

**U.S. Office of Personnel Management
Leave Claim Decision
Under section 3702 of title 31, United States Code**

Claimant: [name]

Organization: [division]
[office]
[activity]
U.S. Army Medical Command
Vilseck, Germany

Claim: Home leave

Agency decision: Denied

OPM decision: Denied

OPM file number: 13-0005

/s/ Linda Kazinetz for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Agency Compliance and Evaluation
Merit System Accountability and Compliance

12/19/13

Date

The claimant is a Federal civilian employee of the U.S. Army Medical Command in Vilseck, Germany. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of home leave. We received the claim on December 27, 2012, the agency administrative report (AAR) on February 19, 2013, and several emailed comments from the claimant in response to the AAR in May 2013. For the reasons discussed herein, the claim is denied.

The claimant was recruited for and accepted employment with the United States firm Computer Sciences Corporation (CSC) in Naples, Italy, effective date unknown. The claimant subsequently applied, was selected for, and accepted a position with the U.S. Army's 69th Signal Battalion, effective September 17, 2007, in Grafenwoehr, Germany.

The claimant requests reconsideration of the agency's May 9, 2012, decision which denied him eligibility for home leave based on a break in service between his employment with CSC and the U.S. Army. The agency cites section 6304(b)(2) of title 5, United States Code (U.S.C.), stating, "...you did not meet the substantially continuous employment criteria. You ended employment at a US private firm effective 7 September 2007 and were subsequently appointed into civil service effective 17 September 2007."

The AAR expanded on the agency's reasoning for denying the claimant's eligibility for home leave. In the AAR, the agency states:

c. The only pertinent documentation submitted by [the claimant] was the position offer letter from Computer Sciences Corporation, addressed to his address in Chaseburg, WI, which had a signature line whereby [the claimant] indicated his acceptance of the position. The letter was dated October 24, 2006. Therefore the letter in itself does not serve as evidence of physical location or geographic residency when he was recruited by the Computer Sciences Corporation...

* * * * *

d. The initial offer letter makes no mention of any return transportation to the United States or its territories including the Commonwealth of Puerto Rico. [The claimant] submitted an email dated 15 August 2007, whereby a generic statement specifies a return plane ticket would be issued to employees supporting EP57 to the point of hire.

Home leave is a form of leave that may be granted to employees who complete 24 months of continuous service overseas (5 U.S.C. 6305). The controlling regulations for home leave are contained in the Code of Federal Regulations, title 5, part 630, subpart F. Under 5 CFR 630.602 (coverage provisions) it states:

An employee who meets the requirements of section 6304(b) of title 5, United States Code, for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with section 6305(a) of that title and this subpart.

Thus, the authorization to grant of home leave is dependent on the employee's eligibility for 45-day annual leave accumulation under section 6304(b), which provides:

(b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for

use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year.

- (1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.
- (2) Individuals employed locally but –
 - (A)(i) who were originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment;
 - (ii) who have been in substantially continuous employment by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments; and
 - (iii) whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico; or
 - (B)(i) who were at the time of employment temporarily absent, for the purpose of travel or formal study, from the United States, or from their respective places of residence in its territories or possessions including the Commonwealth of Puerto Rico; and
 - (ii) who, during the temporary absence, have maintained residence in the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment.
- (3) Individuals who are not normally residents of the area concerned and who are discharged from service in the armed forces to accept employment with an agency of the Government of the United States.

The claimant does not meet the requirements of section 6304(b)(1) because he was not directly recruited or transferred by the Government of the United States from the United States or its territories or possessions for employment outside the area from which recruited or transferred). Rather, he was physically residing in Italy when he was recruited by the Government to work for the U.S. Army in Germany.

Although employed locally, the claimant does not meet all three of the separate requirements under sections 6304(b)(2)(A)(i) – (iii).¹ The agency concludes in the AAR that the claimant provided insufficient documentation to show CSC originally recruited him from the United States or its territories or possessions as required under section 6304(b)(2)(A)(i). The agency further states that, although the October 2006 employment offer letter from CSC to the claimant was mailed to a Wisconsin address, the letter does not provide sufficient proof he actually physically resided at this address at the time he was initially recruited by CSC. We reviewed the documents submitted by the claimant and agency to determine his actual residence at the time of his CSC appointment; however, the record does not include a lease agreement, utility bills, or any other documentation to establish that he was living in Wisconsin or an address in the United States or its territories or possessions prior to his employment with CSC. Therefore there is no substantiation that the requirement under section 6304(b)(2)(A)(i) is met.

The claimant has not established that his conditions of employment with CSC provided for his return transportation to the United States or its territories or possessions as required by section 6304(b)(2)(A)(iii). The record includes an August 16, 2007, email from the CSC Vice President of Human Resources, including the following statements: “With regard to your inquiry about CSC’s responsibility to provide transportation to employees in Naples supporting EP57...” and “[i]n the case that CSC does not win the re-compete, CSC’s commitment to all employees supporting EP57, as designated in the contract, is a return plane ticket to the point from which the employee originated at the acceptance of the position to support EP57.” Since the email makes only non-specific references to “employees” rather than speaking directly to the claimant’s employment with CSC, the email fails to show the firm would have provided the claimant with return transportation, nor does it confirm the claimant was employed with CSC in support of the EP57 contract to which the email referred. Even if it had, such assertions purporting otherwise undocumented benefits during a past period of employment are neither enforceable nor do they substitute for written commitment to such benefits conferred at the actual time of employment.

Further, the email from CSC’s Vice President of Human Resources specifically states the firm would provide EP57 contract employees with a return plane ticket to the place of recruitment (i.e., the “point from which the employee originated at the acceptance of the position”), which may or may not be an overseas location. The requirement under section 6304(b)(2)(A)(iii) requires conditions be in place to specifically ensure transportation to the United States or another of the enumerated locations. Such conditions are not met in this instance by the emailed comments of a CSC representative, since, along with there being no indication the individual was authorized to make financial commitments on the firm’s behalf, the email states that eligible employees would be provided return transportation to the place of recruitment which may or may not be to an overseas location. Thus, the language of the email does not ensure return

¹ The term “substantially continuous employment” as it is used in section 6304(b)(2)(A)(ii) is not defined in the statute nor in any agency implementing regulations specifically pertaining to 45-day annual leave accumulation. Because we find the claimant fails to meet section 6304(b)(2)(A)(i) and (iii), we need not address the agency’s conclusion that the claimant does not pass the “substantially continuous employment” test in section 6304(b)(2)(A)(ii) due to the nine-day break in service between his private sector and Federal civilian employments which, we note, is not cited in the AAR as part of the agency’s rationale for denying home leave to the claimant.

transportation exclusively to the United States or another of the enumerated locations stipulated under section 6304(b)(2)(A)(iii). Since the claimant has provided no documentation establishing that he was recruited in the United States, the return transportation purported in this email would be to the overseas location where he was presumably recruited. The claimant has not otherwise provided documentation, such as an employment contract or relocation agreement, showing that CSC had obligated itself to repatriate him to the United States or its territories upon the termination of his employment; therefore, the requirement under section 6304(b)(2)(A)(iii) is not met.

The claimant does not meet section 6304(b)(2)(B) because, at the time of employment, he was not temporarily absent from the United States for the purpose of travel or formal study. Instead, he was physically residing in Italy to perform contractor work.

The claimant does not meet section 6304(b)(3) because he was not discharged from service in the armed forces to accept employment with the agency.

Since the claimant is not eligible for 45-day annual leave accumulation under section 6304(b), his request for home leave is also denied.

The claimant asserts the agency failed to “provide critical information on entitlements and benefits” relating specifically to the eligibility requirements for home leave. It is well settled by the courts that a claim may not be granted based on misinformation provided by agency officials. Payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee cannot estop the Government from denying benefits not otherwise permitted by law. See *OPM v. Richmond*, 496 U.S. 414, 425-426 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, that the claimant was not provided sufficient information relating to his eligibility for home leave does not confer eligibility not otherwise permitted by statute or its implementing regulations.

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 record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. 5 CFR 178.105, Jones and Short, B-205282, June 15, 1982. Where the agency’s 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, B-261517, December 26, 1995. The agency’s decision to deny the claimant home leave was in accordance with the controlling statute and regulations. A decision that is consistent with controlling statute and regulations which do not allow for the exercise of discretionary authority as in this case cannot be considered arbitrary, capricious, or unreasonable, as compliance with statute and regulation is mandatory. Therefore, the claim is denied.

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