

Date: April 14, 2004
Claimant: [name]
File Number: 03-0026
OPM Contact: Deborah Y. McKissick

The claimant is a former employee of the [agency component], Department of Justice. He is requesting a restoration of 116 hours of forfeited annual leave. The Office of Personnel Management (OPM) received the claim on June 17, 2003, the agency administrative report on August 12, 2003, and the claimant's response to the agency administrative report on August 20, 2003. For the reasons discussed herein, the claim is denied.

The claimant states that he was involuntarily placed on administrative leave for two years, beginning in July 12, 2001. The claimant states that there are no provisions in title 5, United States Code (U.S.C.), that deal with the use of annual leave while an employee is placed in an administrative leave situation. He believes the agency committed an administrative error "... in creating and continuing a situation that made it impractical, if not impossible to use accrued Annual Leave..."

The agency administrative report states, and a telephone conversation with an agency representative on March 30, 2004, confirmed that the claimant was placed on administrative leave for disciplinary reasons from July 6, 2001 to June 30, 2003, and was told to 'remain available.' The claimant was later removed from employment on July 1, 2003.

While on administrative leave, the claimant continued to accrue annual leave for the rest of 2001. The agency states, "Because [the claimant] did not use any annual leave since being placed on Administrative Leave, his accumulated number of hours eventually exceeded the 240 carry-over limit and he forfeited a total of 116.0 hours of annual leave at the end of the 2002 Leave Year."

The agency states that its decision to deny the claimant's claim was based on section 630.308 of title 5, Code of Federal Regulations (CFR). Each year, the agency sent a memorandum to all EOIR employees explaining the procedures that need to be taken by employees to avoid forfeiture of their annual leave and the valid reasons that makes restoration possible if annual leave is forfeited. The agency acknowledges that a copy of the memorandum for the 2002 Leave Year was not provided to the claimant. However, the agency states that the claimant was award of the requirements to avoid forfeiting annual

leave because he would have received the leave memorandum for each of the previous five years of his employment with the agency.

Section 6304 (d)(1) of 5 U.S.C. provides that forfeited annual leave may be restored to an employee as a result of “(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960; (B) exigencies of the public business when the annual leave was scheduled in advance; or (C) sickness of the employee when the annual leave was scheduled in advance.”

Since the claimant believes the agency committed an administrative error, we will address what constitutes an administrative error regarding the forfeiture of leave. The provisions governing the issue are found in Chapter 2, Subpart G of Title II of the Civilian Personnel Law Manual, which states:

...The determination as to what constitutes administrative error is primarily for the employing agency. Therefore, if the agency concerned determines that it violated a mandatory policy or regulation requiring counseling employees to avoid forfeiture, then the leave may be restored under 5 U.S.C. § 6304(d)(1)(A). 55 Comp. Gen. 784 (1976).

In the absence of a mandatory policy, an employee’s claim for restoration of forfeited annual leave is denied since the agency’s failure to counsel him about possible forfeiture of annual leave does not constitute administrative error under 5 U.S.C. § 6304(d)(1)(A). *Amos Knight*, B-234528, October 6, 1989.

The failure to give actual notice of this scheduling requirement to the employees is not an administrative error since the employees are charged with actual or constructive notice of the requirement. 56 Comp. Gen. 470 (1977); B-193567, May 24, 1979; and B-187104, March 8, 1978.

We adopt the Comptroller General’s reasoning that:

Considerable weight must be afforded to the Commission’s [the Civil Service Commission whose regulatory authority regarding leave is now exercised by OPM] interpretation of its regulation regarding restored annual leave which, having been issued pursuant to a statutory mandate, has the force and effect of law. In the absence of some inconsistency with the parent statute, this Office has no authority to waive or modify the application of such a regulation even where they may be some indication of extenuating circumstances. *Matter of Patrick Quinlan*, B-188993, December 12, 1997.

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. There is no evidence that the claimant is entitled to restored annual leave as a result of an administrative error. Therefore, the claim is denied.

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