

Date: December 10, 2002

Claimant: [name]

File Number: 02-0028

OPM Contact: Deborah Y. McKissick

When the claimant filed his claim with the Office of Personnel Management (OPM), he was an employee of the Naval Undersea Warfare Center Division (NUWC DIVNPT), Newport, Rhode Island. The claimant retired on August 3, 2002. He requests restoration of 680.1 hours of annual leave. OPM received the claim on June 4, 2002, and received the agency administrative report on September 3, 2002. On September 24, 2002, OPM received the claimant's response to the agency administrative report. For the reasons discussed herein, the claim is denied.

The claimant stated that his forfeited annual leave was restored on several occasions because he was an employee affected by provisions of the Base Closure and Realignment Act (BRAC) of 1990. After a leave audit in 2002, the Naval Sea Systems Command (NAVSEA) determined that some of the leave restorations were not in accordance with the provisions of section 6304(d)(3) of title 5, United States Code (U.S.C.), and deducted 680 hours from the claimant's restored leave balance. NAVSEA explained that the two-year clock for the claimant's restored leave began on June 3, 1996, the effective date of the claimant's transfer from Naval Undersea Warfare Center (NUCW), New London, to NUWC DIVNPT, because he was no longer subject to a BRAC related alignment or closure.

According to the claim, NUWC DIVNPT initially established the end of leave year 2000 (January 13, 2001) as the deadline for the claimant to use his restored leave. However, NUWC DIVNPT determined in November 2000 that the BRAC process for that activity ended in 1999, resulting in extending the deadline for the claimant to use his restored leave to the end of leave year 2003 (January 10, 2004). However, NAVSEA found that NUWC DIVNPT did not meet the definition of a realigning or closing activity under 5 U.S.C. § 6304(d)(3) and that the claimant was not entitled to automatic restoration of annual leave. Therefore, NAVSEA determined that the deadline for the claimant to use his restored leave expired at the end of the 1998 leave year (January 3, 1999).

The claimant expressed concern that NUWC DIVNPT provided erroneous information regarding the expiration date of his restored leave, which impacted his decision not to retire in late summer of 1999. In a letter dated April 23, 2002, the claimant requested that NAVSEA permit him to reconstruct his leave accounts and make changes using

compensatory time to restored annual leave. The claimant's request was granted, but he has not taken the opportunity to reconstruct his leave accounts.

In the agency administrative report, the agency stated that the claimant was employed at NUWC Headquarters during the leave years 1994 and 1995. During that period, the NUWC was subject to a realignment and base closure, and 324 hours of forfeited annual leave was restored to the claimant's leave account. When the claimant transferred to NUWCDIVNPT on June 3, 1996, he was no longer subject to a BRAC related realignment or closure. However, the 324 hours of restored leave was transferred with the claimant. The agency noted that the claimant should have used the restored leave prior to the end of the 1998 leave year, in January 1999.

The agency administrative report stated that 528.5 hours of forfeited annual leave was restored in 1996, 1997, 1998 and 1999. The agency stated that "In 1996, there was no valid basis for restoration of forfeited annual leave. . . . In accordance with 5 C.F.R. 630.306, the restored annual leave for 1997, 1998, and 1999 should have expired two years from the end of the leave year in which the leave was forfeited. However, this leave was placed in the restored annual leave account with the 324 hours of previously restored annual leave relative to BRAC and apparently no expiration date was put on the account until the end of leave year 1999."

The agency administrative report also stated, "In 1994, NUWCDIVNPT officials made the determination that it was a 'realigning' activity for purposes of 5 U.S.C. § 6304(d)(3)." This determination resulted in an erroneous assumption that the claimant and other employees who had transferred from a realigning or closing activity to NUWCDIVNPT were entitled to continue the automatic restoration of forfeited annual leave. This error was perpetuated until 1999, when the activity declared that it was no longer subject to BRAC or considered to be realigning under BRAC.

The agency administrative report further explained that the claimant's forfeited annual leave for leave years 1996 through 1999 may have been commingled in the same account with the valid BRAC related restored annual leave. The agency notes that, even if the initial restoration of the 528.5 hours of forfeited annual leave during the leave years 1996 through 1999 was proper, the time to use the leave would have expired two years after the year in which the leave was forfeited, the end of the 2001 leave year at the latest.

Under 5 U.S.C. § 6304(d)(3), the closure or realignment of an installation of the Department of Defense subject to BRAC without regard to the year in which the action occurs establishes an exigency of the public business. Forfeited annual leave by an employee of an installation subject to BRAC should be restored in accordance with 5 U.S.C. § 6304(d)(2). Restored maximum leave accumulation permitted by law should be used by the employee within the time limits prescribed by OPM regulations. *See* 5 U.S.C. § 6304(d)(2). The claimant was not entitled to continue automatic restoration of annual leave when he transferred to NUWCDIVNPT on June 3, 1996, because the gaining activity was not subject to a BRAC related realignment or closure. Therefore, the

claimant had until the end of the 1998 leave year (approximately 2 ½ years) to use the restored leave.

The agency considered the possibility that an administrative error occurred regarding the restoration of the claimant's forfeited annual leave. The employing agency primarily determines what constitutes an administrative error. Annual leave which is lost because of an administrative error should be restored to the employee when the error causes a loss of annual leave otherwise accruable. *See* 5 U.S.C. § 6304(d)(1)(A). If an administrative error occurs, the error may be corrected by substituting the restored leave for annual leave that the employee took during the period. *See Charles R. Cox*, B-252773, Dec. 16, 1993. However, Comptroller General decisions have established that the time period to use restored annual leave may not be extended based on administrative errors. The claimant requested and the activity granted him the opportunity to reconstruct his leave accounts and change used compensatory time to restored annual leave.

The documentation provided by the claimant and the agency substantiate the claimant's statement that he was provided erroneous advice by various agency officials at NUWCDIVNPT. Erroneous advice or information provided by a government employee cannot bar the government from denying benefits that are not otherwise permitted by law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, *rehearing denied*, 497 U.S. 1046, 111 S. Ct. 5 (1990).

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 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, Mar. 15, 1982, as cited in Philip M. Brey, *supra*. Accordingly, the claim is denied.

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