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**DECISION**

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

**FILE:** B-213776 **DATE:** April 10, 1984

**MATTER OF:** Larry L. Van Eerden - Retroactive Substitution - Sick Leave for Leave Without Pay

**DIGEST:**

A retired Federal employee seeks the substitution of bought-back sick leave for leave without pay (LWOP) for the period he spent on LWOP pending a decision on his workers' compensation application. Where the employee retired during the same year in which the LWOP was taken, and his request for the leave substitution was timely made, we conclude that the employee's agency may, in its discretion consistent with normal sick leave considerations, allow the retroactive substitution of his bought-back sick leave for his LWOP. Interstate Commerce Commission, 57 Comp. Gen. 535 (1978).

Mr. James E. Mobley, of the Classification and Pay Group, Forest Service, United States Department of Agriculture, (the Forest Service), has requested a decision from the Comptroller General. The issue is whether sick leave bought back from the Office of Workers' Compensation Programs (OWCP) may be retroactively substituted for leave without pay (LWOP). For reasons that follow, we would not object to a retroactive substitution.

## FACTS

Mr. Larry L. Van Eerden sustained an injury while performing his duties as an employee of the Forest Service. Pending a decision on his workers' compensation application, he went on sick leave. After a period of sick leave, Mr. Van Eerden went on LWOP. Eventually, the OWCP granted him workers' compensation which covered the period of the sick leave, but was insufficient to cover all of the subsequent period of LWOP. Mr. Van Eerden then returned to work, and elected to buy back his sick leave. He retired at the end of that year, and now wants to retroactively substitute his bought-back sick leave for LWOP.

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## ARGUMENTS

In a memorandum from the Director, Personnel Management, the Forest Service says that Mr. Van Eerden could not retroactively substitute sick leave for LWOP. The Director stated that, "we can find no directly applicable directives or Comptroller General decisions." Instead, there was resort to inferences drawn from Office of Personnel Management, Department of Labor, and Forest Service regulations. Thus, he concluded that (1) specific regulatory permission was required for such substitution; (2) leave must actually be in an employee's account balance to be used; and (3) bought-back leave is not available to an employee for use until such time as payment is made and that such use would only be prospective.

Mr. Van Eerden, on the other hand, refers to Robert B. Lindsey v. United States, 214 Ct. Cl. 574 (1977), and Interstate Commerce Commission, 57 Comp. Gen. 535 (1978). Robert B. Lindsey v. United States rejected a Comptroller General position that an employee's prior election as to leave is binding so as to preclude the substitution of sick leave for annual leave in the year of his retirement. Mr. Van Eerden argues that that case recognizes that there is no leave statute or regulation barring the result he seeks. Further, he refers to that case's acknowledgement of statutory changes to the leave policy designed to increase benefits to Federal employees and Congressional recognition that correcting inequities was a more important concern than the administrative burden which might be created by reopening employee leave records. Finally, he refers to the court's suggestion to the General Accounting Office that it reconsider its "over-all post hoc leave-substitution policy" in light of what had been discussed in the decision.

Mr. Van Eerden cites our Interstate Commerce Commission decision to us because it represents a liberalization of our position based on Robert B. Lindsey v. United States. He acknowledges that factually that case is different than his in that it involved the retroactive substitution of sick leave for annual leave, but he believes the principles expressed there apply broadly enough to include his situation. He refers specifically to this language from Interstate Commerce Commission, cited above:

> "* * * we now believe that, at least in those cases where the employee retires or dies during the same year in which the leave is taken, and a timely request is made, it is appropriate to permit agencies to allow retroactive leave substitution in their discretion depending upon the circumstances of each case."

He states that the word "leave" suggests the inclusion of sick leave--not just annual leave.

## DISCUSSION AND CONCLUSION

Mr. Van Eerden's circumstances are sufficiently analogous to those in Interstate Commerce Commission so as to make the principles expressed there applicable. In that case, an employee requested that a period of disability be charged to annual leave. He died later that same month, after which his family made a timely request to retroactively substitute sick leave for the annual leave. This was allowed in order to increase the lump-sum leave payment to the survivor of the deceased employee.

In Mr. Van Eerden's situation, he went on sick leave pending a determination on his workers' compensation application. After a period of sick leave, he went on LWOP. Subsequently, the OWCP did grant him worker's compensation, but it was not sufficient to cover the entire period, leaving him still with a period of LWOP. He then elected to buy back the sick leave he had used and he made a timely request--at most, several months after OWCP granted him workers' compensation--to retroactively substitute his bought-back sick leave for the LWOP. Later that same year, he retired.

We have no objection to the retroactive recrediting of sick leave for the period the employee was on LWOP, if the Forest Service, in its discretion consistent with normal sick leave considerations, determines that such action is appropriate.

for Milton J. Socolar
Comptroller General
of the United States