

Date: May 28, 2003

Claimant: [name]

File Number: 03-0003

OPM Contact: Deborah Y. McKissick

Under the provisions of section 178.103 of title 5 of the Code of Federal Regulations (CFR), the General Counsel of the Federal Law Enforcement Officers Association (claimant's representative) filed a claim on behalf of [claimant], a Special Agent with the Internal Revenue Service (IRS). The claimant is requesting the restoration of annual leave. The Office of Personnel Management (OPM) received the claim on October 10, 2002, and the agency administrative report on January 23, 2003. For the reasons discussed herein, the claim is denied.

The claimant's representative is requesting the restoration of 488 hours of annual leave which were restored to the claimant in 1998 and subsequently forfeited at the end of the 1998 leave year. He is also seeking restoration of 168 hours of leave that were forfeited at the end of the 1997 leave year, restored in 1998, and forfeited again at the end of the 2000 leave year. While the agency agreed to restore 160 hours of annual leave that was scheduled and forfeited in 1998 due to the claimant's work-related injury, the agency denied restoration of the 488 hours reccredited in 1998 and the 168 hours forfeited at the end of the 1997 leave year.

The claimant and the agency agree that the claimant was involved in a work related accident and placed on workers' compensation in October 1994. The claimant used over 1,400 hours of sick and annual leave. The claimant returned to work in October 1995. The claimant submitted a request to buy back his annual and sick leave used during the months following his October 1995 injury. In June 1998, the National Finance Center (NFC) received a check for \$45,607.57 from workers' compensation leaving a balance of \$4,103.33. The claimant paid the balance of \$4,103.33 in October 1998, to buy back 940 hours of sick leave and 488 hours of annual leave. The agency administrative report states that on November 12, 1998, the 940 hours of bought back sick leave and the 488 hours of annual leave were credited to his account. However, the claimant does not believe he was credited with the 488 hours.

The agency administrative report indicates that the 488 hours of annual leave were forfeited 2 months later at the end of the 1998 leave year because the claimant's

annual leave account exceeded the allowable 240 hour limitation. (This explains the claimant's belief that he never received the bought-back annual leave.) The Civilian Personnel Law Manual states that annual leave which is reinstated as a result of a buy back is subject to forfeiture under section 6304(a) of title 5 of the United States Code (U.S.C.) and may not later be restored. B-180010, March 8, 1979; B-187104, March 8, 1978; B-182608, August 9, 1977; B-184008, March 7, 1977; and B-204522, March 23, 1982. Therefore, the 488 hours of leave that were bought back in November 1998 and forfeited at the end of that leave year were forfeited without the possibility of restoration, and the claimant's claim for restoration of those 488 hours of annual leave must be denied.

The claimant is also requesting restoration of an additional 168 hours of annual leave that were forfeited at the end of the leave year 1997 and restored to a separate leave account in 1998. In 1997, the agency determined that a public exigency required the claimant to work, and as a result he forfeited 168 hours of annual leave. In 1998, the claimant requested, and the agency granted the restoration of the 168 hours of annual leave. Leave which is forfeited and restored due to an exigency of the public business must be scheduled and used by the end of the leave year in progress 2 years after the date the exigency is declared ended. (See 5 CFR 630.305(a).) Therefore, the time limit for the claimant's restored leave account of 168 hours expired at the end of leave year 2000, which was January 12, 2001. The record indicates that the claimant failed to schedule and use the restored leave during the required time limits, and the 168 hours of annual leave were forfeited a second time. The Comptroller General has ruled consistently that no legal authority exists for further restoration of leave once it is forfeited a second time. (See B-256975, October 11, 1994; and B-213380, August 20, 1984.)

Although the 488 hours of leave bought [back] by the claimant may not be restored to his account under 5 U.S.C. § 6304(d), we note that the agency apparently failed to advise him before the buy back was implemented that any repurchase of leave which caused his leave account to exceed the allowable 240-hour limitation would be subject to forfeiture at the end of the 1998 leave year. Regulations in 20 C.F.R. 10.310, governing the buy back of leave, provide in part that the employing agency "shall help the employee determine how much the buy back cost will be in his or her case." These provisions have been interpreted as imposing an obligation upon the employing agency to advise the employee of all costs associated with buy back, including the potential forfeiture of repurchased leave upon reconstruction of the employee's leave account. Since the agency's failure to advise the claimant resulted in the loss of 488 hours of annual leave, he may avoid forfeiture [of] leave by electing to be placed retroactively on annual leave from August 1998 to the end of that leave year. He would be required to refund the portion of workers' compensation covered by that leave to the Department of Labor. (See B-180010, March 8, 1979; and B-182608, August 9, 1977. In its April 4, 2002, response to the claim, the agency suggested that the claimant could choose to make such an election. Apparently the claimant declined to do so.

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 488 hours of annual leave bought back by the claimant in 1998 were forfeited at the end of that leave year. Since no authority existed for the restoration of annual leave that has been used and “bought back,” the 488 hours may not be restored. The 168 hours of annual leave earned and forfeited due to a public exigency in 1997 and restored in 1998 were forfeited a second time at the end of the leave year 2000 since those hours were not used within the required 2-year period. Since no legal authority exists for further restoration of leave once it is forfeited a second time, the claim to restore the 168 hours of annual leave forfeited is also denied.

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.