

Leave Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
Office of the Inspector General
Department of Defense
Arlington, Virginia

Claim: Request for Change in SCD Leave
Based on Civil Service Appointment
While on Terminal Military Leave

Agency decision: Denied

OPM decision: Granted

OPM contact: Robert D. Hendler

OPM file number: 06-0027

/s/ Robert D. Hendler

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

8/9/2006

Date

The claimant requests credit for his military service in the determination of his leave accrual rate. He is employed in a [position] with the [agency component], Office of the Inspector General, Department of Defense (DoD), in Arlington, Virginia. The Office of Personnel Management (OPM) received his initial claim request on December 21, 2005, which we returned without action because it did not reflect he had received a final agency decision on the matter. As noted in 5 CFR § 178.102, OPM will not docket a claim until an agency-level denial has been issued on the claim. We received evidence of an agency-level denial from the claimant on March 21, 2006, in an attachment to his March 14, 2006, claim request. We received the agency administrative report (AAR), provided by the Defense Accounting Service (DFAS), on April 25, 2006. For the reasons discussed herein, the claim is granted.

The claimant and the agency agree the claimant was appointed to a Federal civilian position, effective August 18, 1997, while on terminal leave from the military.* He retired from military service on November 1, 1997. In his March 14, 2006, claim request, the claimant asserts he is entitled to credit:

for my military service from my initial enlistment on November 27, 1967 to the date I was appointed to the civil service, August 18, 1997, and that the resulting service computation date [SCD] be preserved in accordance with the exception in the Guide to Processing Personnel Actions, Chapter 6, paragraph 1-6(2)(c) “[as an] individual [who] first becomes eligible for a uniformed services annuity while serving as a civilian employ,” so long as I serve without a break in service.

He also cites OPM File Number: S003223, dated March 17, 2000, in support of his claim.

The March 7, 2006, agency-level decision contains a DFAS analysis of the claim also dated March 7, 2006. This analysis cites DoD policy issued by the Field Advisory Service (FAS) of the Defense Civilian Personnel Management Service in support of its position that: “the Department has historically treated individuals hired on terminal military leave pending retirement as retirees and limited service credit in accordance with 5 U.S.C. 6303(a).” DFAS’ analysis also states:

The Shared Service Center has been further advised by FAS to continue to treat employees placed to civilian positions while on terminal military leave as retired members....The OPM Decision S003223 would confirm that even if Mr. Perryman should have received credit for his military service while on terminal military leave, upon retirement he was no longer eligible for inclusion of that time.

The DFAS AAR’s analysis of S008223 further states:

It goes on to say that “accordingly, the claimant is entitled to credit for his military [service] in determining his leave accrual rated [sic] during the period of

* As explained by the United States Court of Claims, *terminal leave* is "a leave of absence granted an officer at the end of his period of military services; a permission to be absent from duty." *Terry v. United States*, 120 Ct. Cl. 315 (1951). Prior to 1945, under the leave laws then in effect, leave of up to 60 days without deduction from pay and allowances could be taken by Army officers at the discretion of the Secretary of War. 56 Comp. Gen. 855 (1977).

his civilian employment prior to...the effective date of his military retirement. After that date, he no longer may use his military service to enhance his leave accrual rate.” Under this citation, [claimant’s] service credit should have been removed upon his retirement from active duty on November 1, 1997.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. *Frank A. Barone*, B-229439, May 25, 1998. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. *Jones and Short*, B-205282, June 15, 1982.

Congress has limited the circumstances under which military retirees may receive credit for their military service in the computation of their leave accrual rates. However, these limitations do not apply to individuals who have not retired from military service at the time of their appointments to civilian positions. See the Dual Compensation Act, Pub. L. No. 88-448, § 203, 5 U.S.C. § 6303(a). It is well established that an individual placed on terminal leave is on active military duty and is not in a retired status. See *Major James D. Dunn*, B-251084, October 12, 1993; 56 Comp. Gen. 855 (1977); and 45 Comp. Gen. 180 (1965)

The agency has misconstrued the cited OPM decision, clarified in two subsequent decisions for DoD civilian employees on this same matter. See OPM File Number 03-0022, October 1, 2003, and OPM File Number 04-0023, January 11, 2006. As stated in the latter case:

Therefore, the claimant is entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment on November 18, 2002, because the claimant’s appointment to a Federal civilian position was effective before his retirement date from the military. The effective date of his military retirement on December 31, 2002, does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment. For purposes of service calculation for SCD-Leave, the claimant’s military service is creditable through November 17, 2002 the last day of his active duty prior to civilian employment. Upon appointment to his civilian position, the claimant will begin receiving civilian service credit for leave accrual purposes. The remaining military service, from November 18, 2002, to December 31, 2002, cannot be used to further enhance the employee’s leave accrual rate. If the claimant separates and is reemployed later, the restrictions for crediting his military service cited by the agency will apply.

In the instant case, the claimant was entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his civilian appointment on August 18, 1997, because his appointment to a Federal civilian position was effective before his retirement date from the military. The effective date of his military retirement on November 1, 1997, would not have disturbed, set aside, or subjected his leave accrual rate to recalculation for the period of his current civilian appointment. For purposes of service calculation for SCD-Leave, the claimant’s military service was creditable through August 17, 1997, the last day of his active duty prior to civilian employment. Upon appointment to his civilian position, the claimant should have begun receiving civilian service credit for leave accrual purposes. The remaining military service, from August 18, 1997, to November 1, 1997, could not have been used to further enhance the claimant’s leave accrual rate.

Under the continuing claim rule, a new claim arises each time the Government fails to make a proper payment. Thus, a claimant may recover for six years prior to the filing of a continuing pay claim, regardless of when the underlying events occurred creating the initial claim. *Janie B. Lopez*, B-249968 (February 16, 1993). *Accord, Burich v. United States*, 366 F.2d 984, 986 (Ct.Cl.1966), *cert. denied*, 389 U.S. 885 (1967); *Batten v. United States*, 597 F.2d 1385, 1387 (Ct.Cl.1979); and 62 Comp. Gen. 80 (1982). We agree that the claimant's circumstances meet the 'continuing claim' rule since leave accrual rates can be adjusted at any time based on the submission of pertinent factual information. The record shows the claimant filed a formal claim on this matter with his employing agency on January 25, 2006. Based on the 'continuing claim' rule, the claim period begins on January 25, 2000, which is six years prior to his filing with the agency on January 25, 2006. He is entitled to credit for his entire period of military service in determining his leave accrual rate from January 25, 2000, forward.

In accordance with the Barring Act in 31 U.S.C. § 3702(b)(1), every claim against the United States is barred unless such claim is received within six years after the date such claim first accrued. *Robert O. Schultz*, B-261461, November 27, 1995. The Barring Act does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order for it to be considered on its merits. *Nguyen Thi Hao*, B-253096, August 11, 1995. A claim can be received by OPM or the agency within six years from the date the claim accrued to satisfy the statutory limitation. Credit prior January 25, 2000, is time barred under 31 U.S.C. § 3702(b)(1). Therefore, the claim is granted in part.

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.