

11992 Pool 762

DECISION



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

FILE: B-195052

DATE: November 13, 1979

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[Entitlement to Lump-Sum Payment for Leave of Absence]
MATTER OF: U.S. Marshal and U.S. Attorney for the Canal Zone --

DIGEST: Decision in 7 Comp. Gen. 83 (1927) that lump-sum payment may not be lawfully authorized to marshal and district attorney of Panama Canal Zone for accrued unused leave of absence after officers have been separated from service, is not presently applicable in view of 5 U.S.C. § 5551 which provides lump-sum payment for accumulated and current accrued leave upon separation from service for employees defined by 5 U.S.C. § 2105 -- and that section does not exclude the U.S. Marshal or the U.S. Attorney for the District of the Canal Zone.

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The Assistant Attorney General for Administration, U.S. Department of Justice, has requested an advance decision whether the U.S. Marshal and the U.S. Attorney for the Canal Zone 1/ may receive a lump-sum payment for 120 days of accrued unused leave of absence at the time of their separation from service. Specifically, the following question is presented:

"Has there been any provision in the law, or in any regulations made pursuant to law, or other factors that would affect your decision in 7 Comp. Gen. 83, concerning the payment for unused leave of absence of the U.S. Attorney or Marshal of the Canal Zone at the time of their separation from service?"

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Mr. Clayburne A. McLelland, the United States Marshal for the Canal Zone, has submitted additional materials for incorporation into the administrative record which he feels document his personal entitlement to the lump-sum payment for accrued, accumulated leave of absence which forms the basis of the submission by the Department of Justice. Mr. McLelland specifically requests that we consider the application of the provisions of 5 U.S.C. § 5551 as controlling the legal analysis of the questions placed in issue.

1/ The U.S. Attorney for the District of the Canal Zone is also referred to as the district attorney.

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Under the provisions of the Panama Canal Act, as amended by section 2 of the Act of December 29, 1926, 44 Stat. 924, the President has prescribed regulations governing the granting of leave of absence with pay to the judge of the district court, the United States attorney, and the marshal for the Panama Canal Zone. The specific entitlement for the marshal presently appears as follows in subsection (c) of section 45, title 3, Canal Zone Code:

"(c) The United States marshal shall be allowed 60 days' leave of absence with pay each year, under regulations prescribed by the President."

The United States attorney has an identical entitlement under subsection (c) of section 41, title 3, Canal Zone Code. The implementing regulations promulgated by the President are set forth in section 8 of Executive Order No. 7676, July 26, 1937, and state as follows:

"SECTION 8. Leave of absence of District Judge, District Attorney, and Marshal. -- The leave of absence allowed the District Judge, District Attorney, and Marshal by * * * the Canal Zone Code shall be reckoned by calendar years. If the office involved is held by two or more persons in one calendar year, the leave shall be prorated to such persons in proportion to the time that they have held office during that year. Any portion of the leave of absence accruing in any one calendar year and not used in that year may be accumulated and used in succeeding calendar years. Provided, that leave may not be accumulated in excess of 120 days, and that not more than 120 days of leave may be taken in any one calendar year. The officers concerned shall make applications for leave of absence to the Attorney General of the United States and shall report to him the time of their departure and the time of their return to duty."

In the decision referred to by the Department of Justice, 7 Comp. Gen. 83 (1927), we held that the implementing regulations which were to be prescribed by the President under the provision of the Panama Canal Act, as amended by section 2 of the Act of December 29, 1926, 44 Stat. 924, could not lawfully authorize the payment of salary attaching to the offices of district judge, district attorney, and marshal of the

Panama Canal Zone for accrued unused leave of absence authorized by law after the officers have been separated from the service by death, resignation, removal, or expiration of term of office. In so holding, we reasoned as follows:

"* * * it is well settled that there is no right to pay for accrued unused leave of absence not taken prior to separation from the service, 6 Comp. Dec. 554; 8 id. 827; 10 id. 15; 12 id. 247; 26 id. 448; 1 Comp. Gen. 482. There is no provision in the statute granting leave of absence to the court officers in derogation of this established principle. The statute does not grant 14 months' pay for 12 months' service. To authorize payment of salary for accrued unused leave of absence subsequent to the separation of the officers from the service would be equivalent to increasing the salary rate for the three officers in excess of that specifically authorized by statute, which, of course, was not intended and is not authorized. * * *"

This rationale, upon which the question of lump-sum leave entitlement in our decision in 7 Comp. Gen. 83, supra, was based must be reconsidered in view of the Act of December 21, 1944, 58 Stat. 845, presently codified at 5 U.S.C. § 5551. Lump-sum payment for accumulated and accrued leave upon separation is provided for by the following language of 5 U.S.C. § 5551.

"(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 is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. * * *"

Unlike the provisions of 5 U.S.C. § 6301(2)(B)(iv)(1976) which serve to specifically exclude the United States Marshal and the United States Attorney for the Canal Zone from coverage under the annual and sick

leave provisions of subchapter I, chapter 63, of title 5 (32 Comp. Gen. 115 (1952)), the operational effect of 5 U.S.C. § 2105 and 5 U.S.C. § 5551 does not specifically exclude either the United States Marshal or the United States Attorney for the Canal Zone from entitlements under the lump-sum leave payment statute.

As we have noted, the entitlement provisions of 5 U.S.C. § 5551 cover the accumulated and current accrued annual or vacation leave which a qualifying employee accrues in accordance with a separate statute. While the Canal Zone officials are excluded from coverage under the annual leave provisions of subchapter 1, chapter 63, of title 5, we have further noted that title 3 of the Canal Zone Code provides that the United States marshal and attorney shall be allowed 60 days "leave of absence" with pay each year, under regulations prescribed by the President. Thus, in view of the legislative purpose and operational effect of 5 U.S.C. § 5551, we conclude that the United States Marshal and the United States Attorney for the Canal Zone -- as employees within the meaning of 5 U.S.C. § 2105 -- are entitled to lump-sum payment for leave of absence accumulated pursuant to title 3, Canal Zone Code, upon separation from the service.

The Assistant Attorney General has requested that this Office respond to the following subsidiary questions if our answer to the above question was in the affirmative.

f "a. As the leave of absence authorized for the attorney and marshal does not differentiate between sick and annual leave, what portion of the total should be authorized for the payment of annual leave equivalent?"

As previously noted, separate subsections of title 3, Canal Zone Code, provide that the United States Marshal and the United States Attorney for the Canal Zone shall be allowed 60 days' leave of absence with pay each year, under regulations prescribed by the President. These statutory entitlements do not provide any proration formula for determining what portion of the total of 60 days' leave of absence per year attaches to any discernible classification as annual or vacation leave, and what corresponding total is ascribed as sick leave.

In addition, we are unaware of any Executive Order prescribing regulations pursuant to either section 45(c) or section 41(c) of title 3, Canal Zone Code, which serves to define "leave of absence" in terms of component amounts of annual or vacation leave and sick leave.

Therefore, in the absence of statutory or regulatory proration of the leave of absence provided for the two officials, there is no basis to differentiate between sick and annual leave and the total leave should be authorized for payment.

"b. If only some portion of the leave of absence is authorized for the payment of annual leave equivalent, should the balance be treated as sick leave for the purpose of determining total service time for retirement computations?"

The response to this question is obviated by our analysis of question (a).

"c. Should the payment be made on the basis that for every day of payable leave, the marshal should be paid 1/360th of his annual salary counting Saturdays, Sundays, and holidays?"

In our decision in 6 Comp. Gen. 470 (1927) we stated -- in a pointed conclusion of continued vitality -- that the leave of absence with pay authorized for the district attorney and the marshal of the Panama Canal Zone which was increased to 60 days "each year" by the Act of December 29, 1926, 44 Stat. 924, was to be computed on the basis of the calendar year. This distinction is clearly drawn in 32 Comp. Gen. 115, 118 (1952). Therefore, payment for lump-sum leave entitlements for the United States Marshal and the United States Attorney for the Canal Zone in accordance with the provision of 5 U.S.C. § 5551 may properly be made on the basis that every day of payable leave is to be computed on the basis of 1/360th of their annual salary, inclusive of Saturdays, Sundays, and established holidays.

"d. Should the amount of payment be limited to a maximum of 120 calendar days under any circumstance?"

As previously noted, regulations prescribed by the President in Executive Order No. 7676, supra, -- in accordance with section 45(c) and section 41(c) of title 3, Canal Zone Code -- provide that leave may not be accumulated in excess of 120 days, which in accordance with our decisions in 6 Comp. Gen. 470, supra, and 32 Comp. Gen. 115, supra, comprehends 120 calendar days. However, we recognize that the substantive distinction drawn by this question goes beyond the statutory and regulatory provisions for "accumulated leave" and addresses the concept of "current accrued" leave -- in the year of separation from the service -- as a specific and cumulative entitlement under the provisions of 5 U.S.C. § 5551. In our decision in 32 Comp. Gen. 115, supra, we stated as follows:

"* * * under the provisions of Executive Order No. 7676, supra, if the office of district judge, district attorney, or marshal is held by two or more persons in one calendar year, the leave shall be prorated among such persons in proportion to the time they have held the office during such year. Hence, if the incumbent of one of such offices leaves the service at the close of March in any year his proportionate share of the 60 days allowable leave would be one-fourth thereof, or 15 calendar days. Moreover, the fact that his successor might not qualify until the following September would not increase the share of the outgoing officer who, as indicated, actually would have been separated on March 31 of such year."

In view of this reasoning, the lump-sum payment is not limited to 120 calendar days. Section 5551(a) of title 5, U.S. Code provides for payment "for accumulated and current accrued annual or vacation leave * * *." Thus, even though the Marshal and the District Attorney are limited by regulation to a maximum accumulation of 120 days, they also continue to accrue leave during each new calendar year. They are entitled to be paid for all accumulated leave and to current leave accrued during the year of separation.

"e. Is there any restriction to the amount being paid, if the constructed leave period overlaps the period in which a new marshal begins to serve?"

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There is no restriction on the amount of the payment. Section 5551(a) provides that the "lump-sum payment is considered pay for taxation purposes only."


Deputy Comptroller General
of the United States