

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

Claimant: [name]

Organization: [agency component]
[location]

Claim: Request Correction to Service
Computation Date to Reflect Time as
U.S. Air Force Academy Cadet.

Agency decision: Denied

OPM decision: Granted

OPM file number: 06-0018

/s/ Jeffrey E. Sumberg

Jeffrey E. Sumberg
Deputy Associate Director
Center for Merit System Accountability

6/13/2008

Date

The claimant is employed by the [agency component], Department of the Air Force, at [location]. He submitted a claim with the Office of Personnel Management (OPM) to correct his service computation date (SCD) to reflect credit for the time he served as a cadet at the U.S. Air Force Academy. OPM received the claim on January 19, 2006, and the agency's administrative report (AAR) on March 14, 2006. For the reasons discussed herein, the claim is granted.

The claimant and the agency agree that the claimant attended the Air Force Academy from May 1985 to May 1989. He then served on active duty with the Air Force from May 1989 until December 2000 when he was honorably discharged. On July 19, 2004, he was appointed to a [position] and was initially credited for leave purposes with his academy time as well as his active duty Air Force time, resulting in a service computation date (SCD) for leave of December 5, 1986. On November 24, 2004, the servicing Civilian Personnel Office issued a Standard Form 50 changing the SCD based on verification of his military service. This change removed the credit for his academy service, resulting in an SCD of December 6, 1992, retroactively effective to July 19, 2004. The January 9, 2006, agency claim denial states his academy time was removed:

In accordance with a Department of Defense (DoD) direction, academy time is not creditable when computing length of service for any purpose. DoD references 10 USC Part 971 which states,

“ . . . in computing length of service for any purpose, service as a cadet or midshipman may not be credited to any of the following officers: . . . (2) A commissioned officer of the Army or Air Force.”

The claimant states he was given e-mail guidance by OPM in December 2004 that stated “At the present time; OPM is permitting such time to be credited for retirement purposes, and this means the time is creditable for leave purposes.” He raised the question again, and in August 2005 was advised that “Employees who have Service Academy time receive credit for leave accrual purposes if they are not retired military.” He provided copies of electronic mail exchanges with the General Inquiries website at www.opm.gov. He states:

They [his agency] reference a law in 10 USC (Armed Forces) which simply do [sic] not apply to anyone outside the military. The law they reference is simply stating that academy time does not count for any military purpose. 5 USC (Government Organization and Employees) tells me that if the time counts for retirement, it counts for leave purposes. 5 USC also states that all active duty military time counts for leave purposes. Academy time was active duty time. Regardless, I know that all non-retired Academy graduates that in-processed [sic] Wright Patterson AFB before Jun 04 is [sic] currently getting credit for their time. I should too.

OPM's authority to adjudicate compensation and leave claims flows from title 31, United States Code (U.S.C), section 3702, which is narrow and restricted. It does not extend to civil service retirement claims. In adjudicating this claim, our responsibility is to make our own independent decision about the proper setting of the claimant's SCD for leave accrual comparing the facts in the case to controlling Federal laws, rules, and regulations. Therefore, we have considered the claimant's statements only insofar as they are relevant to making that comparison. The

claimant's agency is bound by this settlement decision as the final Executive branch determination on this claim and the application of controlling Federal laws, rules, and regulations to similarly situated agency employees.

The AAR letter states:

The Department of Defense, Civilian Personnel Management Service, Field Advisory Services Division (FAS), provided the following guidance “. . . academy time is not creditable in computing length of service for any purpose IAW 10 U.S.C. 971”. The OPM published guidance for service computation date (SCD) leave credit (Guide to Processing Personnel Actions, Subparagraph 1-6) states that uniform service must be verified. As part of the verification process for any active military service, the military departments do not include academy time in active service IAW 10 U.S.C. 971. In April 2005, the Air Force General Counsel requested the Department of Defense General Counsel's assistance and intervention with OPM for a formal decision on academy time, citing U.S. Court of Appeal and Merit System Protection Board cases. At the present time, a decision has not been rendered, and our agency's guidance is to deny service credit for academy time.

The AAR analysis relies on *Horner v. Jeffrey*, 823 F.2d 1521, 1525-26 (Fed. Cir. 1987). Briefly, this decision reversed an earlier MSPB decision (*Jeffrey v. Office of Personnel Management*, 28 M.S.P.R. 81 (1985)). *Horner v. Jeffrey* found the plain and unambiguous language of 10 U.S.C. 971(b)(1), does not limit the bar on use of time spent as a midshipmen in computing length of military service merely to computation of retirement pay; it bars the use of cadet or military time in computing length of military service for all purposes, including calculations of length of military service for purposes of determining civil service retirement entitlements.

The AAR also cites *Crawford v. Department of Transportation*, 373, F.3d 1155 (Fed. Cir. 2004), in which the petitioner appealed the decision of the MSPB which denied credit for his military service as a cadet in the United States Coast Guard Academy for calculating accrued leave time in the civil service. He claimed the denial was discriminatory treatment under the Uniformed Services Employment and Reemployment Act of 1996 (USERRA) and violated 5 U.S.C. 6303(a). The MSPB (*Crawford v. Department of Transportation*, 95 M.S.P.R. 44 (2003)) found he was not denied a benefit of employment because of his military service. Relying on *Horner v. Jeffrey*, the MSPB found: “Since section 971(b) prevents service as a cadet at the Coast Guard Academy from being credited for any purpose, we find the appellant's cadet time cannot be credited for leave accrual purposes.” The court affirmed the MSPB decision, relying on *Horner v. Jeffrey*.

The AAR also cites *Nicholas Vrevich v. Department of Agriculture* (CH-3443-04-0706-I-1), October 21, 2004, an initial MSPB decision in which the appellant claimed denial of benefit of employment based on his military service under USERRA because his agency “will not credit his service as a midshipman at the United States Naval Academy when determining his service computation date for leave-accrual purposes and reduction-in-force purposes.” The appellant had served as a midshipman at the Naval Academy and on active duty in the United States Navy from May 27, 1981 to August 30, 1987. He did not retire from the Navy and was employed by

the Department of Agriculture. The decision notes that *Vrevich* is distinguished from the other cases in that:

...the only precedential court decisions he has found on the issue involved civilian employees who had retired from the military. Although there are no precedential decisions applying the provisions of *10 U.S.C. § 971(a)* to civilian employees who had not retired from military service, the language of the statute does not limit its coverage to individuals who have retired from the military service. Thus, the appellant's argument is not persuasive.

In further support of his argument, the appellant notes that two manuals produced by the Office of Personnel Management-the manuals describing the retirement benefits available to federal employees under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS)-state that service as a midshipman at the United States Naval Academy is creditable for retirement purposes....These provisions conflict with *10 U.S.C. § 971(a)*, which provides that service as a midshipman at the United States Naval Academy "may not be counted in computing, for any purpose, the length of service" of an officer of an armed force....Where a statute conflicts with an agency regulation, the provisions of the statute prevail....Accordingly, the provisions in OPM's FERS and CSRS manuals cannot override the clear provisions of *10 U.S.C. § 971(b)*. Moreover, in interpreting *10 U.S.C. § 971(b)*, the United States Court of Appeals for the Federal Circuit has held that time spent as a midshipman at the Naval Academy is not creditable for retirement purposes or for purposes of calculating accrued leave. See, e.g. *Crawford v. Department of Transportation*, 373 F.3d 1155, 1158 (Fed. Cir. 2004); *Horner v. Jeffrey*, 823 F.2d 1521, 1526, 1532 (Fed. Cir. 1987). In fact, the Federal Circuit Court has stated: "The principle supporting the prohibition against counting military academy time for retirement credit applies with equal force to computation of service time in subsequent civilian employment." See *Crawford*, 373 F.3d at 1158.

Given the unequivocal Congressional intent expressed in the provisions of *10 U.S.C. § 971(a)*, I find the appellant was not deprived, by virtue of his military service, of a benefit available to others....Any inconvenience or hardship that may result from following the statute as written must be relieved by legislation. See *Horner v. Jeffrey*, 823 F.2d 1521, 1526, 1532 (Fed.Cir. 1987)

The recent enactment of Public Law 110-181, § 1115 has resolved the underlying issue of this claim by making service such as the claimant's (as a cadet with the U.S. Air Force Academy) creditable for retirement purposes. Since this service is creditable for retirement purposes, it is also creditable for purposes of annual leave accrual, pursuant to 5 U.S.C. § 6303(a) (providing for crediting of all service of a type that would be creditable under the pertinent retirement provisions). The provisions of Public Law 110-181, § 1115 apply retroactively as well as prospectively.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988.

Based on the written record, and the recent change in law, the claimant's academy time is creditable for purposes of SCD leave and, therefore, the claim is granted.

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.