

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

Claimant: [name]

Organization: [agency component]
Defense Security Cooperation Agency
Garmisch, Germany

Claim: Home leave and 45-day annual
leave accumulation

Agency decision: Denied

OPM decision: Denied

OPM file number: 10-0016

//Judith A. Davis for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

7/8/2010

Date

The claimant, employed in a [position] in the [agency component], Defense Security Cooperation Agency, in Garmisch, Germany, requests the U.S. Office of Personnel Management (OPM) reconsider the Department of the Army's determination that he is ineligible for home leave and 45-day annual leave accumulation. OPM received the claim request on January 5, 2010. We contacted the claimant's servicing human resources office (HRO) by email because it was unclear whether the claimant had received an agency-level denial prior to sending his claim request to OPM, which is required before OPM may docket and process a claim (See 5 CFR 178.102 (a)(3) and 103(b)). In response, the agency provided a copy of a January 10, 2010, denial of a request for reconsideration to grant home leave issued to the claimant which also advised him of his right to appeal to OPM. We received the agency administrative report (AAR) on February 4, 2010. For the reasons discussed herein, the claim is denied.

In his December 22, 2009, claim request, the claimant maintains he qualifies for home leave and 45-day annual leave accumulation under both 5 U.S.C. § 6304(b)(2) and (3). The claimant does not present a rationale as to why he meets the requirements of 5 U.S.C. § 6304(b)(2). Referring to 5 U.S.C. § 6304(b)(3), the claimant states:

Section 5 USC Part [sic] 6304(b)(3) does not state what type of employment "contractor or federal civil servant" by the government of the US. It states....."[sic] Individuals who are not normally residents of the area concerned and who are discharged from the service in the armed forces to accept employment with an agency of the Government of the United States."

I believe my service meets the letter and intent of 5 USC part [sic] 6304(b)(3) and therefore should be entitled to home leave and annual leave accrual of 45 days (360 hours vice 30 days.)[sic]

The claimant further articulates his rationale in his January 4, 2007, email to his servicing human resources office (HRO) in which he states his claim is based on the fact "that the [agency component] offered [him] a position BEFORE [he] left active duty." In this email, the claimant states:

According to the law, an "offer of employment" is just that—an offer made by a dually [sic] authorized agent. It is not limited to the issuance of paperwork by the servicing CPO. In this instance, the Dean of the [agency component], as the principal hiring official for the faculty, made an oral offer of employment to me, which I accepted.

The claimant further states that he "was offered employment by those authorized to do so before [he] left active duty" and [t]hat regulation [sic] [5 U.S.C. 6304(b)(3)] makes no mention of any time frame after leaving active duty to begin employment." In an October 20, 2006, memorandum for the record, the claimant reiterates essentially the same rationale he put forth in March 27, 2006, and August 21, 2007, memorandums and states:

3. I left active military service in the US Army on 31 July 1998 to accept overseas employment offered by representatives of the US Government. I began working for the

Government in August 1998, with my employment becoming permanent in February 1999. At no time was I normally resident in Germany.

5. My acceptance of a valid offer of government employment prior to my discharge and my immediate commencement of employment clearly qualifies under the provisions of the cited USC [5 U.S.C. § 6304(b)(3)].

The claimant states that subsequent to his military retirement on July 31, 1998, he returned on August 3, 1998, “as a civilian contract professor.” He provided a signed statement from the Dean of Academics, [agency component], dated August 2006, which states the claimant:

accepted my offer to remain on the faculty as a civilian professor immediately after [military retirement]. He remained on the faculty as a civilian with no break in service.

To meet the 180 day requirement existing at the time between military and civil service positions, [claimant] remained on the faculty under a contract arrangement.

An October 12, 2006, statement from the Deputy G-3/5/7, United States Army Europe, who served as Associate Dean during this period of time, corroborated the Dean of Academic’s statement and stated that as Associate Dean he “processed all the administrative requirements to facilitate the aforementioned process.”

The agency’s January 11, 2010, claim reconsideration denial states the claimant separated from military service in Augsburg, Germany, effective July 31, 1998. The agency states that according to the information the claimant submitted, he then accepted employment as a local contractor, but no actual employment contract was provided. The agency also states the claimant provided a copy of a December 22, 1998, letter in which the claimant submitted an application for consideration for the [position] to the Dean [Dean of Academics, [agency component]]. The agency states:

4. Management established a Request for Personnel Action, SF-52, to fill the position of Professor on 15 January 1999. The action was authorized effective 20 January 1999. The Notes Section specified the following remark: “[sic] By name request for CONSIDERATION: [claimant].” The Appointment Affidavits [sic] was signed effective 3 February 1999. Entrance on duty date was 3 February 1999.

5. IAW 5 U.S.C. 6304(b)(3), military members who are discharged from service in the military to accept employment with an agency of the Federal government are entitled to 45 days of annual leave. In your case, you separated from the military and a request to fill the position was not submitted until 5 months after your military separation. It therefore appears that no firm job offer of employment could have been conducted prior to your separation from military service.

OPM Compensation and Leave Decision Case #1996-01103 makes clear that military members are not employees for purposes of applying 5 U.S.C. § 6304(b)(2):

The "substantially continuous employment" test in (b)(2) applies only when an individual is moving from one civilian (or private sector) position to a civilian position in the federal service. However, members of the armed forces are not "employees", nor is their tenure in the armed services considered "employment". Through the definitions in section in [sic] 5 U.S.C. 6301(2), the term "employee", as used in section 6304, incorporates the definition of employee in 5 U.S.C. 2105, which expressly applies to persons appointed into the civil service. By contrast, subsection (b)(3) expressly provides [sic] applies to persons discharged from the armed forces. Therefore, if a civilian employee hired overseas claims entitlement to home leave based on prior military service, the applicable subsection is (b)(3).

Thus, 5 U.S.C. § 6304(b)(2) is not applicable to the claimant.

Contractors are service providers; they are not employees since they are not appointed into the civil service as discussed previously in this decision. Thus, the claimant's acceptance of an offer to serve in a contractor capacity prior to his discharge (military retirement) fails to meet the express requirement of 5 U.S.C. § 6304(b)(3) "to accept employment with an agency of the Government of the United States." The claimant does not meet the requirements of 5 CFR 630.602, which provides that employees who meet the requirements of section 6304(b) for 45-day leave accumulation may earn and be granted home leave in accordance with 5 U.S.C. § 6305(a). Therefore, the claim is denied.

This OPM settlement of the claim 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.