



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Merit System  
Accountability and  
Compliance

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

**Claimant:** Martin R. Walker

**Organization:** Federal Aviation Administration  
Herndon, Virginia

**Claim:** Restoration of forfeited annual leave

**Agency decision:** Denied

**OPM decision:** Denied

**OPM file number:** 15-0006

A handwritten signature in black ink, appearing to read "Damon B. Ford".

Damon B. Ford  
Compensation and Leave Claims Program Manager  
Agency Compliance and Evaluation  
Merit System Accountability and Compliance

2/7/2017

Date

The claimant is a former employee of the Federal Aviation Administration (FAA) in Herndon, Virginia. He requests restoration of "over 200 hours" of forfeited annual leave. Although he does not specify in his claim the years in which the leave was forfeited, he requests "restoration of all forfeited annual leave,"<sup>1</sup> and the agency reports that he forfeited leave in the 2004, 2005, 2007, 2008, and 2009 leave years before his retirement from the Federal service effective June 2, 2010. We received the claim on November 4, 2014, the agency administrative report (AAR) on July 14, 2015, and additional documentation from the agency on November 20, 2015. For the reasons discussed herein, the claim is denied.

### *Claim period*

As stated in section 178.104 of title 5, Code of Federal Regulations (CFR), all claims against the United States Government are subject to the six-year statute of limitations contained in section 3702(b) of title 31, United States Code (U.S.C.) (Barring Act). To satisfy this statutory limitation, a written, signed claim must be received by the Office of Personnel Management (OPM), or by the department or agency out of whose activities the claim arose, within six years from the date the claim accrued. The claimant is responsible for proving that the claim was filed within the statute of limitations.

The FAA Personnel Management System (PMS) implemented on March 28, 1996, does not include a claim filing procedure. It does include, in relevant part, the following "FAA Grievance Procedure" covering "matters of personal concern or dissatisfaction to an employee that are subject to control of FAA management":

(a) Effective April 1, 1996, the following grievance procedure shall be implemented for all employees of FAA not covered by a collective bargaining grievance procedure. This FAA Grievance Procedure shall be the sole and exclusive method by which such employees can seek relief from the FAA, Department of Transportation, and/or the United States Government for issues related to the matters covered by this paragraph.

PMS, Chap. III, sec. 4(a) (FAA Grievance Procedure).

However, the FAA Grievance Procedure specifically excludes "matters that are covered by any other statutory appeals process." PMS, Chap. III, sec. 4(c)(xvii). This would presumably exclude leave claims, such as the claimant's request, reviewable under OPM's claims adjudication authority under 31 U.S.C. 3702(b).

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<sup>1</sup> The claimant includes in his claim a complaint that a portion of the period of sick leave he requested under the Family and Medical Leave Act (FMLA) in 2009 was denied, although he does not present this specifically as a claim or request a remedy. Unlike annual leave, there is no lump-sum payment for accumulated and accrued sick leave upon separation from the Federal service. Therefore, we note that since the claimant was apparently in a paid work status on the days for which the leave was denied, no monies would be owed even if the sick leave were to be retroactively approved.

The claimant submitted a written, signed complaint to the FAA Administrator's Hotline on this same matter, which was received by the agency on March 14, 2010. In the absence of a formal claim or grievance process within FAA with regard to leave claims, we consider this complaint as having preserved the claim period with the agency. Therefore, the claim is preserved as of that date and the claim period extends back to March 14, 2004, encompassing the 2004, 2005, 2007, 2008, and 2009 leave years at issue in the claim.

*2009 leave year*

The claimant provides the following account of his leave scheduling for the 2009 leave year:

In February 2009 I requested 80 hours of prime time leave in December. In September 2009 I requested the entire months of November and December off in an attempt to avoid leave forfeiture. This allowed the FLM [front line manager] to schedule me off any time to avoid leave forfeiture. As always, no leave was granted as a result of this request. When the December schedule was published on November 3, 2009 [included with claim], I learned that 56 (of 80 requested) hours of prime time leave were approved. There was never an opportunity to take any leave after the schedule was posted as I worked every shift alone... In January 2010 I forfeited approximately 20 hours of annual leave.

\* \* \* \* \*

At the time I forfeited leave, the FAA had a written policy that required supervisors to counsel employees that were not scheduling leave and to get the employee to sign a statement acknowledging that they were aware of their failure to schedule leave and the consequences. This was never done and I have never been counseled by anyone about failure to schedule or attempt to schedule leave.

However, the agency, in its AAR, states that "[o]n 14 July 2009, [claimant] requested 80 hours of accrued annual leave from 12/18-12/31/2009, of which 64 hours were approved." The leave, which was requested via OPM Form 71, was approved for the dates 12/20-12/31/2009, but was denied for 12/18-12/19/2009. The agency states the claimant had ample time to reschedule the denied leave because the "two days of leave [were] denied 2 months prior to [the] end of [the] leave year." A copy of the SF-71 was not provided by either the agency or the claimant. The agency also states that the claimant did not request restoration of forfeited annual leave for leave year 2009 via FAA Form 3600-20, Request for Restoration of Forfeited Annual Leave. However, the claimant apparently requested restoration of the annual leave forfeited in leave year 2009 in March 2010 per memorandum from the Senior Vice President, Operations, "Subject: Response to March 2010 E-mail Request for Leave Restoration," which denied the request.

*2008 leave year*

The claimant provides no supporting information or documentation on the details of his leave scheduling for the 2008 leave year.

The agency, in its AAR, states that the claimant requested, via OPM Form 71 signed by him on 9/23/2008, 128 hours of annual leave from 12/6-12/28/2008. Although the agency states the claimant "provided a copy of his annual leave request for 'use or lose' leave in FY 2008, "there is "no official documentation of the approval or denial of his request." The agency states the claimant had ample time to reschedule the denied leave because the "leave request [was] signed and dated approximately 3 months prior to [the] end of [the] leave year." The agency asserts that "[t]wo supervisors advised [claimant] that his requested leave dates could not be approved near the end of the year due to available staff and mission requirements," and the claimant subsequently requested restoration of the forfeited annual leave via FAA Form 3600-20 in June 2009. The agency reports that the claimant forfeited 35 hours of annual leave in leave year 2008.

#### *2007 leave year*

The claimant provides no supporting information or documentation on the details of his leave scheduling for the 2007 leave year.

The agency, in its AAR, states that the claimant requested, via OPM Form 71 signed by him on 9/10/2007, 80 hours of annual leave from 12/23/2007-1/5/2008, that there is no "documentation of official action on [the] request" or "supporting documentation of approved/scheduled leave," and that the claimant did not request restoration of the forfeited annual leave until June 2, 2009. The agency states the claimant had ample time to reschedule the denied leave because the "leave request [was] signed and dated 4 months prior to [the] end of [the] leave year." The agency reports that the claimant forfeited 15.30 hours of annual leave in leave year 2007.

#### *2005 leave year*

The claimant provides no supporting information or documentation on the details of his leave scheduling for the 2005 leave year.

The agency, in its AAR, states that the claimant requested, via OPM Form 71 signed by him on 9/03/2005, 160 hours of annual leave from 12/1/2005-1/1/2006, that there is no "documentation of official action on [the] request" or "supporting documentation of approved/scheduled leave," and that the claimant did not request restoration of the forfeited annual leave until June 2, 2009. The agency states the claimant had ample time to reschedule the denied leave because the "OPM Form 71 [was] signed... 4 months prior to [the] end of [the] leave year." The agency reports that the claimant forfeited 137 hours of annual leave in leave year 2005.

#### *2004 leave year*

The claimant provides no supporting information or documentation on the details of his leave scheduling for the 2004 leave year.

The agency, in its AAR, states that there is "no supporting documentation" of the claimant having filed a leave request for the forfeited leave or of any such request having been approved/scheduled/cancelled, or of a request for leave restoration. The agency reports that the claimant forfeited 5.30 hours of annual leave in leave year 2004.

*Analysis*

The FAA's Human Resources Operating Instruction (HROI): Restoration of Annual Leave, provides guidance for the scheduling of use-or-lose annual leave, which must be scheduled "three full pay periods before the end of the leave year," and the restoration of annual leave "forfeited because of an exigency of the public business, sickness, or administrative error." Specifically, the HROI states that "[f]orfeited scheduled and approved 'use or lose' leave may be restored after the leave year if the leave is canceled" for one of these reasons. Thus, a prerequisite for leave restoration is that the leave have been approved and scheduled and then subsequently canceled for one of the three specified reasons.

The claimant acknowledges in his claim that the annual leave he forfeited in leave year 2009 had not been approved and then subsequently cancelled. Although he provides no information on the details of his leave scheduling for the 2004, 2005, 2007, or 2008 leave years, and the agency states there is no documentation of the approval or denial of his leave requests for those years, he states in his claim that his "final year with the FAA, 2009 to 2010 was typical of other leave years when [he] forfeited leave." Therefore, in the absence of documentation showing that the forfeited leave had been approved and scheduled and then subsequently canceled, the claimant fails to meet the basic prerequisite for leave restoration.

Further, there is no documentation establishing that the claimant met one of the three conditions under which forfeited annual leave may be restored as described in the HROI, in relevant part:

- (a) Exigencies of the public business: A front-line manager may cancel previously approved scheduled annual leave so an employee may perform urgent or critical work requirements. Except in emergencies, the delegated approving official must approve the emergency before the front-line manager cancels the leave... When the emergency ends in enough time to reschedule the leave and the employee does not reschedule and use the leave during the leave year, the forfeited leave is not approved for restoration.

The claimant does not assert this as the basis for leave restoration. The agency, in its AAR, states that "[t]he claimant's work unit maintained a 'normal level' of operation even though there were staffing constraints due to operational demands," but those "operational challenges alone did not rise to the level which required a declaration of exigency of public business." Further, the agency, in its review of his claim by year included with the AAR, states there is "no supporting documentation" that an exigency had been declared by a "proper official" for any of the years in question.

- (b) Sickness: Annual leave may be restored if an employee becomes ill and is unable to reschedule and use previously scheduled annual leave before the end of the leave year.

The claimant does not assert this as the basis for leave restoration and there is no indication in the record that this situation applied.

- (c) Administrative error: Annual leave lost because of an administrative error may be restored. The employee's official records are reviewed to determine the hours of forfeited annual leave... An employee's error calculating use or lose leave, or last minute change of plans do not constitute an administrative error.

The claimant asserts he "was told by [a co-worker] that he listed 'clerical error' and his 170+ hours of forfeited leave were restored."<sup>2</sup> Regardless of the veracity of this third-person account, the claims jurisdiction of OPM is limited to consideration of whether the applicable statutes and regulations have been properly interpreted and applied in determining an employee's entitlement to compensation or leave. OPM has no authority to authorize payment based solely on considerations of equity. Therefore, the claimant's implication that he has not been treated equitably has no bearing on our claim settlement determination.

The basis for the claimant's request for leave restoration is that, although he requested in advance all of his use-or-lose leave for the years in question, some of the leave was not approved for scheduling reasons. He claims he was not able to reschedule leave that had not been approved as he was not aware of the denial of leave until the schedule was published the month before the leave request, and he "worked almost every shift alone so spot leave was almost never available after schedules were published."<sup>3</sup> The agency responded to the claimant's assertions in their response to his 2010 Hotline complaint:

...[T]he issue of spot leave is not relevant to your claim that annual leave could not be taken earlier in the year to avoid the forfeiture of annual leave... [S]pot leave is principally used for short-notice leave requests... There is no evidence in the complaint or in discussions with System Operations managers that you were denied annual leave earlier in the year in 2005, 2007, or 2008 making it impossible for you to avoid forfeiting annual leave.

As noted above, the claimant provided no documentation showing, nor does he assert, that he had attempted to reschedule, in advance, the leave that had not been approved. Further, although he provided no documentation related to the denial of his leave requests for the 2004, 2005, 2007, and 2008 leave years, for leave year 2009 he states his leave was partially denied on November 3, 2009. This was within the "three full pay period" deadline for requesting use-or-

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<sup>2</sup> The claimant cites unspecified "OPM regulations" regarding "administrative error" and associated Comptroller General decisions based on OPM regulations as support for his claim. However, OPM leave regulations under 5 CFR, part 630, are not applicable to the claimant as FAA is exempt from the leave administration provisions of title 5, and the cited Comptroller General decisions pre-date the implementation of FAA's personnel management system separate from title 5 and are thus also inapplicable. See 49 U.S.C. § 40122(g)(2).

<sup>3</sup> The claimant submitted copies of his organization's employee work schedules for 2008-2009 to substantiate this assertion, and he reiterates in his November 26, 2015, email to OPM that "[t]here were no opportunities for leave when alone on a shift." However, we note that in addition to the categories of "day," "eve," and "mid," which we assume refer to shifts, the work schedules show a category for "cover." This would suggest that provision was made for employees to work at times outside their normal schedules to cover for other employees.

lose leave and would have allowed him time to attempt to reschedule the 16 hours of annual leave that was subsequently forfeited.

Relevant to the claimant's assertions, FAA Human Resources Management (AHR) policy on annual leave usage is contained in "Order 3600.4, Absence and Leave," which states in Chapter 2, paragraph 9, Use of Leave, in relevant part:

a. Basic Considerations. Employees shall be encouraged to plan the use of their leave wisely, and as far as practicable in accordance with the operating requirements of their organizations. Requests for leave shall be considered in light of current and anticipated workloads... While leave is earned and may be taken as a matter of legal right, it is a matter of administrative discretion as to when and how much leave may be granted.

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f. Employee Responsibilities. Employees have an obligation to request annual leave in a timely manner in order to avoid the forfeiture thereof... [w]hen an employee makes a conscious decision not to request or to use annual leave in order to avoid the forfeiture thereof, he/she is not entitled to have the forfeited leave restored for later use.

g. Management Responsibilities. Management is responsible for the planning and scheduling of the annual leave of employees for use throughout the leave year. It is mandatory that management take deliberate steps to insure that the annual leave of employees is scheduled in order to avoid the loss thereof. If an employee... deliberately chooses not to request or to use annual leave to avoid forfeiture, agency management shall obtain from the employee a formal written statement that he/she is aware that failure to schedule and/or use annual leave will result in the forfeiture of such leave at the end of the leave year with no right to restoration of the forfeited leave. The signed statement shall be kept in the employee's official folder for indefinite retention.

The language of the HROI is reiterated in Chapter 2, paragraph 15, that "[a]nnual leave forfeited because of exigencies of the public business, sickness, or administrative error may be restored" under certain conditions.

The claimant states that the above "management responsibilities" have "never been done in [his organization] and characterizes this as an "administrative error." "Administrative error" is identified as a basis for leave restoration in both the FAA's HROI: Restoration of Annual Leave, and its associated policy document, Order 3600.4: Absence and Leave, but is not explicitly defined in either. However, since both documents describe reviewing the "official record" to substantiate the amount of annual leave to be restored, we can reasonably conclude that an "administrative error" is intended to mean an error in the scheduling or recording of leave earned or used, not a management failure to counsel an employee on potential leave forfeiture. Further, any failure on management's part to counsel the claimant would not entitle him to leave restoration as the requirements of the HROI that the leave have been approved and scheduled, and then subsequently canceled, must first be met. Since there is no documentation in the record

showing that these requirements were met for any of the years in question, leave restoration is not permitted.

Furthermore, FAA policy articulated in the above-cited issuances in regard to the restoration of forfeited annual leave is discretionary in nature. This is evident in their repeated and consistent use of the permissive language "may be restored" as opposed to the mandatory language "shall be restored" or "will be restored." This means that the agency has allowed itself the discretion to restore an employee's forfeited annual leave under certain conditions, but there is no employee entitlement to such. In such cases where an agency's policy or regulations are discretionary in nature, OPM gives considerable deference to the agency's decisions unless it is determined that the agency's action was arbitrary, capricious, or unreasonable. Under 5 CFR 178.105, the burden is upon the claimant to establish the liability of the United States and the claimant's right to payment. *Joseph P. Carrigan*, 60 Comp. Gen. 243, 247 (1981); *Wesley L. Goecker*, 58 Comp. Gen. 738 (1979). As discussed previously, the claimant has failed to do so. Since the claimant has failed to meet his burden in this regard, there is no basis upon which to reverse the agency decision.

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.



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