

U.S. Office of Personnel Management
Leave Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [office]
[region]
U.S. Department of Education
[city & State]

Claim: Restoration of forfeited restored annual
leave

Agency decision: Denied

OPM decision: Denied

OPM decision number: 11-0017

/s/ Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

8/13/13

Date

The claimant is employed by the Department of Education (DOE) in the [office] in [city & State]. In his December 14, 2010, letter received by the U.S. Office of Personnel Management (OPM) on December 16, 2010, the claimant seeks the restoration of 82.5 hours of forfeited restored annual leave, for what he describes as an administrative error committed by his agency's payroll provider, and any additional leave lost because of the claimed error. For the reasons discussed herein, the claim is denied.

In August 2007, the Regional Director for the [office] [region] retired suddenly and the claimant was asked to temporarily assume these responsibilities. He states that from August 2007 until October 2008 he traveled to [region] weekly, usually spending 4-5 days in the [region] [office]. He states that his work in the [region] [office] prevented him from using his previously scheduled annual leave in the 2007 leave year.

On or about January 24, 2008, the claimant submitted a request for the restoration of 82.5 hours of annual leave forfeited in leave year 2007, on the grounds that an "exigency of the public business" prevented him from using his annual leave. The claimant states he timely requested the restoration of the leave forfeited and the request was approved on or about February 23, 2008.

The claimant contends that the payroll provider arbitrarily entered an erroneous end date of "on or about December 23, 2007" for the exigency, which resulted in an incorrect expiration date for restored leave. The claimant asserts the termination date for the exigency was chosen arbitrarily and done so unbeknownst to him. Consequently, the restored leave expired at the end of the 2009 leave year. The claimant contends the exigency actually continued until October 2008, and he expected the leave to expire at the end of the 2010 leave year. Specifically, the claimant states "[n]o one from the Department of Education provided an end date for the exigency and Payroll arbitrarily entered this 2007 date." The claimant declares that because his payroll provider chose the wrong termination date, he had no knowledge of when the two-year time limit for use of restored annual leave was set to expire, and that this action constitutes an administrative error under section 6304 (d)(1)(A) of title 5, United States Code (U.S.C.).

The agency maintains the payroll provider had to fix a termination date for the exigency "in order to process the request." In a May 5, 2010, email submitted by the claimant, the team leader of the payroll function explained that when annual leave is restored, the system automatically generates an expiration pay period. The agency states "when the employee was notified in February 2008 that his request was approved, he did not advise Payroll or any other official that the situation was still 'on-going'." The agency asserts there are no grounds to grant the claimant's request to have his leave restored.

Forfeited annual leave can be restored under the limited circumstances set out in 5 U.S.C. §6304, which provides:

(d)(1) Annual leave which is lost by operation of this section because of-

(A) administrative error when the error causes a loss of annual leave otherwise accruable...;

(B) exigencies of the public business when the annual leave was scheduled in advance; or

(C) sickness of the employee when the annual leave was scheduled in advance; shall be restored to the employee.

Section 6311 of 5 U.S.C. authorizes OPM to “prescribe regulations necessary for the administration of this subchapter.”

Consequently, section 630.306(a) of title 5, Code of Federal Regulations (CFR) (2008), sets forth the time limit for the use of restored leave and states, in part:

...annual leave restored under 5 U.S.C. 6304(d) must be scheduled and used not later than the end of the leave year ending 2 years after:

- (1) The date of restoration of the annual leave forfeited because of administrative error;
- or
- (2) The date fixed by the agency head, or his or her designee, as the termination date of the exigency of the public business that resulted in forfeiture of the annual leave.

When approving a request to restore leave, assigning a termination date for an exigency of the public business is a requirement imposed by the plain language of 5 CFR 630.306(a)(2). The requirement is again set forth in the DOE Personnel Manual Instruction, dated May 13, 1991, which specifies that the ending date for the exigency is “to be fixed by management.” In the present case this did not happen. Instead, on the request form titled “Information to be Included in Request for Restoration of Annual Leave,” the leave approving official, the Acting Enforcement Director, assigned the ending date of the exigency as “on-going.” As discussed previously, the agency states the payroll provider acted in a timely manner to process the claimant’s restoration of annual leave and had to fix a termination date for the exigency “in order to process the request.” That the claimant’s request was processed within the defined parameters of the payroll processing system contracted for by the employing agency cannot be construed as arbitrary, capricious or unreasonable.

Based on our review of the record, December 2007 is a proper date for the end of the exigency. An exigency of the public business must be of such importance that the employee cannot be excused from duty for the duration of the exigency. Under 5 CFR 630.305:

Before annual leave may be restored under 5 U.S.C. 6304, the determination that an exigency is of major importance and that therefore annual leave may not be used by employees to avoid forfeiture must be made by the head of the agency or someone designated to act for him or her on this matter. Except where made by the head of the agency, the determination may not be made by any official whose leave would be affected by the decision.

While the claimant asserts the date fixed for the end of the exigency was arbitrary and erroneous, it appears to be consistent with the facts and records provided. The record contains the claimant’s SF 71 approving the use of restored annual leave from December 24 – December 31, 2007, and no documentation indicating this leave was cancelled. The fact that the claimant was able to take leave starting on December 24, 2007, signifies the end of the exigency under 5 CFR

630.305. Moreover, leave and earnings statements obtained from the agency for pay periods 24, 25, 26, and 27 of 2007 and pay period 1 of 2008 show that the claimant used annual leave during each of these pay periods. From the foregoing, it is reasonable to conclude the exigency ended no later than the end of the 2007 leave year, since management was approving annual leave during the time the claimant asserts the exigency existed. Therefore, notwithstanding the fact that the end date of the exigency of the public business was set by the payroll provider rather than by the designated agency official, we find that the date established as the end of the exigency is proper.

Thereafter, the claimant had two years to schedule and use the restored leave. The claimant's restored annual leave was not used within the prescribed time frame and since the promulgated regulation, 5 CFR 630.306, has the force and effect of law, no remedy is available once the two-year period expires; restored leave which is forfeited again carries no further rights to retention or payment (Patrick J. Quinlan, B-188993, December 12, 1977). Furthermore, administrative error may not serve as the basis to extend the two-year period in which to use restored annual leave. This is so even where the agency fails to fix the date for the running of the two years as required by the regulations (William Corcoran, B-213380, Aug. 20, 1984).

Accordingly, the claim for restoration of annual leave is denied.

We note that although the agency's payroll provider may not have advised the claimant of the termination date set for the exigency of public business or that his leave was going to expire, this does not constitute an administrative error, as the claimant appears to believe, since no regulation requires employees to be advised concerning their leave balances. Comptroller General decisions have held that, when counseling an employee is required by administrative regulations, failure to give correct advice on such matters constitutes an administrative error. B-174199 (1971). The agency confirmed that it had no regulation which required that employees be advised concerning termination dates of the exigency of the public business or impending forfeiture of annual leave under the circumstances of the claimant's situation. As a general rule, employees are charged with constructive knowledge of the statutes and regulations which pertain to them. Michael Dana, 56 Comp.Gen. 473 (1977).

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.