

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

Claimant: [name]

Organization: Federal Emergency Management Agency
Department of Homeland Security
Baltimore, Maryland

Claim: Creditable service for annual leave
accrual rate

Agency decision: Denied

OPM decision: Denied

OPM file number: 12-0022

/s/ Linda Kazinetz for

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

1/30/14

Date

The claimant, who currently works for the National Aeronautics and Space Administration, occupied a [title, series & grade] position with the Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), in Washington, D.C., during the period of her claim. She seeks assistance from the U.S. Office of Personnel Management (OPM) to credit her prior work experience for purposes of determining her annual leave accrual rate under the provisions of section 630.205 of title 5, Code of Federal Regulations (CFR). OPM received the claim request on May 2, 2012, the agency administrative report on September 3, 2013, and additional information from the claimant on September 18, 2013. For the reasons discussed herein, the claim is denied.

The claimant was appointed to her first Federal position with DHS on May 16, 2005. In her May 2, 2012, claim request to OPM, the claimant states: "When I was hired...I was led to understand that I would be credited at the same [annual leave] accrual rate I had in State government...especially given the high level in which I was hired." Prior to serving in her Federal position, the claimant writes that she was the [two prior private-sector positions]. The claimant believes that her non-Federal work experience warrants earning annual leave at a level comparable to her non-Federal rate. She cites to authority under the Workforce Flexibility Act of 2004 and 5 CFR 630.205.

Section 202 of the Federal Workforce Flexibility Act (Public Law 108-411, October 30, 2004) added two new provisions to Chapter 63 of title 5, United States Code. One of these provisions provided for crediting previous non-Federal service for newly appointed employees if the employee's experience is directly related to the position for which selected. Section 202(a) of the Act charged OPM with implementing regulations. OPM issued implementing regulations in 5 CFR 630.205.

Under section 5 CFR 630.205(a), the head of an agency or his or her designee may, at his or her sole discretion, provide credit for prior experience. Section 630.205(a) of title 5, CFR, states:

- (a) The head of an agency or his or her designee may, at his or her sole discretion, provide credit for service that otherwise would not be creditable under 5 U.S.C. 6303(a) for the purpose of determining the annual leave accrual rate of an individual receiving his or her first appointment (regardless of tenure) as a civilian employee of the Federal Government or an employee who is reappointed following a break in service of at least 90 calendar days after his or her last period of civilian Federal employment. The head of the agency or his or her designee must determine that the skills and experience the employee possesses are –
- (1) Essential to the new position and were acquired through performance in a prior position having duties that directly relate to the duties of the position to which her or she is being appointed; and
 - (2) Necessary to achieve an important mission or performance goal.

It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). The language for crediting prior work experience for purposes of leave accrual is permissive. The

discretionary nature of this crediting is made clear under 5 CFR 630.205(a): “The head of an agency or his or her designee may, at his or her sole discretion, provide credit....” Although the claimant was eligible to receive credit as otherwise permitted by the implementing regulations, FEMA was not obligated to provide such credit to the claimant.

The approval for enhanced annual leave must be authorized in writing by the head of the agency, or his or her designee, prior to an applicant’s entrance on duty as a Federal employee. Retroactive determination of enhanced leave is not authorized. See 5 CFR 630.205(d). The claimant asserts that “[d]ocumentation was provided and accepted and approved. I saw the approval letter....” However, the claimant has supplied no official documentation supporting her assertion that the incentive was offered to her. In its administrative report to OPM, FEMA states the agency has “no documentation that shows that a qualifying head of an agency approved enhanced annual leave for [the claimant] at any point during her tenure with DHS.”

Under the claims settlement process, the burden is upon the claimant to establish the liability of the United States. See 5 CFR 178.105. The claimant has failed to provide any documentation showing she was approved creditable service for annual leave accrual as defined in 5 CFR 630.205. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. See *Jones and Short*, B-205282, June 15, 1982. Based on the record presented, the claimant has not established any liability on the part of the United States. Hence, the claim is denied.

We also note that 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 or information provided by a Government employee cannot bar the Government from denying benefits which are not otherwise permitted by law. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, rehearing denied, 497 U.S. 1046, 111 S. Ct. 5 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed.Cir. 1997); and 60 Comp. Gen. 417 (1981). Therefore, the claimant may not rely on her being “led to understand” that the incentive would be offered to her as a basis for granting her claim.

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.