United States
Office of Personnel Management

Washington, DC 20415

Date: March 7, 2005

Claimant: [name]

File Number: 04-0016

OPM Contact: Robert D. Hendler

The claimant occupies a [position] with the U.S. Department of Justice in St. Thomas, Virgin Islands. He requests that the U.S. Office of Personnel Management (OPM) provide him coverage for a 360-hour annual leave ceiling (45-days) which was denied by his agency. For the reasons discussed herein, the claim is denied.

The claimant states his claim should be granted because he was informed that he would be covered by a 360-hour leave ceiling when he was recruited by the Virgin Islands [agency component] and because his situation falls squarely within the explicit terms of the applicable statute. He states that while the applicable statute provides that eligibility for that ceiling is a prerequisite for home leave, there is no law or regulation that requires eligibility for home leave as a prerequisite for the 360- hour leave ceiling.

The agency states that in November 2002, the claimant was recruited for his position in the Virgin Islands while working as [position] in the Eastern District of Virginia and resided in Alexandria, VA. From July 21, 1997, until his transfer to the Eastern District of Virginia, effective July 29, 2001, he was employed as [position] in the District of the Virgin Islands. The agency indicates that [claimant] claims entitlement to the 45-day ceiling since he was "directly recruited or transferred from the United States... for employment outside the area of recruitment or from which transferred" in accordance with Section 6304(b) of title 31, United States Code (U.S.C.).

In response to the claimant's rationale, the agency states that the claimant, until his transfer to the Eastern District of Virginia, was a life-long resident of the Virgin Islands where he was born, educated, and lived most of his life, leaving the islands for short-term summer or other employment, college, and law school. The agency states that 5 U.S.C. § 6304(b) cannot be read alone, and that long-standing practice and interpretation of law require a broader reading. It says that 360 hours annual

leave accrual is linked to home leave coverage at 5 U.S.C. § 6305(a), and that home leave, regulated at title 5, Code of Federal Regulations (CFR) §§ 630.601 to 630.607, limits eligibility to employees covered by 5 U.S.C. § 6304(b), citing 5 CFR § 630.602. The agency states that there is no documentation to support a separate entitlement to the 45-day limit but not the home leave benefit, citing an unpublished Comptroller General (CG) letter to John W. Macy, then Chairman of the U.S. Civil Service Commission, which clarifies and defines this relationship:

> It is evident from the legislative history of the 45-day leave ceiling provision and the 'home leave' provision of the Annual and Sick Leave Act of 1951, 5 U.S.C. 2062(d) and (f) respectively, that both sections have as a basic purpose the allowing of an additional accumulation of leave to employees stationed overseas so that they will have ample leave for extended stays in the United States incident to the period of overseas assignments. Those provisions are to be construed with this complimentary relationship in mind. (See B-145180, November 2, 1961.)

In order to determine the claimant's entitlement to home leave and, thus, to be eligible for a 45-day leave ceiling, the agency points to the need to determine his actual place of residence for home leave purposes. The agency cites two CG cases in support of its contention that the Virgin Islands is the claimant's actual place of residence. The first found a claimant was a resident of Hawaii:

> …having been born, raised, educated and married in Honolulu, leaving only to accept Government employment and returning as soon as permitted under agency policy, evidences that Honolulu and not El Paso, is his 'actual residence' for the purpose of 5 U.S.C. 73-3 (referring to the Administrative Expenses Act of 1946. (See also 5 U.S.C. 5728.) 45 Comp. Gen. 136 (September 13, 1965).

The second case (48 Comp. Gen. 437 (December 23, 1968)) is one in which the CG concluded that Puerto Rico, not New York, was the employee's actual residence despite a two and-one-half year period of employment in New York:

> ....[T]here is no indication that he changed his permanent residence to any point in the United States where he would be expected to take home leave. Therefore, there is no basis for permitting him to accumulate the additional amount of leave.

In the decision, the CG explains the purpose of the higher (i.e., 45-day) leave accrual:

> The reason why such employees are permitted to accumulate annual leave in excess of that permitted employees in the United States is so that they will have ample time for extended stays in the United States when they are able to return.

The agency also points to a CG decision that closely matches the fact situation in [claimant's] claim concerning a native of Puerto Rico who transferred to Miami, Florida on January 4, 1976, and, upon his transfer back to Puerto Rico in 1977, claimed that Miami, Florida was his actual residence. Although the employee claimed that he purchased real estate, registered to vote, and paid all state and federal taxes until his transfer back to Puerto Rico on December 4, 1977, the CG reviewed the agency's supporting evidence and concluded that the agency's determination was not arbitrary, capricious, or contrary to law and upheld the agency's determination that Puerto Rico was his place of actual residence. B-197205, February 28, 1982.

In evaluating [claimant's] case, the agency stated that it looked for evidence that Alexandria, in particular, and Virginia, in general, qualifies as "home" to which the claimant continues to have a commitment with a standing need to return to maintain property and/or relationships with co-workers or relatives since retaining such bonds is one of the reasons for home leave and the higher 45-day annual leave ceiling. The agency notes that the claimant's mailing address upon his transfer to the Virgin Islands in November 2003 is the same mailing address listed on his personnel and payroll documents from 1997 until his transfer to Alexandria, Virginia in 2001. The agency states that there is no written evidence, and the claimant did not supply any, that he established a new residence in St. Thomas upon his transfer back to the Virgin Islands in November 2002, and that it appears from the record that he maintained his residence in the Virgin Islands during his 15-month assignment in Virginia. The claimant's wife and one child continued to live in the Virgin Islands during the claimant's 15-month assignment in Virginia, and the agency states that he made several trips back to St. Thomas, especially after the birth of a second child. The agency concludes that having established an Alexandria, Virginia address does not qualify as a "residence" for purposes of establishing his entitlement to home leave and the 45-day annual leave ceiling.

In the instant case, the claimant does not contest the agency's description of what appears to be his initial appointment to a Federal government position in the Virgin Islands in July 1997, his transfer at his own request to work as [position] in the Eastern District of Virginia in July 2002, and his subsequent return to the Virgin Islands in November 2002, as the result of his being "recruited" by the USA, District of the Virgin Islands. In his March 15, 2004, claim to OPM, the claimant does not contest his ineligibility for home leave with which we agree based on previous CG and OPM decisions, including those cited by the agency in making its determination. *Matter of Leon H. Liegel*, B-212697 (December 23, 1983); Matter of *Alexander Sambolin*, B-196466 (December 2, 1982); OPM Decision Number 1996-01103, OPM Decision Number S002862, March 17, 2000. Rather, he bases his claim for a 45-day leave ceiling on there being no statutory requirement to be eligible for home leave as a prerequisite for the 45-day leave ceiling.

Every clause and word of a statute should be given effect if possible, and the statute should be given the most harmonious, comprehensive meaning possible, in light of the legislative policy and purpose. Therefore, the provisions of Chapter 63 of 5

U.S.C. must be read in their entirety to determine the proper application of each and every section. Contrary to the claimant's reasoning, 5 U.S.C. § 6304(b) may not be read in isolation. The special relationship between annual leave accrual and an employee "on leave to the United States, or his place of residence, which is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico" is recognized in 5 U.S.C.§ 6303(d). Under these circumstances, 5 U.S.C. § 6304(b) provides for such affected employees to accumulate 45 rather than 30 days of annual leave for the purposes described in 5 U.S.C. 6303(d), and additional home leave under 5 U.S.C. § 6305. The link in eligibility between 5 U.S.C. § 6304(b) and 5 U.S.C. § 6305 is codified at 5 CFR § 630.602. Five CFR § 630.302 (c) and (d) implement the requirements of 5 U.S.C. § 6304(c), which provides that annual leave in excess of the standard 30-day carry over limit that an employee accumulated when subject to a higher limit in section 6304(b), remains to the credit of the employee until it is used. The limit may be reduced in succeeding leave-years when the amount of leave that the employee has used exceeds the amount of leave that the employee has accrued.

Assuming, for the sake of argument, that 5 U.S.C. § 6304(b) may be read as suggested by the claimant, the circumstances in his case also fail to establish his eligibility for 45-days leave accrual. We find the CG's reasoning in the *Matter of Rafael F. Arroyo,* B-197205, February 16, 1982, persuasive and applicable to the instant case:

> …we are unable to conclude on the basis of the record here that the agency's determination was clearly arbitrary, capricious, or contrary to law. Mr. Arroyo is a native of Puerto Rico and resided in Miami only from January 1976 to December 1977 when he returned to Puerto Rico upon being selected for a position for which he had applied. Therefore, the FAA's determination that Mr. Arroyo's actual residence is San Juan and that his residence in Miami was only incident to his duties there must be afforded great deference. This office will not substitute its independent judgment for that of the agency under the circumstances.

Furthermore, the CG left undisturbed the agency's reasoning with regard to 5 U.S.C. § 6304(b):

> Since Mr. Arroyo is considered not to have had an actual residence in the continental United States, and he has transferred back to the area in which he was recruited, he does not meet the requirements stipulated in 5 U.S.C. § 6304(b).

OPM does not conduct adversary hearings, but settles claims on the basis of the written record involved in the claim. 5 CPR 178.105; Matter of *John B. Tucker,* B-215346, March 29, 1985. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer,* B-205452, March 15, 1982. On the basis of the record, we are unable to conclude that the agency's

determination was clearly arbitrary, capricious, or contrary to law. Therefore, the claim is denied.

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