

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

Claimant: [name]

Organization: Operational Readiness Office
U.S. Army Engineer District, Europe
Corps of Engineers North Atlantic
Division
U.S. Army Corps of Engineers
Weisbaden, Germany

Claim: Request for Home Leave

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 05-0046

/s/ Judith A. Davis

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

9/28/2006

Date

The claimant occupies a [position] with the Army Corps of Engineers (Army COE) in Weisbaden, Germany (GE). He requests reconsideration of his agency's decision concerning his eligibility for home leave. The U.S. Office of Personnel Management (OPM) received the claim on August 17, 2005, and the agency administrative report (AAR) on March 29, 2006. For the reasons discussed herein, the claim is denied.

The record shows the claimant served on active duty as a member of the U.S. Army stationed in Kaiserslautern, GE until his retirement effective December 31, 1999, under terms providing for his return transportation and shipment of household goods to his home of record, place entered active duty, or a home of his selection within the continental U.S. (CONUS) within 365 days of his separation date, i.e., until December 31, 2000. He became an employee of LOGICON, Inc., Hohenfels, GE, a U.S. based Department of Defense contractor, on October 18, 1999, while living in GE and continuing to serve on active duty with the U.S. Army in a transitional leave status. The claimant signed a memorandum of understanding with LOGICON on May 9, 2000, providing for:

travel expenses (excluding temporary living expenses and costs incurred upon return to your point of origin or home of record) and return shipment of household goods and personal effects...to your point of origin (*i.e., Kaiserslautern, GE*) or home of record (*i.e., Las Vegas, NV*)” within 3 months of completing his assignment with the company.

The claimant was offered and accepted a Federal civilian position as [position], with the Army COE in Weisbaden, while still an employee of LOGICON. He received a career conditional appointment with the Army COE, effective January 2, 2001, (note: the claimant states his employment with the Army COE started four days before his employment with LOGICON officially ended). The claimant was initially granted home leave by the agency. However, based on a review of his work history with LOGICON, the agency subsequently determined he did not meet the eligibility requirements, and his home leave entitlement was withdrawn. The claimant inquired about home leave and discussed why he believes he meets the requirements for the entitlement with staff of the Civilian Personnel Management Center, Weisbaden, GE on January 6, 2005. He subsequently received a response on June 17 2005, from the Northeast Region Civilian Personnel Operations Center (NECPOC), Aberdeen Proving Ground, Maryland, telling him he was not eligible. The claimant's June 21, 2005, e-mail to the NECPOC stated he did not agree with their decision and expressed his belief that he meets the criteria of title 5 United States Code (U.S.C.), § 6304 (b)(1) and § 6304 (b)(2)(A), and is eligible for home leave.

The NECPOC August 1, 2005, response letter which we accepted as the agency decision, states:

Section 6304(b)(2) pertains to individuals employed locally and requires that employees meet three separate criteria...Based on your contract (*with LOGICON*) you do meet two requirements (1) that your employment provided for return transportation to the U.S. and (2) you had been in “substantially continuous employment” by other agencies of the U.S. However, the requirement that you were originally recruited from the U.S. is not met...In order to meet the requirements in 5 U.S.C. § 6304(b)(2) you would have to be initially recruited from the U.S. for your employment with LOGICON. Even though you were provided return transportation to the U.S., you were residing in the overseas area.

In order to meet the requirements in § 6304(b)(3) you would have had to receive your job offer for your current position prior to your retirement from the military.

The agency found the claimant ineligible for home leave because he was not recruited directly from the U.S. by LOGICON to work in GE (5 U.S.C. § 6304 (b)(2)(A)(i)), nor had he received his offer of Federal civilian employment with the Army COE immediately prior to retiring from active duty (5 U.S.C. § 6304 (b)(3)). They also cite OPM Compensation and Leave Decision #1996-01103 as support for their decision.

The claimant filed his claim with OPM by letter dated August 9, 2005, based on his belief that he fully meets the requirements for credit under 5 U.S.C. § 6304 (b)(1) and § 6304 (b)(2)(A). He stated he meets: 5 U.S.C. § 6304 (b)(1) because this section refers to “individuals” and does not indicate “military or civilian,” therefore, his transfer to GE as a military member fully meets the intent of this section; (2) 5 U.S.C. § 6304 (b)(2)(A): (i) “for the same reasons stated in (1) above”; (ii) because he served as a member of the U.S. armed forces, took a position with a U.S. based private sector company prior to his retirement from the Army, and then began work as a Federal civilian employee with the Army COE without a break in employment; and (iii) because “At no time have I ever lost my entitlement to return transportation back to CONUS.”

The agency’s AAR includes a March 24, 2006, NECPOC cover letter which stated “...our position is that he does not meet the eligibility requirements for home leave entitlements and that his claim should be disallowed.” The agency’s rationale for this decision is the same as that provided in the August 1, 2005, letter except they now find the claimant does not meet the requirements for “substantially continuous employment” in 5 U.S.C. § 6304 (b)(2)(A)(ii), again citing Compensation and Leave Decision #1996-01103 in support of their findings.

Department of Defense (DOD) Civilian Personnel Manual (CPM) 1400.25M, Subchapter (SC) 1260, dated December 1996, establishes policy and procedure for home leave within the DOD and incorporates, by reference, title 5 CFR part 630, subpart F, Home Leave. SC1260.4.1, Eligibility, states:

Employees recruited for overseas duty from the United States or its territories or possessions including the Commonwealth of Puerto Rico and who may accumulate a maximum of 45 days of annual leave under § 6304 of U.S.C. are entitled to earn, and may be granted home leave.

5 CFR 630.601-607 are the governing regulations implementing 5 U.S.C. § 6304. 5 CFR 630.602, Coverage, states: An employee who meets the requirements of § 6304(b) of title 5, U.S.C., for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with § 6305(a) of that title and this subpart.

5 U.S.C. § 6301 defines terms as they are to be used throughout subchapter I; i.e., 5 U.S.C. §§ 6301 – 6312. The term “employee,” is defined by reference to 5 U.S.C. § 2105, which states: “For the purpose of this title (*i.e.*, title 5, U.S.C.), “Employee”, except as otherwise provided by this section or when specifically modified, means an officer and an individual who is (1) appointed in the civil service...” The definition does not include active duty military personnel.

The cited portions of title 5 U.S.C. § 6304(b), Annual Leave; accumulation, state:

(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 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.

(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.

In applying 5 U.S.C. § 6304(b), OPM Compensation and Leave Decision #1996-01103, states:

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 sector. However, members of the armed forces are not “employees”, nor is their tenure in the armed services considered “employment”. Through the definitions in 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 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).

Established OPM interpretation of law and regulation, as they relates to this claim, is clear and unambiguous. The claimant’s work history, prior to January 2, 2001, compares to the stated criteria as follows:

6304(b)(1): Immediately prior to his appointment by the Army COE, the claimant was a civilian employee of LOGICON, a U.S. based Government

contractor operating in GE. He was not a *civilian* recruited or transferred by the U.S. Government from the U.S. to work overseas.

6304(b)(2): The claimant was employed locally in GE at the time of his appointment. However, he was not originally recruited as a civilian from the United States or its territories or possessions, 6304(b)(2)(A)(i), and had not been substantially continuous employment as a civilian by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments, 6304(b)(2)(A)(ii). His conditions of employment with LOGICON provided for his return transportation to the U.S., 6304(b)(2)(A)(iii). However, to meet the requirements for credit under 6304(b)(2), all three sub-elements must be met, and the claimant did not meet all sub-elements.

6304(b)(3): The claimant resided in GE as a civilian employee of LOGICON, and had been retired from the military for two years at the time of his employment with the Army COE. Therefore, he does not meet this requirement because he did not move directly from his military position to a civilian Federal Government position.

In asserting that he met the criteria for entitlement to home leave, the claimant misconstrued the requirements under 5 U.S.C. 6304(b) by combining his military service and private sector employment, when in fact he does not fully meet any of the cited requirements.

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 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, as cited in *Philip M. Brey*, *supra*. We are required to settle claims only in accordance with the applicable laws and regulations and we find the agency's conclusion the claimant is not entitled to home leave is in accordance with controlling law and regulation. Accordingly, the claim is denied.

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.