

Date: March 1, 2004  
Claimant: [name]  
File Number: 03-0023  
OPM Contact: Deborah Y. McKissick

The claimant is a former employee of the Office of Independent Counsel Daniel S. Pearson, who served as the Certifying Officer. The claimant requests payment for accumulated and accrued leave. The Office of Personnel Management (OPM) received the compensation claim on April 11, 2003 and the agency administrative report on July 2, 2003. For the reasons discussed herein, the claim is granted in part and denied in part.

The claimant believes the agency has not appropriately compensated her for 488 hours of accrued annual leave. The claimant provided copies of documents pertinent to this claim. The claimant retired from the agency on March 24, 2001. At the time of her retirement, the claimant received payment for 474 hours of restored leave, but not for the 280 hours of annual leave listed on a Record of Leave Data (SF-1150), properly signed and dated on March 15, 2001. On March 26, 2001, the claimant was reappointed to an excepted temporary indefinite appointment into the Office of Independent Counsel, with all leave and benefits in effect. *See* Notification of Personnel Action, effective March 26, 2001. The claimant retired again from the Federal government on March 27, 2002, with 160 hours restored leave, 34 hours sick leave, and 328 hours annual leave accrued. *See* Record of Leave Data (SF-1150), dated February 20, 2002.

The agency administrative report confirmed that the claimant retired from the Office of Independent Counsel effective March 24, 2001, and was reappointed under a temporary indefinite appointment effective March 26, 2001. At the time of her retirement, the SF-1150, dated March 15, 2001, showed 280 hours of current annual leave (240 carried over from 2000, plus 40 hours earned in 2001 to the date of retirement), and 474 hours of restored leave. The claimant was paid for the 474 hours of restored leave on March 28, 2001. However, the claimant was not paid for the 280 hours of current annual leave because of her reemployment as a Federal employee, effective March 26, 2001. At the time that the claimant's employment as a Federal employee was terminated effective March 27, 2002, a SF-1150 dated February 20, 2002, showed 328 hours of current annual leave (280 hours recorded on the March 26, 2001 SF-1150, plus 48 hours earned in 2002 to the date of termination), plus 160 hours of restored leave (leave earned in 2001 from the date of reemployment through the end of the year).

The agency does not contest the claimant's assertion that she should receive a lump-sum payment for the 328 hours accrued annual leave. The agency is prepared to pay the claimant for the 328 hours accrued annual leave when the claimant either returns a credential issued on November 14, 1996 or provides a letter stating that the credential is lost or stolen. However, the agency contends that the claimant is not entitled to payment for the 160 hours restored leave listed on a Record of Leave Data (SF-1150) dated February 20, 2002, because there is no evidence that leave was requested in advance for the 160 hours and approved by the Independent Counsel.

Section 5551(a) of title 5, United States Code, provides that an employee who is separated from the service is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which the employee is entitled by statute. The lump-sum payment is to equal the pay (excluding any differential under section 5925 and any allowance under section 5928) the employee or individual would have received had the employee remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered pay for taxation purposes only. The period of leave used for calculating the lump-sum payment is not extended due to any holiday occurring after separation.

The provision governing restored leave is found in 5 U.S.C. § 6304(d)(1), which specifies that forfeited annual leave shall be restored to an employee when the leave is lost because of: (1) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960; (2) exigencies of the public business *when the annual leave was scheduled in advance*; or, (3) sickness of the employee when the annual leave was scheduled in advance. (Emphasis added). *See also* Title II of the Civilian Personnel Law Manual, Chapter 2, Subpart G.

The authority to restore forfeited annual leave is limited to the statutory criteria for restoration specified in section 6304(d)(1). Neither the claimant nor the agency provided any written documentation as evidence that the claimant scheduled 160 hours of annual leave in advance and was denied the opportunity to use the leave annual leave. *Also see* section 630.308 of title 5 of the Code of Federal Regulations (CFR).

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the written record presents an irreconcilable dispute of fact between a government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982. The unsigned November 1, 2001 memorandum regarding the "carryover and restoration" of the 160 hours of annual leave earned during the year 2001, that the claimant submitted to OPM and documents submitted by the agency supports the agency's

decision that the 160 hours were not scheduled in advance and, therefore, could not properly be restored. Therefore, the claim is granted in part and denied in part.

The agency should pay the claimant a lump-sum payment for the 328 hours of current annual leave, but not for the 160 hours of restored leave. Interest is not recoverable against the U.S. Government unless expressly authorized by statute or contract. *Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986); *United States v. Louisiana*, 446 U.S. 253, 264-5 (1980); and *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947). See also 5 C.F.R. § 550.803 (expressly excluding lump-sum payments for annual leave from the definition of *pay, allowances, and differentials* in the Back Pay Act, 5 U.S.C. § 5596(b)(1)).

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