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

Claimant:	[name]
Organization:	[organizational component] U.S. Army Medical Command Stuttgart, Germany
Claim:	Home leave
Agency decision:	Denied
<b>OPM decision:</b>	Denied
OPM file number:	12-0027

//Judith A. Davis for

Robert D. Hendler Classification and Pay Claims Program Manager Merit System Audit and Compliance

2/13/2013

Date

The claimant is currently a Federal civilian employee of the U.S. Army Medical Command (ARMC) in Stuttgart, Germany. She requests the U.S. Office of Personnel Management (OPM) reconsider her agency's denial of home leave. We received the claim on July 17, 2012, and the claim administrative report on September 18, 2012. For the reasons discussed herein, the claim is denied.

The claimant was recruited for and accepted employment with the United States firm Magnum Medical, while residing in Haltom City, Texas, effective March 2002. The firm relocated her to Stuttgart, Germany. The claimant subsequently applied and was selected for a position with the ARMC. Before accepting the job offer, she contacted the Stuttgart Civilian Personnel Advisory Center (CPAC) to negotiate and confirm the benefits, salary, and other conditions of employment. The CPAC's January 9, 2009, email response stated the claimant would be eligible to receive home leave. She accepted the position with ARMC, effective March 1, 2009.

In January 2012, after the claimant contacted the CPAC on an unrelated matter, the agency informed her that her Department of Defense Transportation Agreement, signed on January 27, 2009, was not valid as she was considered a local hire and ineligible for transportation rights. By letter dated March 9, 2012, the CPAC Director gave the claimant written determination of "noneligibility for a Transportation Agreement and its subsequent effect on home and annual leave accrual," stating:

We have determined based on the regulatory requirements that you were not eligible for a Transportation Agreement; as the position was announced for candidates located in the local commuting area, a Transportation Agreement is not allowed in IAW [*sic*] the JTR Vol II C5564, "New appointee recruited for OCONUS service at a geographical locality other than in which the actual residence is located." Attached is a copy of the erroneous Transportation Agreement, DD1617. Your SF-50 will be corrected to remove the 5 day Home Leave Accrual and change the 45 Day Leave Accrual to 30 Day Leave Accrual per annum.

Home leave is an entitlement to additional leave that is granted to employees who complete 24 months of continuous service overseas (section 6305 of title 5, United States Code (U.S.C.)). To qualify for this benefit, the employee must also qualify for the entitlement to accumulate up to 45 days of annual leave set forth in 5 U.S.C. 6304, which follows:

(b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year:

- (1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.
- (2) Individuals employed locally but -

- A. (i) who were originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment;
  - (ii) who have been in substantially continuous employment by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments; and
  - (iii) whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico; or
- B. (i) who were at the time of employment temporarily absent, for the purpose of travel or formal study, from the United States, or from their respective places of residence in its territories or possessions including the Commonwealth of Puerto Rico; and
  - (ii) who, during the temporary absence, have maintained residence in the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment.
- (3) Individuals who are not normally residents of the area concerned and who are discharged from service in the armed forces to accept employment with an agency of the Government of the United States.

The claimant does not meet §6304(b)(1) because she was not directly recruited or transferred by the Government from the United States for employment in Germany. Rather, she was already physically residing in Germany when she was recruited by the agency.

The claimant does not meet (b)(2)(A)(b)(2)(A) because she does not meet each of the three separate requirements under (b)(2)(A)(i) - (iii) as required by law. She was employed locally by the ARMC but was originally recruited from the United States and had been in "substantially continuous employment" by the United States firm Magnum Medical. The claimant passes the "substantially continuous employment" test in (b)(2)(A)(i) as she moved from the private sector to the Federal civilian position without a break in service. However, the claimant did not have return transportation benefits during her entire overseas employment as required by (b)(2)(A)(ii). In its March 9, 2012, letter, the agency stated the claimant was not eligible for a transportation agreement in accordance with the Joint Travel Regulations, Volume II, as the position was announced for candidates located in the local commuting area. Accordingly, the record shows the claimant was not afforded transportation benefits during her employment with ARMC; thus, the requirement under (b)(2)(A)(iii) is not met.

The claimant does not meet §6304(b)(2)(B) because, at the time of employment, she was not temporarily absent from United States for the purpose of travel or formal study. Instead, she was physically residing in Germany to perform contractor work.

The claimant does not meet §6304(b)(3) because she was not discharged from service in the armed forces to accept employment with the agency. Therefore, the claimant's request regarding 45-day annual leave accumulation is denied.

The agency further supports its denial of the claimant's request in the claim administrative report to OPM, citing local policy concerning the granting of 45-day annual accumulation. They state: "[w]ithout an initial transportation agreement [claimant] is not eligibility [*sic*] for home leave IAW Army in Europe Supplement 1 to AR 690-300.30, Appendix F..." However, eligibility for 45-day annual leave accumulation under specified conditions is established by statute without provision for the exercise of discretionary authority by the agencies. Therefore, the above-cited local policy is not applicable to the claimant's case and will not be addressed here.

The controlling regulations for home leave are contained in 5 CFR 630.602, which states:

An employee who meets the requirements of section 6304(b) of title 5, United States Code, for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with section 6305(a) of that title and this subpart.

Thus, the granting of home leave is dependent on eligibility for 45-day annual leave accumulation under section 6304(b). Since the claimant is not eligible for 45-day annual leave accumulation because the agency did not grant her a transportation agreement, her request for home leave is also denied.

OPM's authority under 31 U.S.C. 3702(a)(2) does not provide authority to settle issues in the claim relating to transportation agreement. The U.S. General Services Administrative (GSA), not OPM, is responsible for issuing regulations on travel, transportation, and subsistence expenses and allowances for Federal civilian employees as authorized in 5 U.S.C. chapter 57. GSA's Civilian Board of Contract Appeals is responsible for settling travel and transportation claims (http://www.cbca.gsa.gov/).

It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot estop the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant was initially told she was eligible for home leave by the Stuttgart CPAC does not confer eligibility not otherwise permitted by statute or its implementing regulations. The claimant further asks OPM to conduct a review of the CPAC's "hiring practice" as it was applied in her case. However, the claims jurisdiction of OPM is limited to determining whether a claimant is entitled to compensation or leave under the controlling statute and/or regulations. Therefore, the agency's hiring practices are not subject to review under OPM's compensation and leave claims adjudication process and will not be addressed further in this decision.

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. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. 5 CFR 178.105; Jones and Short, B-

205282, June 15, 1982. Where the agency's determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., Jimmie D. Brewer, B-205452, Mar. 15, 1982, as cited in Philip M. Brey, B-261517, December 26, 1995. The agency's decision to deny the claimant 45-day annual leave accumulation and home leave were in accordance with the controlling statute and regulations. A decision that is consistent with controlling statute and regulations which do not allow for the exercise of discretionary authority as in this case cannot be considered arbitrary, capricious, or unreasonable, as compliance with statute and regulation is mandatory. Therefore, the claim is denied.

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.