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

Claimant: [name]

Organization: [agency component]
Department of the Army (DA)
[city & State]

Claim: Back pay for enforced leave

Agency decision: N/A

OPM decision: Denied; time barred, barred by res judicata, and denied for lack of subject-matter jurisdiction

OPM file number: 10-0039

//Ana A. Mazzi for

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

7/28/2010

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Date

On November 3, 2008[1], the U.S. Office of Personnel Management (OPM) received the claimant's request to file a pay claim based on enforced leave. The claimant was previously employed in a Position Classification Specialist, GS-221-12, position in the [agency component] DA, in [city & State]. For the reasons discussed herein, the claim is time barred, barred by *res judicata,* and denied for lack of subject-matter jurisdiction.

The claimant seeks to challenge his "enforced" leave without pay (LWOP) effective December 14, 1980, stating, inter alia, the enforced leave was retroactive; the agency violated its own regulations regarding enforced LWOP; the agency cited no reasons to "validate, legitimize, justify, and support such a personnel action;" that are "part of due process of law" in that the Supreme Court has established "pre-decision advance notice is a constitutional due process right;" 5 U.S.C 7513(b) and case law require employees be given advance notice; 5 CFR Part 752 "mandates notice specificity;" "when notice is not provided, the agency lacks jurisdiction to take the action, and the action is void and cannot be ratified;" the motive for enforced leave was personal; [agency component] failed to conduct an investigation before it acted; case law shows agency inconsistency (using forced LWOP when forced LWOP is banned) means the "employee is to prevail;" "and case law forbids disciplining an employee for approved leave."

The claimant states absent compliance with these "rules of law and precedents" his "forced leave" is divested of legality, he remains on the roles, and he is "entitled to his pay." He requests OPM (1) "investigate the systematic pattern of incidents and issue a report on the pattern of federal agencies imposing enforced leave and acting outside their jurisdiction" in doing so; (2) recognize DA "acted outside the rule of law" which means the actions it took "cannot be ratified;" and (3) "[g]rant this pay claim," have DA and [agency component] "comply with the herein cited rules of law and precedents," and provide the claimant with "back pay, taking into account all pertinent laws and precedents including those on the issue of "jurisdiction"."

The Barring Act, 31 U.S.C. 3702(b)(1), requires a claim against the United States to be received within six years after the claim arises. General Accounting Office (GAO, now the Government Accountability Office) regulations in effect before June 15, 1989, required a claim to be received at GAO within six years after the claim arose to stop the limitation period from running. *John M. Nelson*, B-238379 (March 16, 1990); *Jerry L. Courson*, B-200699 (March 2, 1981). Filing a claim with any other Government agency at that time failed to satisfy the filing requirements of the Barring Act, and did not toll or stop the statutory six-year limitation period from running. *My Anh Company*, B-252872 (April 19, 1994); *Frederick C. Welch*, 62 Comp. Gen. 80 (1982). This was true even though failure to file with the GAO within the six-year period was the fault of the agency and not of the employee. *Sara Dyson*, B-260207.2 (November 6, 1995); *John M. Nelson*, *supra*; *Richard C. Bockus*, B-198085 (November 5, 1980); *James C. Payne*, B-191801 (October 20, 1978).

GAO revised its regulations on June 15, 1989, to provide that the filing requirements of the Barring Act would be satisfied by timely filing the claim with the agency involved or with GAO. 54 Fed. Reg. 25437 (1989); see also *John M. Nelson*, *supra*. The revised regulations only applied to claims that were not barred under the Barring Act as of June 15, 1989. Thus, a claim

[1] Claimant's mail receipt confirms this date. However, the original claim and supporting documentation was never found. Claimant resubmitted his claim through his congressional representative and it was received by OPM on January 5, 2010.

which arose on or after June 15, 1983 (six years prior to June 15, 1989), and had been filed with an agency, did not have to be filed with GAO for purposes of tolling the Act.

To preserve a claim, statute and regulation require the claim to be written and signed (both the General Accounting Office's (GAO) regulations at 4 CFR 31.2 in force when the claimant was placed on LWOP on December 14, 1980, and OPM's regulations at 5 CFR 178.102(a) contain these requirements)[2]. As discussed in GAO's Principles of Federal Appropriation Law, Second Edition, Volume III, November 1994 (Redbook):

> However, claims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C. § 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to "fix responsibility for the claim and the representations made therein." *Bialowas v. United States*, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, "there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9, 11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).
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> While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter's intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

Nothing in the record shows the claimant filed a valid claim within the meaning of the Barring Act with GAO between June 15, 1983, and June 15, 1989. Furthermore, nothing in the record shows the claimant filed a signed, written claim under 31 U.S.C. 3702(b)(1), with either DA or OPM prior to November 3, 2008.

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[2] 4 CFR 34.2. Form of claim, states: "Unless otherwise specifically provided, claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney." 4 CFR 31.3 states: "A claim filed by an agent or attorney must be supported by a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant." 4 CFR 31.5(a) states: "Statutory limitations relating to claims generally. Statutory limitations relating to claims generally are contained in 31 U.S.C. 3702(b). Claimants should submit their claims to the Claims Group, Accounting and Financial Management Division of the General Accounting Office if the statutory period of limitation will soon expire."

5 CFR 178.102 (a) states: "Content of claims. Except as provided in paragraph (b) of this section, a claim shall be submitted by the claimant in writing and must be signed by the claimant or by the claimant's representative." 5 CFR 178.103 states: "A claim filed by a claimant's representative must be supported by a duly executed power of attorney or other documentary evidence of the representative's right to act for the claimant." 5 CFR 178.104(a) states: "The claimant is responsible for proving the claim was filed within the applicable statute of limitations."

The Barring Act, as does any statute of limitations, starts to run when the claim first "accrues." The rule is that a claim first accrues on the date when all events have occurred which fix the liability, if any, of the United States, entitling the claimant to sue or to file a claim. *See Chevron U.S.A., Inc. v. United States*, 923 F.2d 830 (Fed. Cir. 1991), cert. denied, 112 S. Ct.167. *Lins v. United States*, 688 F.2d 784 (Ct. Cl. 1982), cert. denied, 459 U.S.1147; *Empire Institute of Tailoring, Inc. v. United States*, 161 F. Supp. 409(Ct. Cl. 1958); *Kinsey v. United States*, 13 Cl. Ct. 585 (1987), aff'd, 852 F.2d556 (Fed. Cir. 1988); 42 Comp. Gen. 622 (1963); 42 Comp. Gen. 337 (1963); OPM File Number S00285, May 4, 1999.

A claim does not accrue unless the claimant knew or should have known that the claim existed. *See Jones v. United States*, 801 F.2d 1334, 1335 (Fed.Cir.1986), *cert. denied*, U.S., 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987). Section 178.105 of title 5, Code of Federal Regulations (5 CFR) states:

> The burden is upon the claimant . . . . to establish the liability of the United States, and the claimant's right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary.

The record shows the claimant knew or should have known that the claim existed when he chose to pursue redress on this matter in other forums by filing appeals with the Merit System Protection Board, the Equal Employment Opportunity Commission, and various Federal courts. (See, for example, 15 M.S.P.R. 697 (July 20, 1983) and 16 M.S.P.R. 88 (October 24, 1984; and *Pletten V. Merit Systems Protection Board*, 908 F.2d 973 (6th Cir. 1990), cert. denied, 498 U.S. 1053, reh'g denied, 499 U.S. 913 (1991)). Since this claim accrued on December 14, 1980, and the claimant did not preserve it under 31 U.S.C. 3702(b)(1), the claim is timed barred.

As discussed in *Stearn v. Department of the Navy*, 280 F.3d 1376 (Fed. Cir 2002):

> Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2423 (1981)*….The doctrine serves to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and…encourage reliance on adjudication." *Allen v. McCurry, 449 U.S. 90, 94, 66 L.Ed. 2d308, 101 S.Ct. 411 (1980).*

The U.S. Court of Appeals for the Sixth Circuit has rendered a decision on the merits of the claimant's allegation of "enforced leave" (*Pletten V. Merit Systems Protection Board*, 908 F.2d 973 (6th Cir. 1990), cert. denied, 498 U.S. 1053:

> Appellant, [claimant], was a civilian employee of the United States Army at [agency component] in [city & State] from 1969 until he was placed on leave without pay on December 14, 1980. Appellant, who is asthmatic, worked in an invironment where many fellow employees smoked. He was placed on leave because [agency component] was unable to "reasonably accommodate" plaintiff's medical condition. Although [agency

> component] offered appellant a smoke-free private office, [agency componet] could not accommodate appellant with a work environment totally free from tobacco smoke which, according to plaintiff's physicians, plaintiff required.
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> The district court found it to be undisputed, based on the reports of appellant's physicians, that appellant could only work in a totally smoke-free environment. The district court also found that appellant's job took him to all parts of the [agency component] establishment, which in and of itself was quite large and that smoking in the past had been permitted in various parts of the [agency component]. Further, the district court found that appellant never established that he would work in another classification. Therefore, it followed that there was no form of reasonable "accommodation" which was possible for the appellant. That being so, summary judgment was granted for defendants.
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> The district court determined that appellant was not a "qualified handicapped person". The undisputed medical evidence presented by appellant's own physicians supported the finding that no reasonable accommodation would be possible. Appellant's reference to improved ventilation and other methods of providing a smoke-free environment do not establish a genuine issue of material fact. None of the evidence appellant points to shows that these alternatives could produce an environment clean enough to meet his undisputed medical need for absolutely pure air. Appellant's job required him to travel throughout the [agency component] establishment. Appellant's reference to improved ventilation or the possibility of a smoke-free environment could not meet his medical needs. Without a complete ban on smoking throughout the entire [agency component], appellant could not be accommodated.

Therefore, claimant's attempt to revive his challenge in this forum to DA's placing him on "enforced leave" is barred by *res judicata*.[3]

Although we may not render a decision on this claim, we note the authority in section 31 U.S.C. § 3702 is narrow and limited to adjudication of compensation and leave claims. Section 3702 does not include any authority to decide on the propriety of a constructive suspension ("enforced leave") for more than 14 days. Under 5 U.S.C. §§ 7512((2) and 7513(c), an employee suspended for more than 14 days is entitled to appeal to the Merit Systems Protection Board (MSPB) as provided for in 5 U.S.C. § 7701. Therefore, OPM does not consider such appeals within the context of the claims adjudication function it performs under section 31 U.S.C. § 3702. The claimant's reliance on previous GAO claim decisions (36 Comp. Gen. 779, 37 Comp. Gen. 160, 38 Comp. Gen. 203, 39 Comp. Gen. 154, 41 Comp. Gen. 774, and 56 Comp. Gen. Claim) to assert OPM's jurisdiction on this matter is misplaced as these cases do not render decisions on the propriety of the actions taken by the agency, but rather on the expenditure of funds incident to those decisions. Therefore, the claim is denied for lack of subject-matter jurisdiction.

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[3] The record shows the claimant filed for and subsequently received civil service retirement system (CSRS) benefits based on disability beginning December 14, 1980 (*Leroy J. Pletten v. Horner*, et al., 891 F.2d 292, December 14, 1989). Thus, it appears the claimant is seeking back pay for a period of time for which he has already received CSRS benefits.

We note the authority in section 31 U.S.C. § 3702 does not include any authority to investigate agency practices or report on them as the claimant requests. Furthermore, 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. 5 CFR 178.105; *Matter of John B. Tucker,* B-215346, March 29, 1985; OPM File Number 01-0053, February 8, 2002; OPM File Number 01-0055, February 25, 2002.

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.