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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-196718(MGB) January 22, 1980

The Honorable J. Stanley Kimmitt
Secretary of the Senate
United States Senate

Do not make available to public reading

Dear Mr. Kimmitt:

This is in response to your letter of October 31, 1979, which poses several questions regarding sick and annual leave for Senate employees. In particular, you are concerned with the annual leave earned by Christine Hansen while employed by Senator Jepsen.

We are aware of no authority which would permit payment of a lump-sum for annual leave to Ms. Hansen, or any other employee of a Senator, committee, or other office of the Senate. Authority for lump-sum payments for accrued and accumulated annual leave to Federal employees is contained in 5 U.S.C. § 5551, as amended, which provides, in pertinent part, as follows:

> "(a) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is separated from the service or elects to receive a lump-sum payment for leave under section 5552 of this title, is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he <u>is entitled by statute</u> * * *." (Emphasis added).

As apparent, section 5551 applies only to annual leave to which an employee is entitled by statute. The accrued leave was earned by Ms. Hansen under an informal system established by Senator Jepsen incident to his power of appointment. There is no statutory right to such leave, and thus it is not covered by the provisions of section 5551. We are aware of no other statutory provision authorizing such an expenditure. In the absence of any statutory authorization, disbursement of Treasury funds is precluded by the Constitutional prohibition, Art. I, § 9, cl. 7, against disbursement of funds. See 16 Comp. Gen. 899 (1937).

Neither may Ms. Hansen's leave be transferred to her credit at her new position with the Department of Housing and Urban Development (HUD). Leave may be transferred to a position in the Executive branch only when authorized by 5 U.S.C. § 6308, as amended. That section provides, in pertinent part, as follows:

> "The annual and sick leave to the credit of an employee who transfers between positions under different leave systems without a break in service shall be transferred to his credit in the employing agency on an adjusted basis under regulations prescribed by the Office of Personnel Management unless the individual is excepted from this subchapter by section 6301(2) (ii), (iii), (vi), or (vii) of this title." (Emphasis Added).

Subsection 6301(2)(vi) excepts an employee of either House of Congress or of the two Houses. Accordingly, Ms. Hansen's leave may not be transferred to HUD.

The other method of compensating employees for accrued or accumulated annual leave is a grant of terminal leave. Such a grant is within the discretion of the Senator but in order to avoid forfeiture under the dual pay provisions of 5 U.S.C. § 5533, Ms. Hansen's starting date at HUD should have been delayed until expiration of her terminal leave from the Senate. It appears from the information forwarded with your letter that an error was made, and this was not done. Ms. Hansen apparently received compensation from both the Senate and HUD for the period September 24-30, 1979, in violation of 5 U.S.C. § 5533(c)(1).

The enclosures accompanying your letter indicate that the amount of the overpayment received by Ms. Hansen was $380.00. Inasmuch as the amount involved is under $500.00, and is not the subject of an exception by the Comptroller General, it appears that the Secretary of the Senate may consider waiving collection of this overpayment pursuant to the provisions of 2 U.S.C. § 130c (1976).

You also ask if accrued sick leave may be certified to the Office of Personnel Management (OPM) as creditable service for Civil Service retirement purposes. The question of what constitutes creditable service for the purpose of the Civil Service Retirement Act is a matter primarily for determination by OPM. However, we note that OPM gives credit for retirement purposes for sick leave earned under a formal leave system. At 5 C.F.R. § 831.302(c) (1979) a formal leave system is defined as:

> "* * * one which is provided by law or regulation or operates under written rules specifying a group or class of employees to which it applies and the rate at which sick leave is earned."

OPM currently recognizes the leave system established for House employees covered by the "Leave Regulations for Employees of the House of Representatives Under the House Employees Position Classification Act." We are aware of no other leave system for employees of the House or Senate, or both, which has been recognized by OPM as a formal leave system for purposes of determining creditable service for retirement. Thus, while Ms. Hansen's years of service in the Senate are creditable for purposes of determining the rate at which she will accrue leave in her new position at HUD, any sick leave she may have accrued is not creditable for retirement purposes absent a determination by OPM that the leave system established by Senator Jepsen is a formal leave system within the meaning of 5 C.F.R. § 831.302. 5 U.S.C. § 6303.

The general questions you pose regarding the establishment of an official or formal Senate leave system appear to revolve around several basic issues which are frequently raised in the administration of Federal leave systems. The first such issue is what constitutes creditable service for Civil Service retirement purposes. As noted above, OPM now recognizes the leave system of certain House employees as a formal leave system for purposes of determining creditable service for retirement. That leave system was established by a regulation issued by the House Administration Committee pursuant to its authority under the House Employees Position Classification Act. 2 U.S.C. § 291 et seq. (1976) It covers the same employees covered by the House Classification Act; that is, employees of non-elected officers of the House. See

2 U.S.C. § 292. A decision as to what type of Senate leave system would be recognized as a formal leave system for purposes of determining creditable service for retirement is for determination by OPM.

The second issue frequently raised is whether sick and annual leave earned in one position can be transferred to the employee's credit in a new position. As apparent from the above discussion of Ms. Hansen's leave situation, leave earned by Congressional employees is specifically exempted from the transfer provisions in 5 U.S.C. § 6308. Accordingly, to authorize the transfer of leave earned as a Senate employee, it would be necessary to do more than establish a "formal" leave system. It would be necessary to modify section 6308. This, of course, can only be done by statute. Absent an amendment to section 6308, leave earned by Senate employees under any type of leave system could not properly be transferred to the Executive or judicial branch.

A third issue is the authority for payment of a lump-sum for accrued or accumulated leave. As indicated in the above discussion of Ms. Hansen's leave, payment of a lump-sum for leave is precluded absent specific statutory authorization. A leave system for Senate employees established by statute could either indicate an intent to be included in the transfer provisions of 5 U.S.C. § 5551, supra, or provide separate statutory authority for the payment of a lump-sum.

The fourth issue involves the relationship of a lump-sum payment, a grant of terminal leave, and the dual compensation laws. Specifically, you ask if a leave system could provide the option of a lump-sum payment, or a grant of terminal leave without violating the dual compensation laws. Under existing statutory authorities, disposition of accrued or accumulated leave is generally dictated by statutes and no options are available. Employees who transfer between covered positions with leave systems recognized by 5 U.S.C. § 6308 must transfer their leave to the new position. Similarly, if an individual receives a lump-sum payment pursuant to 5 U.S.C. § 5551, but is then reemployed in a position with a leave system before expiration of the period covered by the lump-sum payment, he must refund an amount equal to the pay covering the period of his reemployment and the expiration of the lump-sum period. 5 U.S.C. § 6306. In these situations, the issue of dual compensation does not arise.

If an employee transfers from a position with a statutory leave system to a position without a leave system, that employee may

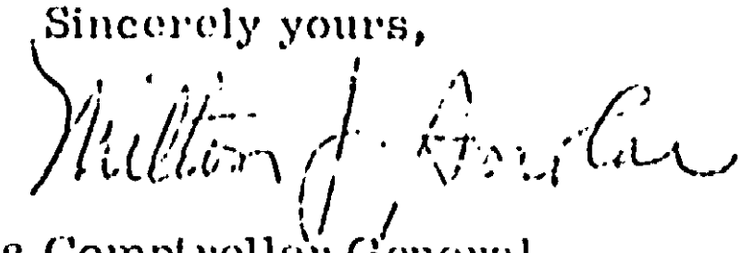
not transfer his leave, but may receive a lump-sum payment pursuant to section 5551 and pay from the new position simultaneously. 33 Comp. Gen. 622 (1954); 49 Comp. Gen. 189 (1969); but see, 49 Comp. Gen. 545 (1970). Since section 5551 specifically provides that a lump-sum payment is considered pay for tax purposes only, this is not viewed as a violation of the dual compensation laws. B-191713, May 22, 1978.

In summary then, the authority required to establish a Senate leave system depends primarily upon the benefits the leave system hopes to make available to Senate employees. However, as apparent from the above discussion, most of the features now available to other Federal employees can only be made available to Senate employees through the establishment of a statutory leave system. In its discretion, Congress could also legislate a leave system which provides additional or different benefits from those now accorded to other Federal employees.

With respect to your additional questions at E, F, and H, we believe that the particular benefits and coverage of any leave system which might be enacted are matters for legislative consideration.

We trust the above information has been helpful. Copies of the cited decisions are enclosed for your convenience.

Sincerely yours,



For The Comptroller General
of the United States

Enclosures