manager

8/10/2006

Date

The claimant retired from the National Aeronautics and Space Administration's Langley Research Center on April 3, 2004, but he requests the Office of Personnel Management (OPM) direct his former agency to credit his entire period of military service in determining his annual leave accrual rate. OPM received the claim on February 15, 2006, and the agency's administrative report (AAR) on March 24, 2006. For the reasons discussed herein, OPM does not have the authority to settle this claim.

The claimant and the agency agree the claimant was appointed to a Federal civilian position, effective September 26, 1983, while on terminal military leave*. He officially retired from military service on November 1, 1983. The AAR states the agency believes the claim should not be allowed because 5 U.S.C. 6303 does not allow military retirees to use military service to enhance the rate at which leave is accrued and that the claim is barred under the applicable statute of limitations.

While establishing the claimant's employment record as a civilian employee, the agency applied the leave accrual rules applicable for military retirees to determine the claimant's service computation date (SCD) for leave purposes. The initial SCD was determined to be September 26, 1983, the date of appointment. The record indicates that on August 15, 1985, the agency approved changing the claimant's SCD to September 27, 1982, to reflect credit for his actual service performed while participating in a campaign or expedition for which a campaign badge was authorized. Congress has limited the circumstances under which military retirees may receive credit for their military service in the computation of their leave accrual rates. These also include retirement based on disability resulting from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in line of duty during a period of war.

These limitations, however, do not apply to individuals who have not retired from military service at the time of their appointments to civilian positions. See the Dual Compensation Act, Pub. L. No. 88-448, § 203, 5 U.S.C. § 6303(a). It is well established that an individual placed on terminal leave is on active military duty and is not in a retired status. *Major James D. Dunn*, B-251084, October 12, 1993; 56 Comp. Gen. 855 (1977); and 45 Comp. Gen. 180 (1965). Therefore, the claimant was entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment, because the claimant's appointment to a Federal civilian position on September 26, 1983, was effective before his November 1, 1983, retirement date from the military.

The agency has misconstrued the OPM decision, S003223, cited in its report. This decision was clarified in two subsequent decisions on this same matter. See OPM File Number 03-0022, October 1, 2003, and OPM File Number 04-0023, January 11, 2006. As stated in the latter case:

* As explained by the United States Court of Claims, *terminal leave* is "a leave of absence granted to an officer at the end of his period of military services; a permission to be absent from duty." *Terry v United States*, 120 Ct Cl. 315 (1951). Prior to 1945, under the leave laws then in effect, leave of up to 60 days without deduction from pay and allowances could be taken by Army officers at the discretion of the Secretary of War. 56 Comp. Gen. 855 (1977).

Therefore, the claimant is entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment on November 18, 2002, because the claimant's appointment to a Federal civilian position was effective before his retirement date from the military. The effective date of his military retirement on December 31, 2002, does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment. For purposes of service calculation for SCD-Leave, the claimant's military service is creditable through November 17, 2002 the last day of his active duty prior to civilian employment. Upon appointment to his civilian position, the claimant will begin receiving civilian service credit for leave accrual purposes. The remaining military service, from November 18, 2002, to December 31, 2002, cannot be used to further enhance the employee's leave accrual rate. If the claimant separates and is reemployed later, the restrictions for crediting his military service cited by the agency will apply.

In accordance with those decisions, the effective date of the claimant's military retirement on November 1, 1983, does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment. For purposes of service calculation for leave, the claimant's military service would have been creditable through September 25, 1983, which was the last day of his active duty prior to civilian employment. Upon appointment to the civilian position, the claimant began receiving civilian service credit for leave accrual purposes. The remaining military service from September 26, 1983, to November 1, 1983, could not be used to further enhance the employee's leave accrual rate.

In accordance with the Barring Act in 31 U.S.C. § 3702(b)(1), every claim against the United States is barred unless such claim is received within six years after the date such claim first accrued. *Robert O. Schultz*, B-261461, November 27, 1995. The Barring Act does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order for it to be considered on its merits. *Nguyen Thi Hao*, B-253096, August 11, 1995. A claim can be received by OPM or the agency within six years from the date the claim accrued to satisfy the statutory limitation.

The claimant indicated he did not discover the possible error until early 2005. He believes the 'continuing claim' rule is appropriate in his case and filed a claim with his agency on July 19, 2005. Under this rule, a new claim arises each time the Government fails to make a proper payment, and a claimant may recover for six years prior to the filing of a continuing pay claim regardless of when the underlying events occurred creating the initial claim. *Janie B. Lopez*, B-249968, February 16, 1993. *Accord, Burich v. United States*, 366 F.2d 984, 986 (Ct. Cl. 1966), *cert. denied*, 389 U.S. 885 (1967); *Batten v. United States*, 597 F.2d 1385, 1387 (Ct. Cl. 1979); and 62 Comp. Gen. 80 (1982). We agree that the claimant's circumstances meet the 'continuing claim' rule since leave accrual rates can be adjusted at any time based on the submission of pertinent factual information. In the instant case, the claim period begins July 19, 1999, which is six years prior to the claimant's filing with his agency. He is entitled to credit for his entire period of military service in determining his leave accrual from July 19, 1999, forward. However, at that time, the claimant was already receiving the maximum eight hours per pay period of annual leave accrual, and there is no corrective action to be taken. Credit prior to July 19, 1999, is time barred under 31 U.S.C. § 3702(b)(1).

OPM does not conduct investigations or adversary hearings in adjudicating claims but relies on the written record presented by the parties. *Frank A. Barone*, B-229439, May 25, 1998. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. *Jones and Short*, B-205282, June 15, 1982.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.