

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

**Claimant:** [name]

**Organization:** Regional Fire Rescue Directorate  
Director, Command, Public Safety  
Program  
Commander, Navy Mid-Atlantic  
Philadelphia Naval Shipyard  
Department of the Navy  
Philadelphia, Pennsylvania

**Claim:** Request for Restoration of Leave

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 07-0011

/s/ for

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

1/31/2008

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Date

## Introduction

The claimant is a former civilian employee of the Department of the Navy who retired in December 2005. At the time of the claim, he occupied a [position] in the Regional Fire Rescue Directorate; Director, Command, Public Safety Program; Commander, Navy Region Mid-Atlantic, at the Philadelphia Naval Shipyard in Philadelphia, Pennsylvania. He requests reconsideration of his agency's decision concerning his eligibility for restoration of annual leave. The U.S. Office of Personnel Management (OPM) received the claim on January 18, 2006, and the agency administrative report (AAR) on April 6, 2007. For the reasons discussed herein, the claim is denied.

## Background

The claimant requests the restoration of 147.5 hours of annual leave. He asserts he should have been allowed to repurchase this leave upon returning to work after being out for necessary surgery and recovery resulting from a recurrence of an on-the-job injury which was subsequently approved by the Office of Worker's Compensation Programs (OWCP) of the Department of Labor (DOL). He alleges administrative errors on the part of his former employing agency and the Defense Finance and Accounting Service (DFAS), and exigencies of public business in support his assertion that restoration of his annual leave was improperly denied. He also requests the agency restore and compensate him for 48 hours of compensatory time (CT) he claims he never authorized for use during his absence.

The claimant received a work-related injury on August 6, 1983, for which the OWCP approved a worker's compensation claim. In June 2004, as a result of recurring problems related to this earlier injury, the claimant's physician recommended the claimant undergo surgery which would require an extended period of recovery away from work.

The claimant sought advice from his servicing Human Resources Office (HRO) in June 2004 concerning filing a claim with OWCP for recurrence of his injury. The record includes a copy of the CA-2a, Notice of Recurrence signed by the claimant on June 9, 2004, for submission to OWCP.

The HRO replied to the claimant's questions by email on June 14, 2004, recommending he proceed with his plans for surgery, and concurrently apply to OWCP stating:

These claims take quite a while for OWCP to adjudicate and you could be waiting months for authorization to make the doctors appointment.

If you use your health insurance and OWCP accepts the claim, then contact your health plan and tell them that this is a work-related injury and they should not have paid for it.

...if OWCP denies the recurrence, your insurance would be responsible anyway.

The claimant began leave on July 29, 2004. Later while on leave, he emailed the HRO stating "As of Sep 2004, I will be close to zero leave in all my accounts, Sick and

Annual,” and he had proceeded with the surgery “...knowing that the case [i.e., the CA-2a recurrence claim] “Should” be reopened with the documentation I have and medical evidence, but was expecting word by now...”

On September 9, 2004, the HRO replied there had been a delay with OWCP’s processing of the claim. The HRO advised the claimant OWCP had difficulty locating the previous claim through the Federal Records Center because of mix-up with a different claim number assigned to the claimant for another on the job injury.

The claimant returned to work September 15, 2004. He states he submitted a Standard Form 71 (SF-71) for 504 hours of sick leave that day (copy provided by the claimant), but his supervisor did not sign it and instead asked him to submit another reflecting the leave and compensatory time as recorded during his absence, which he did. The record includes an SF-71, Request for Leave or Approved Absence, signed and dated by the claimant September 15, 2004, requesting 358 hours accrued annual leave, 74 hours accrued sick leave, and 48 hours CT for the period from July 29, 2004, to September 11, 2004. It was signed by his supervisor on September 29, 2004, approving the request. The claimant also provided a number of SF-71 forms submitted by him and approved by management prior to his absence, covering various periods of time between July 25, 2004, and August 20, 2004, which were later incorporated in the SF-71 submitted and approved upon his return to work. One of these, signed by the claimant on June 29, 2004, requested 48 hours of CT for the period from August 16, 2004, to August 20, 2004. Having used 358 hours of annual leave while out of work, the claimant had a remaining balance of 51.5 hours accrued annual leave on September 18, 2004.

On October 7, 2004, the claimant submitted another SF-71 requesting 144 hours of annual leave for “Vacation – Use or Loose [sic]” from November 14, 2004, to November 27, 2004. However, the record shows the claimant did not have enough accrued annual leave in his leave account at that time to allow for a use-or-loose leave situation at the end of the 2004 leave year. The claimant states he placed this request in his supervisor’s in-bin on October 7, 2004 “...on purpose; it was to eliminate the chance of this scenario from happening, dropping my “Annual Leave” balance under the Use-or-Loose [sic] cap,” and “The fact that I put in the leave slip was to protect myself from losing [sic] the leave when the leave was restored. Meaning that when the restoration of leave time was bought back, I would not be over that magic number...” and “...my submission of a SF-71 Leave Slip for 144 hours shows that my intention [was] to make sure I went below the required hours of 432, my cap as a federal firefighter working a 72 hour work week.” The record does not show this SF-71 request was ever approved by agency management.

On October 19, 2004, OWCP approved the claim stating “If you have lost time from work due to the recurrence and have not already completed a CA-7, please submit the form through your employing agency with supporting medical evidence.”

The claimant submitted a signed CA-7, Claim for Compensation on October 29, 2004, requesting OWCP compensate him for the leave he took as a result of his surgery and time needed for recovery. The claimant’s CA-7a, Time Analysis Forms show he requested compensation for 528 hours (406 hours of annual leave, 74 of sick leave and 48 for

compensatory time). This was later changed to 480 total hours by the HRO because “As per payroll [DFAS], compensatory time cannot be bought back.”

The record includes an OWCP Leave Buy Back (LBB) Worksheet/Certification and Election Form (CA-7b), signed by the DFAS payroll supervisor on December 1, 2004, which show the claimant’s weekly pay-rate as \$1705.79 and his Federal Employees’ Compensation Act (FECA) entitlement as \$8528.95. The DFAS summary sheet for the CA-7b states the employee is responsible to pay the agency the difference between the amount of money the agency requires to recredit the leave and the total amount of the employee’s FECA entitlement. In this case it shows the claimant would owe the agency \$5974.96 of the monies paid by OWCP to buy back his annual and sick leave and would receive the remaining \$2553.99 because his FECA entitlement was greater than the amount owed to the agency.

DFAS faxed this form with their buy back calculations to the local HRO on December 1, 2004, under a fax cover sheet which states:

Advise employee not to send a payment to DFAS Cleveland until after the DOL has made a payment to DFAS Cleveland. A letter of notification will be sent to the employee to inform him of how much he owes. If a refund is due the employee he/she will also receive a letter of notification.

Also advise employee he/she will automatically forfeit regular annual leave when the annual leave to be restored exceeds the maximum allowable ceiling...[when] recredited to a prior leave year and the recredit causes a leave balance at the end of that leave year which is in excess of the maximum authorized accumulation.

The AAR states there is nothing in the agency’s files to indicate the claimant was ever informed of these statements by DFAS.

The claimant signed the CA-7b summary sheet on December 2, 2004, with a check mark in the block stating “I hereby elect not to repurchase the leave at this time.” The AAR notes this apparent conflict with the claimant’s otherwise consistent approach toward repurchase of the leave, stating “...it is unclear as to whether checking that particular block was a simple administrative error that went unchecked by the agency before forwarding the form to DFAS for processing of payment.”

The record includes an email the claimant refers to as a “key email” for his claim. He sent it on January 3, 2005, to inform his supervisor he had been informed by the HRO that OWCP had approved his leave buy back on December 17, 2004. The claimant further states:

The Question I have, there may be Use-Or-Lose time imbedded in the buy back of leave. I also had to forfeited time [sic] due to Ken Barber putting in Comp Time for this injury, and workers comp will not buy back “CT”. I would like to get this time back (48) hours if at all possible, since this was never approved by me to use comp time for the injury. I used my own time

under the advice of my doctor and HR to get the surgery done now and wait for the comp to kick in later, which I did. I should not have leave taken from me that I did not authorize to use.

I would also like to roll over any "AL" time that may be Use or Loose [sic] to next year. Since the year end [end of the 2004 leave year January 8, 2005] is less than a week away, I want to make sure the leave hours restored to my account will not be lost or given back, since I had no control of this leave due to the injury. This U or L leave was scheduled as vacation, but the injury was over the same period of time.

INFO – Leave used 480 hours total – 406 AL and 74 hrs of SL  
48 hours of CT used but workers comp will not pay  
this type of leave back to me.

TOTAL = 528 hours

The claimant received a letter from OWCP dated January 5, 2005, stating:

Your application to "buy-back" the leave which you used has been approved. The amount of compensation and period covered are shown below. Payment has been authorized to you or your employing agency as shown below. You should make arrangements with your employing agency to pay any balance due for the buy-back of your leave.

Compensation due: 8528.95  
Period covered: 7-25-04 to 9-11-04 for 480 hours  
Pay to employing agency: \$8528.93  
Pay to Employee: \$0.00

A handwritten notation at the bottom of the AAR copy of the January 5, 2005, OWCP letter states "Paid 12-17-04."

The claimant provided a copy of an email he sent to his supervisor on January 7, 2005, which states:

The CO [Commanding Officer] must approve leave carry over or restored leave. HR here informed me if there is leave credited back to me over the U or L amount, it may be lost. They informed me to notify CNI of this possibility so I would not loose [sic] my leave.

His supervisor responded to the claimant the same day informing him a "...request to restore leave could not be considered until the leave is actually paid back and posted..."

On January 31, 2005, the HRO received a fax from DFAS stating:

The employee should have been made aware that if he [is] going to buy back that many hours of annual leave he should plan on using enough annual leave during the leave year. [Claimant] brought 173.5 hours of

annual leave into the 2005 leave year, so that means the most he can buy back is 258.5 hours before any credit reductions ( $173.5 + 258.5 = 432$  hours). His maximum [annual] leave ceiling is 432 hours. The check will be returned to OWCP.

The DFAS fax references “a copy of an OPM decision...off the OPM website” which states:

If the employee buys back regular annual leave which is recredited to a prior year and the recredit causes a leave balance at the end of that leave year which is in excess of the maximum leave accumulation... the excess leave will be immediately forfeited as of the beginning of the leave year to which it was recredited (5 U.S.C. 6304) and it is not subject to 5 U.S.C. 6304(d).

Agencies should ensure that employees buying back annual leave are informed of the amount of leave which can be recredited for use and not buy back leave subject to forfeiture, as well as other changes that result from the buy back of leave. For example, when the records are changed from a paid leave status to a Leave Without Pay (LWOP) status, the amount of leave previously accumulated while in a pay status will be reduced since leave does not accumulate while in a LWOP status. In addition, the employee will no longer be entitled to pay received for any holiday which was included within the period of LWOP.

The AAR states a revised CA-7b was sent to DFAS on February 24, 2005, for calculation of 332.5 hours; i.e., the maximum of 258.5 hours of annual leave cited by DFAS as available for buy-back, and 74 hours of sick leave.

The claimant provides a copy of an email dated April 3, 2005, which he sent to the Navy Mid-Atlantic Region, PA District Fire Chief dated stating “...attached is my request to proceed with a grievance...for the decision to turn down my request to have my leave restored due to an “On-The-Job” injury...” due to management’s failure to follow up on his request in a timely manner. This email also requests official time to “generate documents needed to present ...the formal grievance.”

On April 7, 2005 the claimant received an email from the local HRO stating:

We originally put in for 480 hours and OWCP paid DFAS \$8528.93 for the 480 hours. Then DFAS...discovered they made a mistake, that you could not buy back any leave that would take you over the amount you are allowed to carry over for the year (use or lose). They redid your leave buy back less 147.5 hours which left 332.5 hours you could buy back...the amount DFAS would not allow you to repurchase was 147.5 hours.

The claimant signed and submitted a revised CA-7 for 332.5 total hours to repurchase his leave on May 11, 2005. OWCP replied on May 19, 2005, that they could not process this new request until they had received back the original check issued for \$8528.93.

On June 29, 2005, the OWCP approved the claimant's new application to buy back leave in the amount of \$4437.72. DFAS then sent him a letter dated July 11, 2005, explaining that the total amount due to repurchase his leave was \$5586.26 of which OWCP had paid \$4437.72 which left \$1148.54 the claimant owed to repurchase the leave and that he needed to send them a check for that amount.

The record includes an email dated October 4, 2005, by which the claimant officially filed a grievance with the Program Director, Public Safety, Commander, Navy Region Mid-Atlantic (MIDLANT PDPS) by email. He asks to "get back the time (147.7 hours of annual leave) owed to me..." and states DFAS was paid by DOL for all leave used for the OWCP injury in 2004 including the 147.7 hours, but that DFAS "for unknown reasons held this check and did not act on the payback until well after the 2005 new-year and well into the new leave year." He states "I made attempts to use my leave when I returned from the injury, but due to manning levels within the Philadelphia District being below staffing levels and [claimant's supervisor] being in and out on sick leave... I was told I could not have leave by [claimant's supervisor]. There were leave slips submitted but he was not in to act on them, nor was there enough manning to take the leave I request[ed]."

On November 8, 2005, the Fire Chief, Navy Region Mid-Atlantic Fire and Emergency Services (MIDLANT PDPS), denied the claimant's grievance for restoration of 147.5 hours of annual leave in writing, finding the claimant was not in a use-or-lose status at the end of the 2004 leave year and no annual leave was forfeited by him at that time because:

You had elected to use annual leave during your medical absence. Thus you were not in a "use or lose" situation during the fall of 2004 when you contend that manning requirements prevented you receiving permission for using 144 hours of annual leave.

The OWCP leave buy back program is the sole means by which an employee may obtain compensation for annual leave used for a work related injury. But this remedy does not permit restoration of leave in excess of the maximum amount that may be accumulated [during the leave year].

The decision also states:

You appear to be confusing the OWCP leave buy back program with the leave restoration rules. Under the worker's compensation leave buy back program, leave that is restored is recredited to the year in which it was actually used and may not exceed the maximum ceiling. Title 5 USC [sic] 6304(d) and implementing regulations... permit restoration of forfeited leave in excess of the maximum ceiling, but only if such leave was forfeited due to "exigencies of the public business" or sickness that prevents an employee from using annual leave that had been previously scheduled, in writing, so late in the calendar year that there is insufficient opportunity to reschedule the leave.

On November 18, 2005, following a teleconference held the day before between the claimant and MIDLANT PDPS management officials to further discuss his requested recrediting of the 147.5 hours of annual leave; the HRO sent the claimant an email stating:

The command does not find the administrative error provision [of 5 U.S.C. 6304(d)] for consideration of forfeited annual leave to be applicable to your circumstances.

...any actions surrounding the 7 Oct 04 SF-71 [submitted to request 144 hours of annual leave before the end of the 2004 leave year] would not be germane to a finding of administrative error as intended by 5 CFR 630...since you did not have that 144 hours to your credit then, but only hoped to eventually have it bought back at some future date.

...the 5 CFR 630 forfeiture restoration exceptions [administrative error, exigencies of the public business, and sickness of the employee when the annual leave was scheduled in advance] do not allow for overriding the workers comp buy back provisions [concerning forfeiture of OWCP restored annual leave in excess of the maximum allowable carry over]...there is no authority for the command to ignore these two sets of rules and create its own unauthorized transaction...

The deciding official for the Commander Navy Installations Command's (CNIC) response to this claim, dated June 23, 2006, states he: reviewed the claimant's grievance of October 4, 2005; the MIDLANT PDPS grievance decision; the email of November 18, 2005; the claimant's email of March 21, 2006; and the substance of the claim for recrediting the 147.5 hours of annual leave and does "...not see any basis to reach a conclusion other than what the command did." On January 19, 2007, this CNIC decision was certified by the Department of the Navy to be the agency-level decision in this matter.

On April 5, 2007, we received an additional extensive package of documents from the claimant regarding his claim and an email dated April 8, 2007, with the claimant's comments on the AAR.

The claimant states the agency and DFAS erred in how they handled his request to buy back his leave and the agency agrees there were mistakes which caused delays in processing the actions. We have fully considered these issues to the extent they affect the claim.

## **Evaluation**

Statutory and regulatory provisions for the restoration of annual leave under title 5, United States Code (U.S.C.), section 6304(d) and title 5, Code of Federal Regulations (CFR), part 630, Absence and Leave are separate and distinct from those which allow employees to buy back annual and/or sick leave used while awaiting approval of an OWCP claim under title 20 U.S.C. part 10, Claims for Compensation under the FECA.

The pertinent statutory and regulatory provisions in effect at the time of the claim for



the restoration of annual leave are found in 5 U.S.C. 6304 and 5 CFR part 630, dated January 1, 2004. They provide for the restoration of leave under circumstances where the employee has: accrued or will accrue an amount of annual leave that will exceed the allowable annual leave carry-over and be forfeited at the end of the current leave year if unused (5 U.S.C. 6304 (a)); requested and received approval in writing, before the start of the third biweekly pay period prior to the end of the leave year, to schedule and use the leave in order to avoid forfeiture (5 CFR 630.308(a)); and been prevented from doing so because of administrative error (the employing agency determines what constitutes administrative error), a sickness or injury to the employee which occurred late in the leave year or was of such duration that it prevented the use of the excess annual leave, or because of an exigency of public business (the employing agency determines what is an exigency, i.e., an urgent need for the employee to be at work so they are unable to use the scheduled leave) (5 U.S.C. 6304(d)(1)(A), (B) and (C)).

For the claimant to have been eligible for restoration of annual leave under the conditions specified above, he would have to have already accrued, or been able to accrue leave hours in excess of the allowable annual carry over by the end of the 2004 leave year. Because he used 358 hours to ensure continuation of pay while he awaited OWCP approval of his recurrence claim and had a remaining balance of 51.5 hours of accrued annual leave on September 18, 2004, he did not meet this requirement. Therefore the SF-71 he submitted on October 7, 2004, to meet the deadline for scheduling use-or-lose leave in the 2004 leave year could not have been approved by the agency since he had no use-or-lose annual leave to lose.

The agency could not consider restoring the claimant's annual leave until after OWCP approved it and provided money to buy it back and DFAS accepted the payment. OWCP approved his recurrence of injury claim October 19, 2004, and his initial CA-7 claim to buy back 406 hours of annual leave on December 17, 2004. OWCP paid DFAS for 406 hours. However, the record does not show DFAS ever processed the payment. Instead it shows DFAS returned the money to OWCP because DFAS discovered it included payment for 147.5 hours that would be forfeited if bought back by the claimant. The HRO submitted a revised CA-7 to OWCP, minus the 147.5 hours, which the claimant signed on May 11, 2005. The revised claim was approved and paid by OWCP and processed by DFAS for repurchase of the 332.5 hours of annual leave, which were not subject to forfeiture.

The Civilian Personnel Law Manual states annual leave which is reinstated as a result of a buy back is subject to forfeiture under title 5 U.S.C., section 6304(a) and may not later be restored. B-180010, March 8, 1979; B-187104, March 8, 1978; B-182608, August 9, 1977; B-184008, March 7, 1977; and B-204522, March 23, 1982. In this case, DFAS determined the amount of annual leave requested for buy back included 147.5 hours of annual leave which would be forfeited and acted with the agency to reduce the amount of the claimant's repurchase of leave by that amount to ensure the claimant did not forfeit this leave.

The claimant requests to exchange 147.5 hours of the annual leave he used, while out of work due to an on-the-job injury pending OWCP approval of his claim, for Continuation of Pay (COP) hours paid by OWCP so that he might buy these hours back from his former employing agency thereby receiving a post retirement lump sum payment. However,

given the particular circumstances of this case, had the claimant bought back these hours, he would have lost both the hours and OWCP payment received for that time through forfeiture due to exceeding the maximum leave accumulation for the leave year.

Had the agency and DFAS not acted to prevent the claimant from repurchasing the 147.5 hours and failed to inform him of the loss through forfeiture before the buy back was actually implemented, he would have been able to elect to be placed on annual leave retroactively in order to use the 147.5 hours to avoid forfeiture. The claimant would then have been entitled to a refund of the amount paid to his agency to repurchase the annual leave and assumed an obligation to repay OWCP for the monies he received from them to buy back the 147.5 hours. This scenario results in the claimant's receiving exactly what he did receive for the 147.5 hours; i.e., being paid for the use of the leave. Comp. Gen. B-205709, March 16, 1983; B-242076, May 7, 1991.

The claimant asserts he would have been denied the use of the annual leave because of exigencies of the public business had it all been restored to him in a timely manner before the end of the 2004 leave year. However, this assertion is based on assumptions and presumptions of events which may or may not have occurred and, as such, cannot serve as the basis for a decision in this matter. The record shows the annual leave buy back was fully implemented and the leave restored after the start of 2005 leave year. Had it all been restored at that time 147.5 hours would unavoidably have been forfeited. Comp. Gen. B-182608, August 9, 1977; B-193431, August 8, 1979; and B-233945, February 24, 1989.

The claimant asserts he never requested to use 48 hours of CT time during his absence and requests the agency restore and compensate him for this time. However, the record clearly shows he requested to use this CT for the period of his surgery and recovery on two separate occasions as evidenced by SF-71s he submitted on June 29, 2004, and September 15, 2004, which were approved by agency management.

The claimant asserts the errors made by his former employing agency and DFAS, including delays in processing his leave buy back, failure to approve his projected use-or-lose leave request, and failure to deny this request in writing due to staff shortages which would have established cancellation of leave due to the exigencies of public business, constitute administrative error permitting restoration of the 147.5 hours of annual leave. While unfortunate, delays in processing the claimant's leave buy back request do not constitute administrative error. B-187055, March 4, 1977. Furthermore, the citation of Comp. Gen. B-205709, March 16, 1983, in the now sunsetted Federal Personnel Manual (FPM) Letter 630-31, October 6, 1983, a copy of which the claimant provided to OPM, makes clear leave forfeiture is well recognized as a potential result in cases where employees buy back leave used during a period of absence as in the instant case. As noted in both B-205709 and FPM Letter 630-31, administrative error would have occurred had Department of the Navy and DFAS not taken action to prevent buy back of the 147.5 hours as previously discussed in this decision.

## **Decision**

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. Moreover, the burden of proof is on the claimant to prove the liability of the Government and his or her right to payment, 5 CFR 178.105. 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 in accordance with applicable laws and regulations. We concur with the agency's conclusion the claimant's request for the restoration of 147.5 hours of annual leave is precluded by 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.