

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

Claimant: [name]

Organization: [agency component]
National Labor Relations Board
Washington, DC

Claim: Restoration of leave

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0047

//Linda Kazinetz for

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

10/6/2011

Date

The claimant, currently employed by the U.S. Agency for International Development, seeks to have five hours of annual leave and two hours of sick leave restored to her leave account from when she was employed by the National Labor Relations Board (NLRB).¹ The claim request was initially sent to OPM via email on May 18, 2009, by NLRB on the claimant's behalf. OPM returned the claim without action on May 21, 2009, stating:

Sections 178.102(a) and (b) of title 5, Code of Federal Regulations (CFR), indicate the claimant's *employing* agency already has reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. The information submitted by NLRB does not include an agency-level denial of the April 21, 2009, grievance on this matter which you filed with NLRB's Human Resources Branch. It also does not establish by date stamp or other means the date NLRB received your claim request and thus, does not establish the date you preserved your claim with NLRB (5 CFR 178.104(a)). A claim denial should include the agency's factual findings and the agency's conclusions of law with relevant citations which respond to the underlying issues of the claim. A claim denial must be in writing (5 CFR 178.102(a)(3)) and signed by an agency official authorized to issue the decision.

On June 30, 2009, NLRB issued a grievance denial which recognized it had received the grievance on April 21, 2009. The grievance denial identified the basis of the grievance: "Your grievance alleges that while participating in the Agency's Voluntary Leave Transfer Program ("VLTP"), leave was improperly deducted from your leave balance." It states the claimant participated in the VLTP for seven pay periods from November 5, 2008, through January 7, 2009, during which time she accrued leave at the rate of 8 hours of annual leave and 4 hours of sick leave for every 80 hours of pay which were calculated in two separate accounts; one account for all regular pay codes and one for all VLTP codes used:

While you were in the VLTP, you encountered multiple Federal Holidays, which built up your accrual in the regular account. The system is designed to exhaust annual and sick leave balances prior to using any VLTP coded. The excess hours are carried over from pay period to pay period to assure all hours are accounted for in calculating accruals.

* * * * *

As you are aware, 5 CFR §630.907 [sic] governs leave accruals for employees while participating in a VLTP. A leave audit was performed by our payroll provider National Business Center [NBC, a component of the U.S. Department of the Interior], to determine whether your leave accrual was properly calculated while you were participating in the VLTP. Based on the submitted time and attendance reports, your leave accruals were properly calculated, and you received all of the hours to which you were entitled. During your participation in the VLTP, you accrued fifty-six (56) hours of Annual Leave and thirty-two (32) hours of Sick Leave, which includes accruals for holidays that occurred during your participation in the program. This is consistent with your leave accrual rate,

¹ The hours claimed were identified in the claimant's April 6, 2010, email to OPM, responding to additional information provided on the claim by NLRB at OPM's request.

and the regulations governing leave accrual for employees participating in a VTLP. When your participation in the program terminated, the system moved leave from the separate accounts into the regular leave accounts for a total of 30 hours annual leave accruals and 15 hours sick leave accruals, in pay periods 0902 and 0903.

On August 26, 2009, we accepted and docketed the claim based on NLRB's June 30, 2009, grievance denial and requested an agency administrative report (AAR) which asked that the AAR be provided to the claimant so that she could review and provide comments to OPM and NLRB within 30 workdays.

NLRB's December 16, 2009, AAR appears to reverse NLRB's June 30, 2009, grievance denial²:

In communication with the National Business Center (NBC) it was indicated that the employee was considered as "*two separate part time employees*" while enrolled in the leave share program and that when there is a holiday in the pay period an employee would not accrue leave at the normal rate. Therefore, following the "part time employee" rationale provided by NBC indicates that the employee did not earn the regular accrual of leave during the following pay periods: 0824 (11/09/08 through 11/22/08); [sic] 0825 (11/23/08 through 12/06/08), 0901 (12/21/08 through 01/03/09), and 0902 (01/04/09 through 01/17/09).

Specifically, in Pay Period 0823, FPPS [Federal Personnel/Payroll System]³ indicates 5.15 hours of sick leave were used and 12.45 hours of annual leave, however sick leave was never used and only 9 hours of annual leave were used. In Pay Period 0824, FPPS showed the employee earned and used 1 hour of annual leave. There were 4 hours in annual excess, and 14 hours in sick excess. 80 hours of donated leave were used for the period. In Pay Period 0825, FPPS showed the employee earned and used 1 hour annual and 1 hour of sick leave. FPPS showed 4 hours of annual excess and 4 hours of sick excess. 80 hours of donated leave were used for this period. In Pay Period 0826, FPPS showed 4 hours in annual excess, and 4 hours in sick excess; 80 hours of donated leave was [sic] used. In Pay Period 0901, FPPS indicates that the employee earned and used 3 hours of annual and 1 hour sick and 2 hours excess and 12 hours sick remained. The employee was never provided an explanation about the excess hours.

* * * * *

It is the position of NLRB that although NBC accurately calculated the claimant's accrual of fifty-two hours of Annual Leave and thirty-two (32) hours of Sick Leave, including the holidays comprising the seven weeks while participating in the program, the actual

² Section 178.102(a) of title 5, Code of Federal Regulations (CFR), indicates that the claimant's employing agency must review and issue a written decision on a claim before it is submitted to OPM for adjudication. We asserted jurisdiction over this claim based on NLRB's June 30, 2009, claim denial and will render a decision on that basis.

³ The record shows these are FPPS T&A (time and attendance) View Screens which are input by the agency; i.e., NLRB.

allocations were not distributed in kind to the employee. NBC's inequitable distribution of accruals is inconsistent and contrary to the regulation [5 CFR 630.907]...The employee therefore should be entitled to the difference between the accrued fifty-six (56) hours of Annual Leave as determined by NBC and the thirty (30) hours of Annual Leave actually distributed; and the difference between the thirty-two (32) hours of Sick Leave accrued as determined by NBC and the fifteen (15) hours Sick Leave actually distributed to the employee in pay periods 0902 and 0903, respectively. A review of the NBC practice and an equitable adjudication of this claim are respectfully requested.

On March 24, 2010, we sent an email to NLRB advising that, based on our review of the FPPS printouts provided, the codes associated with the hours on them did not appear consistent with the NLRB AAR's description of events or emails in the file between NLRB and NBC. For example, the December 16, 2009, NLRB letter to OPM stated "Pay Period 0823, FPPS indicates 5.15 hours of sick leave were used and 12.45 hours of annual leave." However, the FPPS T&A View Screen (FPPS T&A) for pay period 0823 shows no sick leave (code 030) taken and 9 hours, not 12.45 hours, of annual leave (code 020) taken. We advised that we could not find hours of leave earned on the FPPSs and asked for further clarification of the record.

The NLRB's March 30, 2010, response sought to clarify NLRB's December 16, 2009, letter (incorrectly identified as December 12, 2009, in the March 30, 2010, letter) and the basis of the claim for the hours lost:

It is NLRB's view that certain oversights and misapplied calculations resulted in a loss of leave accruals for [the claimant] (approximately 2 hours).

Looking back at pay-period 0823 (see attached) it is acknowledged that the employee had accrued leave on the books (6.45 ANN; 2.15 SICK) at the time VLTP participation began. It is noted that the VLTP began in the middle of a pay period as well.

According to NBC, during pay period 0823, "Holiday pay", under the VLTP, was construed and treated as "time worked." Under the regulations Holiday pay cannot be treated as a day worked. The NBC system calculated [the claimant's] time as regular time and not as "donated leave". The holiday was characterized as a regular day of leave for leave share purposes.

The first oversight in this period was the fact that employee's leave balances had not been exhausted first, before applying leave share donations. This event was further complicated by the fact that NBC initiated their calculations in the middle of the pay-period. As a result, the employees' [sic] work hours for pay-period 0823 were prorated at 72 hours instead of the 80 hours of a full-time employee. In other words the employee was a "full-time" leave share participant and not a "part-time" leave share participant. The distinction is that a "full-time" designation earns/accrues leave at a higher rate than a "part-time" employee participating in the VLTP. The rate is 1 hour accrued for every 10 hours worked. The employee was treated differently by the constructive designation as a part-time employee with respect to accrual calculations.

The same scenario occurred in pay-period 0824 (see attached). NBC should not have used the holiday hours as hours worked to prorate and calculate the work week at 72 hours worked. Rather, the appropriate rate should have been at the 80 hours work week, not a prorated 72 hour work week.

In pay-period 0825, a non holiday [sic] period (see attached), the employee's 2 hours of accumulated annual leave were misapplied to a prorated work week of 70 hours, thereby reducing the leave share amount that was available to the employee. The employee was denied a total of two hours of leave because of the wrongfully applied calculation.

When the employee ultimately returned to work, her accruals had been reduced by 2 hours to which she was entitled but for the misapplication of rate accruals for holidays and shortened work week hours as well as the mischaracterization of a full time employee as a part time employee.

It is requested that the 2 hours be restored to the employee and that NBC adjust the calculation methodology with respect to holidays when administering VLTP to full time employees.

In her April 21, 2009, grievance outlining the basis of the claim, the claimant states that based on her conversation with NBC, which conducted a leave audit at her request, she was advised that she "was considered two part time employees while enrolled in the leave share program and when there was a holiday in the pay period [she] did not accrual [sic] leave at the normal rate..." The claimant stated she did not "earn [her] normal accrual of leave" for pay periods 0824, 0825, 0901, and 0902." She also stated that the documentation provided by NBC, the FPPS View Leave and Earnings Statement is inaccurate:

Pay Period 0823: FPPS states I used 5.15 of sick leave, 12.45 of annual leave, however sick leave was never used and only 9 hours of annual leave was [sic] used.

Pay Period 0824: FPPS showed I earned and used 1 hour of annual leave. There were 4 hours in annual leave excess, and 14 hours in sick excess. I used 80 hours of donated leave.

Pay Period 0825: FPPS showed I earned and used 1 hour of annual and 1 hour of sick. FPPS showed 4 hours of annual excess and 4 hours of sick excess. I used 80 hours of donated leave.

Pay Period 0826: FPPS showed 4 hours in annual excess, and 4 hours in sick excess. I used 80 hours of donated leave.

Pay Period 0901: FPPS states I earned and used 3 hours of annual and 1 hour sick. FPPS showed 2 hours annual excess and 12 hours sick excess.

I was never given an explanation about the excess hours.

The claimant specified the exact number of hours at issue in her claim in an April 6, 2010, email to OPM commenting on NLRB's March 30, 2010, response to OPM described above:

I have reviewed the Memorandum prepared by [NLRB human resources official] Mr. Gonzalez. It states that NBC should credit me two hours of leave. According to my records this calculation is incorrect. In pay period 0824 NBC used 1 hour of leave that should have been placed in my reserve account. In pay period 0825 NBC used 1 hour of annual leave and 1 hour of sick leave that should have been placed in my reserve account and in pay period 0901 NBC used 3 hours of annual leave and 1 hour of sick leave that should have been placed in my reserve account. I did not return to work until January 7, 2009; pay period 0902 (01/04/09 - 01/17/09). When all of the leave accruals are calculated NBC should credit me 5 hours of annual leave and 2 hours of sick leave.

On February 7, 2011, the claimant provided to OPM copies of the FPPS View Leave and Earnings Statements and the NLRB Earnings and Leave Statements from Employee Express for pay periods 0823, 0824, 0825, 0826 and 0901 on which she based her April 6, 2010, claim rationale.

Section 6333(b)(1) of title 5, United States Code (U.S.C.), mandates that "any annual leave, and any sick leave accrued or accumulated by the [VLTP] leave recipient and available for the purpose involved must be exhausted before any transferred annual leave may be used." While an employee is in a transferred leave status, annual leave and sick leave accrue to the credit of the employee at the same rate as if the employee were in a paid leave status. *See* 5 U.S.C. § 6337(b)(1). This leave earned while in transferred leave status is placed in "special" annual and sick leave accounts, separate from the "regular" annual and sick leave accounts. *See* 5 U.S.C. § 6337(b)(2)(A). Although all "regular" leave must be exhausted before any transferred leave may be used, the "special" leave is not available for use until the hours have been transferred to the employee's "regular" leave accounts. *See* 5 U.S.C. §§ 6333(b)(1) and 6337(b)(2), and 5 CFR 630.907. Under 5 U.S.C. § 6337(a)(2), "transferred leave status" is defined as "the administrative status of such employee while such employee is **using** [emphasis added] transferred leave under this subchapter." Therefore, the claimant was not in a "transferred leave status" on the days she was receiving holiday pay. Annual and sick leave earned for those holidays were properly placed into her "regular" leave accounts and had to be exhausted before the claimant could use additional transferred leave.

The record does not support the claimant's contention that "when there was a holiday in the pay period [she] did not accrual [sic] leave at the normal rate." The leave she accrued for the holidays was proper in amount and was properly credited to her "regular" leave accounts because she was in a paid leave status. The leave could not have been placed in her "special" leave accounts as she was not in a transferred leave status. Because all leave in "regular" accounts must be exhausted before transferred annual leave may be used, leave accrued for the holidays had to be used as it became available before the claimant could use additional transferred leave.

This process is best illustrated by comparing the pay period 0823 FPPS T&A View Screen (FPPS T&A) as input by NLRB and the FPPS View Leave and Earnings Statement (FPPS VLES) as prepared by NBC. It is undisputed that the claimant started VLTP participation on

November 5, 2008, in the middle of the pay period and that she had 9 hours of leave in her "regular" accounts (6.45 hours annual leave and 2.15 hours sick leave). The FPPS T&A shows 47 hours in a pay status (44.5 hours worked, 2.5 hours administrative leave for Election Day) and 24 hours of transferred leave used, which properly exhausted the 9 hours of leave in her "regular" accounts and made her eligible to use transferred annual leave. However, the FPPS VLES shows 12.45 hours of annual leave, 5.15 hours of sick leave, and 15 hours of transferred leave used. In that pay period, the claimant accrued 9 hours of "regular" leave (6 hours annual and 3 hours sick), in accordance with the leave prorating process, for the 56 hours she was in a pay status (consisting of 44.5 hours worked, 2.5 hours administrative leave, 6.45 hours of annual leave, and 2.15 hours of sick leave). The 9 hours of "regular" leave had to be exhausted before she could use transferred leave.

While leave may be taken in increments of less than one hour, leave is earned and credited in whole hours. In accordance with the leave prorating process, the claimant earned one hour of annual leave for every 10 hours in a pay status, resulting in the accrual of 8 hours for each 80 hours in a pay status, and one hour of sick leave for each 20 hours in a pay status, resulting in four hours for each 80 hours in a pay period. Records from NBC for pay period 0823 show that the claimant's leave account appeared to be short one hour for both sick and annual leave accruals. This is because during the 15 hours she was in a transferred leave status, the claimant did not accrue a whole hour of sick leave under the leave prorating process. She did accrue a whole hour of annual leave for 10 of those hours, but she did not accrue a whole hour of sick leave under the leave prorating process for the other five hours. The five hours for which the claimant did not accrue leave are the "excess hours" the claimant states were not explained to her by NBC.

The FPPS T&A (input by NLRB) for pay period 0824 shows 8 hours of holiday pay for Veterans' Day and 72 hours of transferred leave. However, the FPPS VLES shows one hour of "regular" annual leave used and 71 hours of transferred leave used. In that pay period, the claimant accrued one hour of "regular" annual leave in accordance with the leave prorating process, for the 8 hours she was in a pay status for the Veterans' Day holiday and 2 hours of "excess" leave from pay period 0823. This hour of "regular" leave had to be exhausted before the claimant could use transferred leave. Thus, the claimant's assertion that one hour of annual leave should have been placed in her "special" account for pay period 0824 is inaccurate. Leave for pay period 0824 was properly accrued and placed in her "regular" leave account and had to be exhausted before using any transferred leave.

The FPPS T&A (input by NLRB) for pay period 0825 shows 8 hours of holiday pay for Thanksgiving and 72 hours of transferred leave. However, the FPPS VLES shows one hour of "regular" annual leave used, one hour of "regular" sick leave used, and 70 hours of transferred leave used. In that pay period, the claimant accrued one hour of "regular" annual leave and one hour of "regular" sick leave in accordance with the leave prorating process, for the 8 hours she was in a pay status for the Thanksgiving holiday and 2 hours of "excess" leave carried over from previous pay periods. The hour of "regular" annual leave and the hour of "regular" sick leave had to be exhausted before the claimant could use transferred leave. Thus, the claimant's assertion that one hour of annual leave and one hour of sick leave should have been placed in her "special" accounts for pay period 0825 is inaccurate. Leave for pay period 0825 was properly

accrued and placed in her “regular” leave accounts and had to be exhausted before using any transferred leave.

The FPPS T&A (input by NLRB) for pay period 0901 shows 24 hours of holiday pay for Christmas Day, the Friday after Christmas which was granted as a holiday by Executive order , and New Years Day and 56 hours of transferred leave. However, the FPPS VLES show three hours of "regular" annual leave and one hour of “regular” sick leave used and 52 hours of transferred leave used. In that pay period the claimant accrued 4 hours of “regular” leave (3 hours of annual leave and one hour of sick leave) in accordance with the leave prorating process, for the 24 hours she was in a pay status for the holidays and 6 hours of “excess” leave carried over from previous pay periods. The 3 hours of “regular” annual leave and the hour of “regular” sick leave had to be exhausted before the claimant could use transferred leave. Thus, the claimant’s assertion that one hour of annual leave and one hour of sick leave should have been placed in her “special” accounts for pay period 0901 is inaccurate. Leave for pay period 0901 was properly accrued and placed in her “regular” leave accounts and had to be exhausted before using any transferred leave.

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the Government agency involved in the claim. *See* 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. *See* 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the written record presents an irreconcilable dispute of fact between a Government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. *See* 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982. Based on the record, we find the claimant has failed to show that her payroll provider did not properly calculate and credit the hours of annual and sick leave at issue in this claim.

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.