

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

Claimant: [name]

Organization: [agency component]
Executive Office for
Immigration Review
U.S. Department of Justice
[city & State]

Claim: Service computation date leave;
appointment while on military terminal
leave

Agency decision: Denied

OPM decision: Denied; Lack of jurisdiction

OPM file number: 08-0023

/s/ Judith A. Davis for

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

10/7/2010

Date

The claimant requests credit for the entire period of his military service in the determination of his leave accrual rate. The U.S. Office of Personnel Management (OPM) received the initial claim request on February 4, 2008, and the agency administrative report on May 19, 2008. OPM delayed the processing of this claim pending a formal opinion by the U.S. Department of Justice, Office of Legal Counsel (OLC), on the issues underlying this claim. That decision was issued on October 16, 2007. For the reasons discussed herein, the claim is denied for lack of jurisdiction.

OPM cannot take jurisdiction over the compensation or leave claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee's agency and labor union *for any time during the claim period* (emphasis added) unless the matter is or was *specifically* excluded from the CBA's NGP. The Federal courts have found Congress intended such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (Fed. Cir. 1990) (en banc), *cert. denied*, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121(a)(1) of title 5, United States Code (U.S.C.) mandates the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

Information provided by the claimant's employing activity at our request shows the claimant was appointed to a bargaining unit position covered by a CBA between the National Association of Immigration Judges and the DoJ, Executive Office for Immigration Review, during the period of his claim. Compensation and leave issues are not specifically excluded from the NGP covering the claimant. For OPM purposes, the fact such matters are not specifically excluded from the NGP (Article 8) is enough to remove this claim from OPM's jurisdiction.

Although we may not render a decision in this case, we note the claimant was appointed to a Federal civilian position, effective September 3, 1996, while on terminal leave¹ pending military retirement. He retired 27 days later from military service on September 30, 1996.

The claimant's rationale relies on OPM File Number 04-0023, January 11, 2006, which states:

Congress has limited the circumstances under which military retirees may receive credit for their military service in the computation of their leave accrual rates. However, these limitations do not apply to individuals who have not retired from military service at the time of their appointments to civilian positions. *See* the Dual Compensation Act, Pub. L. No. 88-448, § 203, 5 U.S.C. § 6303(a). It is well established that an individual placed on terminal leave is on active military duty

¹ As explained by the United States Court of Claims, *terminal leave* is "a leave of absence granted at the end of [an officer's] period of military service" and "permission to be absent from duty." *Terry v. United States*, 120 Ct. Cl. 315 (1951). Prior to 1945, under the leave laws then in effect, leave of up to 60 days without deduction from pay and allowances could be taken by Army officers at the discretion of the Secretary of War. 56 Comp. Gen. 855 (1977).

and is not in a retired status. *See Major James D. Dunn*, B-251084, October 12, 1993; 56 Comp. Gen. 855 (1977); and 45 Comp. Gen. 180 (1965)

Therefore, the claimant is entitled to credit for his entire period of military service in determining his leave accrual rate at the time of his initial civilian appointment on November 18, 2002, because the claimant's appointment to a Federal civilian position was effective before his retirement date from the military. The effective date of his military retirement on December 31, 2002, does not disturb, set aside, or subject his leave accrual rate to recalculation for the period of his current civilian appointment. For purposes of service calculation for SCD-Leave, the claimant's military service is creditable through November 17, 2002, the last day of his active duty prior to civilian employment. Upon appointment to his civilian position, the claimant will begin receiving civilian service credit for leave accrual purposes. The remaining military service, from November 18, 2002, to December 31, 2002, cannot be used to further enhance the employee's leave accrual rate. If the claimant separates and is reemployed later, the restrictions for crediting his military service cited by the agency will apply. Accordingly, the claim is granted.

Subsequent to this decision, the Department of Defense sought a legal opinion from OLC asking whether a member of a uniformed service who is appointed to a Federal civilian position while on terminal leave pending military retirement is entitled to credit for his years of active military service for purposes of determining his leave accrual rate. In its October 16, 2007, opinion, OLC concluded:

...for appointments made before the effective date of section 1101 of the Warner Act², a member of a uniformed service appointed to a civilian position while on terminal leave is entitled under section 6303(a) to credit for his years of active military service in determining the rate at which he accrues annual leave, but only while he continues on active duty. Once the member retires from the uniformed service, he is entitled to credit for his years of active military service on the same basis as any other retired member, namely only if he satisfies one of the exceptions in section 6303(a)(A)-(C) or receives credit from the head of the appointing agency pursuant to section 6303(e).

²Section 1101 of the John Warner National Defense Authorization Act for FY 2007 (the "Warner Act"), Pub. L. No. 109-364, 120 Stat. 2083 (Oct. 17, 2006) amended 5 U.S.C. § 5534a to provide that a uniformed service member who is appointed to a civilian position while on terminal leave pending military retirement is entitled to accrue annual leave with pay in the manner specified in 5 U.S.C. § 6303(a) for a retired member of a uniformed service. Therefore, following the enactment of this section, any such member appointed to a civilian position will be entitled to credit for his years of active military service only if he either meets the requirements of 5 U.S.C. § 6303(a)(A)-(C) or receives credit under regulations implementing 5 U.S.C. § 6303(e) (authority to provide for crediting of prior service which would not otherwise be creditable under 5 U.S.C. § 6303(a) for purposes of determining leave accrual rate).

OLC is authorized to resolve issues of legal interpretation raised by Executive branch agencies. Exec. Order No. 12146 (July 18, 1979). OPM is an Executive branch agency, and we will follow the opinion issued by OLC. Consequently, we have reversed our analysis in OPM File Number 04-0023 to the extent that we did not permit the agency to reduce the claimant's leave accrual rate upon his retirement from the uniformed service. Assuming the instant case was under OPM's jurisdiction, the claimant would be entitled to a leave accrual rate based on his entire period of military service (20 years), but only during his period of terminal leave from September 3, 1996, until September 30, 1996. Upon his retirement from the uniformed service effective September 30, 1996, the agency would have been required to recalculate his leave accrual rate in accordance with OLC's opinion and OPM's Compensation Policy Memorandum 2009-03, issued January 16, 2009, at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=1972>. The change to the claimant's rate of accrual of annual leave would have taken effect at the beginning of the pay period after which his entitlement changed; i.e., the pay period after the claimant's military retirement became effective.

We note the January 29, 2008, agency claim decision applied the OLC opinion to the claimant's situation and credited the claimant's leave account with 12 additional hours of leave. However, the record indicates the claimant preserved his claim with the agency on November 28, 2006. In accordance with the Barring Act, 31 U.S.C. 3702(b)(1), every claim against the United States is barred unless such claim is received within six years after the date such claim first accrued. Matter of Robert O. Schultz, B-261461 (November 27, 1995). The Barring Act does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order for it to be considered on its merits. Matter of Nguyen Thi Hao, B-253096, (August 11, 1995). Executive agencies, including OPM, do not have any authority to disregard the provisions of the Barring Act, make exceptions to its provisions, or waive the time limitation that it imposes. See Matter of Nguyen Thi Hao, *supra*; Matter of Jackie A. Murphy, B-251301 (April 23, 1993); Matter of Alfred L. Lillie, B-209955, May 31, 1983. Thus, the law would have precluded us from considering this claim. Therefore, it appears the agency's crediting of 12 hours of annual leave to the claimant's leave account is erroneous.

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.