

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

Claimant: [name]

Organization: [division]
Underwater Sound Reference
Department
Submarine Combat Systems Directorate
Naval Undersea Warfare Center Division
Naval Sea Systems Command
Department of the Navy
Newport, Rhode Island

Claim: Lump sum payment for forfeited
annual leave

Agency decision: Denied

OPM decision: Denied

OPM file number: 07-0054

/s/ for

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

9/30/2009

Date

The claimant retired from Federal civilian service on January 3, 2003, from a [position] in the [division], Submarine Sonar Department, Submarine Combat Systems Directorate, Naval Undersea Warfare Center Division Newport (NUWCDIVNPT), with a duty station of Newport, Rhode Island. The claimant seeks to “dispute the administrative action of 15 Jan 03 involving my restored leave account” and asserts he is entitled to receive compensation for 741.5 hours of restored leave “removed at that time.” OPM received the claim request on March 15, 2007, an agency administrative report (AAR) provided by the Naval Sea Systems Command (NAVSEA) dated August 28, 2008, and the claimant’s comments on the AAR on September 22, 2008. We received the final documents from the agency on March 20, 2009. For the reasons discussed herein, the claim is denied.

The record contains a December 22, 1994, memorandum in which NUWCDIVNPT officials determined NUWCDIVNPT was a realigning activity under the Defense Base Realignment and Closure Act of 1990 (BRAC), Public Law Number 101-510. In accordance with section 6304(d)(3)(A) of title 5, United States Code (U.S.C.), a closure or realignment creates an exigency of the public business, and any leave lost by an employee of such an installation will be restored to the individual. Consequently, NAVSEA AAR states the activity restored the 741.5 hours of annual leave the claimant forfeited from 1995 to 1998 (167 hours of annual leave in 1995, 196 hours in 1996, 184 hours in 1997, and 200 hours in 1998, a total of 747 hours reduced the 5.5 hours used by the claimant) due to his eligibility for “automatic restoration of forfeited annual leave.”

Claimant cites documentation dated January 15, 2003, in which his former employing activity, NUWCDIVNPT, took the following administrative action: “[I]t was determined that the annual leave you forfeited from leave years 1995 through 1998, which you later had restored, has expired and/or was improperly restored.” As a result, the activity deducted 741.5 hours from the claimant’s lump sum annual leave payment since the claimant had retired from Federal service. The letter advised the claimant he could dispute the action by submitting a written claim to the Commander, Naval Sea System Command (NAVSEA) and, if he disagreed with the NAVSEA decision, to OPM. The record shows the claimant submitted a signed written claim to NAVSEA in a letter dated July 10, 2006, which was denied on October 16, 2006.

The October 16, 2006, NAVSEA claim denial states the claimant was employed by the NUWC Detachment, Orlando, Florida, which was an activity subject to realignment in 1995. NAVSEA states the claimant’s position was identified as one of the functions to be transferred to NUWCDIVNPT pursuant to the BRAC. As a result, the claimant had 167 hours of annual leave restored in 1995 under the provision of the BRAC statute. The claim denial indicates the claimant was transferred to NUWCDIVNPT effective September 1, 1996, and upon that transfer the claimant was no longer eligible for restoration of forfeited annual leave pursuant to 5 U.S.C. § 6304(d)(3). NAVSEA states the claimant was allowed to carry the 167 hours of restored leave when he transferred which, under 5 CFR 630.306, had to be used within two years from the date it was restored. Thus, this restored leave should have expired at the end of the 1998 leave year.

The claim denial states under the provision of the December 22, 1994, NUWCDIVNPT memorandum, the claimant improperly had 380 hours forfeited annual leave restored to him during 1996 and 1997 when he was considered to be:

“BRAC Staff”, a term attributed to a group of NUWC Division, Newport, RI employees erroneously determined to be eligible for continued restoration of annual leave....The activity considered itself realigning and afforded members of the “BRAC Staff” restoration of annual leave pursuant to BRAC procedures through 1999. However, for purposes of entitlement to restored annual leave, at no time was NUWC Division, Newport, RI a closing or realigning activity pursuant to BRAC or as defined by the statute, 5 U.S.C. §6304(d)(3).

The claim denial further states NUWC DIVNPT did not meet the criteria set forth in 10 U.S.C. § 2687 used to determine whether an activity is being “realigned” or “closed.” NAVSEA states that, in an effort to give the claimant the maximum benefit of restored leave, it considered the 200 hours of non-BRAC forfeited annual leave for 1998 as restored under 5 U.S.C. § 6304(d)(1) for an exigency of public business which, under 5 CFR 630.306, should have expired in 2000. The claimant used 5.5 hours of this non-BRAC leave before the end of the 2000 leave year and, as such, the remaining 194.5 hours expired at the end of the 2000 leave year.

In his March 5, 2007, claim request to OPM, the claimant bases his claim “on two points, one relating to my employment status during this time and second relating to the spirit and intent of the BRAC legislation regarding automatic restoration of leave during BRAC activity.” The claimant states that although he was eligible to retire, he accepted his transfer of function offer to facilitate the relocation of the Undersea Sound Reference Detachment (USRD) from Orlando, Florida, to Newport, Rhode Island. He states he relocated his family to Newport and traveled back and forth between Newport and Orlando to provide effective leadership for the relocation process. The claimant asserts: “I was still employed at USRD, continuing to maintain my office there and serve as the [division] Head. This continued until August 1997...I was an employee of the closing activity USRD in Orlando...” The claimant states he continued his “reinstallation efforts” of Orlando equipment and facilities at Newport which “was completed in early 1999.” The claimant asserts he was “heavily involved in the BRAC process from its beginning in 1995 to its completion in 1999,” and states:

In fact the pace of BRAC was so hectic...that I was unable to take more than a small amount of my leave. I believe that my situation is exactly that being addressed in BRAC law [5 U.S.C. 6304(d)(3)] that calls for automatic restoration of forfeited annual leave due to the business exigency of the BRAC process....I believe that law was intended to provide automatic restoration of forfeited annual leave (through 1998) in circumstances such as mine.

In his September 22, 2008, response to the AAR, the claimant reiterated his assertion:

I was employed by the closing activity USRD in Orlando FL until August 1997 when my function as Head of the [division] actually transferred to Newport. As such, I was eligible for automatic restoration of unused annual leave for 1995, 1996, and 1997 and am eligible for payment for such leave today under Section 1114 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004, Pub. L. 108-136 (November 24, 2003).

The record shows the claimant's transfer in duty station from Orlando, Florida, to Newport, Rhode Island, was effective August 4, 1996, not September 1, 1996, as indicated by NAVSEA and stated in the October 11, 1995, offer of transfer to the claimant. As of this date, the claimant no longer occupied a position covered by the annual leave provisions of 5 U.S.C. § 6304(d)(3) since he no longer occupied a USRD, Orlando, position. Thus, claimant was no longer "an employee of such installation;" i.e., a closing or realigning installation, as required for coverage under 5 U.S.C. § 6304(d)(3). Contrary to the claimant's rationale, his transfer to the Newport, Rhode Island, duty station was effective August 4, 1996, for purposes of applying 5 U.S.C. § 6304(d)(3), not August 1997 or 1999, as he has argued. The claimant's reliance on the NDAA for Fiscal Year 2004 is similarly misplaced. This statute was effective November 24, 2003, after the claimant retired from Federal service (January 2, 2003) and after he was informed his restored leave account had been adjusted (January 15, 2003) under the provisions of the statute in force at the time those actions occurred.

Under the provisions in effect during the claim period, federal employees may accrue and carry over a maximum of 30 days annual leave into the next leave year, but accumulated annual leave is forfeited when it exceeds the maximum amount and is not used before the end of a leave year. Leave forfeited by operation of 5 U.S.C. § 6304(a) or (b) (30-day or 45-day or personal ceiling limitation on accumulated leave) may be restored under 5 U.S.C. § 6304(d), if the forfeited leave resulted from (1) an administrative error, (2) the exigencies of public business when the annual leave was scheduled in advance, or (3) sickness of the employee when the annual leave was scheduled in advance.

We agree NUWCDIVNPT officials erred in believing their activity was subject to a BRAC realignment or closure, but the determination as to what constitutes an administrative error lies with the employing agency. As a result, NAVSEA considered the possibility an administrative error occurred in the restoration of the claimant's forfeited annual leave, which allows for restoration of leave under 5 U.S.C. § 6304(d)(1)(A). We note that, even if the agency restored the annual leave forfeited from the 1995 to 1998 leave years, the issue is immaterial as the claimant, having failed to use the restored annual leave within the required two-year period, forfeited the leave again. No legal authority exists for further restoration of leave once it is forfeited a second time. See *William Corcoran*, B-213380, August 20, 1984; OPM File Number S9701310, January 14, 1998; OPM File Number 02-022, June 19, 2002; OPM File Number 02-0028, December 10, 2002; and OPM File Number 05-0032.

The two-year requirement is contained in OPM regulations, and it has the force and effect of law and cannot be waived or modified. See *Dr. James A. Majeski*, B-247196, April 13, 1992. Therefore, the claimant's request for restoration of 741.5 hours of forfeited annual leave is denied. OPM does not conduct investigations or adversary hearings in adjudicating claims but relies solely on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988; and OPM File Number 05-0032. When 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.

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