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

Claimant: [name]

Organization: Camp Smedley D. Butler
United States Marine Corps
Okinawa, Japan

Claim: Request for 45-day annual leave accumulation and home leave

Agency decision: Denied

OPM decision: Denied

OPM file number: 11-0021

//Judith A. Davis for

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

8/22/2012

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Date

The claimant is a Federal civilian employee of the United States Marine Corps at Camp Smedley D. Butler in Okinawa, Japan. He requests the U.S. Office of Personnel Management (OPM) reconsider his agency's denial of 45-day annual leave accumulation and home leave. We received the claim on June 14, 2011, the claim administrative report on July 13, 2011, and the claimant's response to the administrative report on August 18, 2011. For the reasons discussed herein, the claim is denied.

The claimant retired from active duty military service at Okinawa, Japan, and was appointed to his Federal civilian position on June 30, 2008. On April 25, 2011, he requested the agency review his eligibility for 45-day annual leave accumulation and home leave. By letter dated May 16, 2011, the agency denied his request for these benefits on the basis that he did not meet basic statutory eligibility requirements or locally-established criteria.

Eligibility criteria for 45-day annual leave accumulation are set forth in section 6304 of title 5, United States Code (U.S.C.):

> (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-
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> (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;
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> (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
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> (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 §6304(b)(1) because he was not directly recruited or transferred by the Government from the U.S. for employment in Japan. Rather, the claimant was already physically resident in Japan when he was recruited by the agency.

The claimant does not meet §6304(b)(2)(A) because he does not meet each of the three separate requirements under (b)(2)(A)(i)-(iii) as required by law. He was appointed while on military terminal leave pending his retirement from active duty military service and, as noted by the claimant and addressed in a previous compensation claim decision issued by OPM, OPM Ref # 1996-01103, the term "employment" is restricted to civilian employment:

> 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 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).

The claimant does not meet §6304(b)(2)(B) because at the time of employment he was not temporarily absent from the United States for travel or formal study; he was in Japan performing active military service.

The claimant does not meet §6304(b)(3) because, regardless of any consideration as to whether he was "normally resident" of Okinawa[1], he was not *discharged* from service in the armed forces to accept Federal civilian employment but rather *retired* from such service. In an attempt to establish that the terms "discharged" and "retired" as used in a military context are interchangeable, the claimant submitted with his claim the following “discharge definitions” from the “U.S. Department of Defense official website:”

> Discharge Reason establishes the classes of reasons for which a DoD Military Service Member may be discharged from the Military Service.

[1] There is insufficient information in the claim file concerning the claimant's prior places of residence to determine whether he could be considered as "normally resident" in Okinawa.

> Usage - Discharge reason describes the circumstances surrounding a DoD Military Service Member's discharge from Military Service. Certain values reflect the decision or outcome wherein a DoD Military Service Member is to be separated from service are associated with a Court Martial. Other values governing weight control, physical fitness, inefficiency, twice failed promotion etc., would apply when associated with performance-related issues. Discharge reason when combined with Character of Service (containing the code values for honorable, general, dishonorable, etc.) describes the circumstances surrounding a Member's discharge from Military Service.
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> Separation Reason is the narrative of the reason for which a DoD Military Service Member may be discharged, released from active duty, or retired.
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> Usage - Separation Reason and Separation Program Designator Code are used together to denote the reason and circumstance for a DoD Military Service Member's separation from Military Service either through voluntary or involuntary discharge, voluntary or involuntary retirement, end of service agreement, or other reasons.

Although the claimant did not identify the specific source for these definitions, they appear to be derived from the DoD's Business Enterprise Architecture "domain vocabulary." This terminology is not designed or intended as legal definition and may not be relied on for purposes of statutory interpretation. Regardless, it is unclear why the claimant believes the above-cited definitions support his claim as they clearly distinguish between "discharge" and "retirement" as different and distinct separation reasons; i.e., "separation" is used as the umbrella term encompassing "voluntary or involuntary discharge, voluntary or involuntary retirement, end of service agreement, or other reasons" whereas "discharge" refers only to that term itself.

The claimant also cited the following definition of "honorable discharge" from Barron's Law Dictionary:

> A formal and final judgment passed by the government upon the entire military record of the soldier, and it is an authoritative declaration that he has left the service in a status of honor.
>
> A person's classification after retirement from the armed services directly affects his ability to take advantage of benefits provided to members of the services.

However, this definition does not support his claim as it does not equate the terms "discharge" and "retirement" but only notes that the retirement of a military member is also subject to different classifications for benefit purposes.

The claimant also made the following assertion:

> That Military Separation Codes used from the 1940s through the early 1970s had the following Separation Program Number Numeric Code 213 - Discharge for retirement as an officer and were used by DoD on all DD-214s. This definition would be consistent with the language used during the time 5 U.S.C. 6304(b)(3) was drafted and enacted into

> law and clearly defines the use of, "discharge" in the statute and is applicable to veterans and [claimant] who was honorably discharged as an officer.

The military services no longer release either current or superseded separation code definitions to the general public, they are not posted on any official DoD websites, and the claimant did not identify his source for the above-cited "Code 213." Therefore, we will not address this particular assertion except to note that the claimant's suggestion this purported code, as opposed to the commonly understood meaning of the term "discharge," served as the basis for §6304(b)(3) is speculative at best.

Within the military context, the terms "discharge" and "retirement" have clearly different and distinct connotations, with "discharge" alleviating the military member of any unfulfilled military service obligation whereas "retirement" subjects the member to recall to active duty.[2] For example, Marine Corps Order P1900.16F, Chapter 2, Marine Corps Separation and Retirement Manual, provides the following definitions:

> Discharge - Complete severance from all military status gained by appointment, enlistment, or induction.
>
> Separation - A general term which includes dismissal, dropping from the rolls, revocation of an appointment or commission, termination of an appointment, release from active duty, release from custody and control of the Marine Corps, or transfer from active duty to the: IRR, Fleet Marine Corps Reserve, Retired List, Temporary or Permanent Disability Retired List, or Retired Reserve and similar changes in an active or reserve status.

Thus, that the statute specifically uses the term "discharged" rather than "separated" or "released" may only be interpreted as representing its specific intent.[3] A military member who has been

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[2] That Congress recognized this distinction in the drafting of the statute is evidenced by its separate use of the two terms in different contexts. Relevant to this case, §6303(a) governing annual leave accrual specifically refers to "retired" uniformed service members. Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972**).** Therefore, there is no basis on which to believe that Congress intended the terms "discharged" and "retired" to be used interchangeably.

[3] The statute does not define the term "discharge." Our review of the legislative history of section 6403(b)(3) found no discussion in the Congressional record with regard to the definition of that term in the drafting of the statute. Therefore, we may only rely on the commonly understood meaning and usage of the term for purposes of statutory interpretation. See *Terry v. Principi*, 340 F.3d 1378, 1382-1383 (Fed.Cir, 2003) ("In the absence of an express definition, we presume that Congress intended to give these words their ordinary meanings." (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995))); Engine

honorably discharged is issued a DD Form 256, Honorable Discharge Certificate. The claimant has submitted no such document to establish his status as having been discharged from the military. Therefore, the claimant's request for 45-day annual leave accumulation is denied.

In support of its denial of the claimant's request, the agency cites local policy concerning the granting of 45-day annual leave accumulation as contained in Marine Corps Base Order 12000.1A as follows:

> Employees hired locally may accumulate annual leave not to exceed a maximum of 30 days in a leave year. Civilian employees serving in Okinawa, whose conditions of employment provide for their return transportation to the place from which recruited, may accumulate annual leave not to exceed a maximum of 45 days in a leave year.

However, since eligibility for 45-day annual leave accumulation under specified conditions is established by statute without provision for the exercise of discretionary authority by the agencies, the above-cited local policy is not applicable to the claimant's case and will not be addressed here.

The controlling regulations for home leave are contained in 5 Code of Federal Regulations (CFR) 630.602, which 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 granting of home leave is dependent on eligibility for 45-day annual leave accumulation under section 6304(b). Since the claimant is not so eligible, his request for home leave is also denied.

The claimant asserts that the agency's "personal policy decisions" to deny him and other veterans "benefits guaranteed to them by law under 5 U.S.C. 6304(b)(3) is arbitrary, capricious, unreasonable and possibly unlawful," that the "facts presented suggest a comprehensive review of all recent "local-hire" veterans within a six year period with the agency to ensure their statutory rights were recognized," and he "requests a comprehensive review by OPM." OPM's claim authority under 31 U.S.C. 3702(a)(2) is narrow and limited to adjudicating certain categories of individual claims by Federal employees. It does not encompass conducting the types of reviews of agency actions requested by the claimant.

The claimant cites other employees whom he asserts have circumstances similar to his but were granted the requested benefits. The claims jurisdiction of OPM is limited to consideration of statutory and regulatory liability. OPM adjudicates compensation claims by determining whether controlling statute, regulations, policy, and other written guidance were correctly

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Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246, 124 S.CT 1756 (2004) ("The ordinary meaning of language employed by Congress is assumed accurately to express its legislative purpose." (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105S.Ct. 658, 83 L.Ed.2d 582 (1985))."

applied to the facts of the case. OPM has no authority to authorize payment based solely on consideration of equity. The fact that others may have obtained benefits improperly does not give the claimant an enforceable right. Further, his assertion that he should be granted 45-day leave accrual and home leave because other individuals in a similar situation may have been granted the same would have the effect of obligating the agency to continue granting these benefits to other applicants in perpetuity regardless of the merits of any particular situation. Therefore, the claimant's assertion he has not been treated equitably has neither merit nor applicability to our claim determination.

Likewise, the claimant's allegations of personal bias and purported mishandling of his case by the servicing human resources office and others to discredit their determinations likewise have no bearing on our adjudication of his claim and will not be considered or addressed further.

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 45-day annual leave accumulation and home leave were 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.