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DECISION



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

FILE: B-221265

DATE: June 2, 1986

MATTER OF: Virginia A. Gibson - Retroactive
Substitution of Sick Leave for Annual Leave

DIGEST:

An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. § 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later.

This decision is in response to a request from the Director, Headquarters Personnel Operations Division, Department of Energy. It concerns the entitlement of Ms. Virginia A. Gibson to substitute sick leave for annual leave which was used in the calendar year prior to the year in which she retired. For the reasons set forth below, we hold that the retroactive leave substitution requested may not be granted.

BACKGROUND

Ms. Gibson was an employee of the Energy Information Administration, Department of Energy. On October 24, 1984,

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she requested and received approval for the use of 72 hours of annual leave to be taken during the period December 21, 1984, through January 4, 1985, the last Friday of the leave year ending January 5, 1985. On November 19, 1984, she suffered injuries as a result of a non-job related automobile accident and was placed in a sick leave status. She did not return to duty until Monday, January 7, 1985.

After the accident, when it became apparent that her injuries were sufficiently incapacitating so as to preclude her use of the annual leave for the purpose for which it was intended, she requested and was granted permission to substitute the use of that approved annual leave in lieu of the sick leave she could have otherwise taken. The submission points out that Ms. Gibson took this action in order to avoid possible forfeiture of the 72 hours of annual leave.

In June or July 1985, she submitted a further request regarding leave substitution. She requested that she be permitted to retroactively substitute 72 hours of sick leave for the 72 hours of annual leave already approved to be used in lieu of sick leave in the first instance and that the 72 hours of annual leave be restored and carried forward into the 1985 leave year. Her apparent purpose was to enhance her lump-sum leave payment, since we understand that Ms. Gibson retired from Federal service on September 27, 1985.

Prior to submission here, the agency, based on their interpretation of our decision Interstate Commerce Commission, 57 Comp. Gen. 535 (1978), has already proposed allowing retroactive substitution of 24 hours of sick leave for annual leave, which represented the leave taken on January 2, 3 and 4, 1985, because it was in the calendar year of her retirement. The question asked is whether similar retroactive substitution and restoration may be made for the annual leave used in the calendar year prior to that in which the employee retired.

DECISION

Preliminarily, we do not agree with the agency's interpretation of our decision Interstate Commerce Commission, supra. The facts in that case showed that in

November 1977, the employee took 2 weeks of approved annual leave. He died on November 29, 1977, following return to duty. Shortly thereafter, a member of his family informed the agency that the period during which he had requested and was charged annual leave should have been charged as sick leave, since the reason he was absent was due to an illness and he needed hospital care, which he wanted to keep secret. Based on those circumstances, the family requested that the leave period be charged to sick leave and the annual leave charged be recredited for the purpose of the lump-sum leave payment to the employee's survivor.

We ruled in that case that we had no objection to the retroactive charging of the absence to sick leave and recrediting the annual leave used, if the agency determined that such action was appropriate. In so ruling, we stated in part:

" * * * 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 * * *."
57 Comp. Gen. at 536.

The year involved in that discussion was not a "calendar" year. Nor did the case involve potential forfeiture of leave for non-use. Since the focus of the decision was the provisions governing annual and sick leave under 5 U.S.C. §§ 6301 to 6312, the year to which we had reference was a "leave" year. This distinction is important for several reasons. First, while the last work day of a leave year may coincide with the last day of a calendar year, it rarely does so because the cycle of biweekly pay periods is not equal to the exact number of weeks and days in a calendar year. More often than not the last biweekly pay period beginning in December of a particular year extends into January of the succeeding calendar year, thus establishing those days in January which are within that biweekly pay period as days within that leave year for annual leave accrual and use. Second, unlike the accrual and accumulation of sick leave (5 U.S.C. § 6307), the accumulation of annual leave is subject, generally, to a maximum carryover of 240 hours

from one leave year to the next with the excess annual leave subject to statutory forfeiture under 5 U.S.C. § 6304, if not used during the leave year.

All of the annual leave for which recredit is sought in the present case was subject to forfeiture under 5 U.S.C. § 6304 if not used by the end of the leave year. In view of the fact that Interstate Commerce Commission, supra, did not involve the prospect of possible forfeiture of any annual leave, the ruling therein would not control disposition of this case.

The law governing restoration of forfeited annual leave is contained in 5 U.S.C. § 6304 (1982). Subsection 6304(d)(1)(C) provides, in part:

"(d)(1) Annual leave which is lost by operation of this section because of--

* * * * *

"(C) sickness of the employee when the annual leave was scheduled in advance;

"shall be restored to the employee."

Clearly, if Ms. Gibson had not used the annual leave in question in place of sick leave, it would have been forfeited and restored under the above-quoted section.

In 31 Comp. Gen. 524 (1952), we recognized, in principle, that while absences due to illnesses are normally charged to sick leave, such absences may be charged to accrued annual leave if timely requested and administratively approved, thereby preserving that sick leave for future use. Thus, the above provisions and that decision, when considered in combination, establish that an employee may elect which type of leave to use to cover absences due to illness. If the illness occurs during an approved period of annual leave which cannot be used for the purpose intended and because it is not used it is forfeited at the conclusion of the leave year, that forfeited annual leave may be restored to the employee for use in the following year. If,

on the other hand, the employee chooses to use that otherwise forfeitable annual leave in lieu of sick leave and such use is approved, then at the close of the leave year, to the extent that such excess annual leave is used, the employee would have no excess annual leave to be forfeited.

In our decision 54 Comp. Gen. 1086 (1975), we considered a factual situation parallel to that involved in Ms. Gibson's case. There the employee chose to have his absence for illness charged to annual leave, thereby reducing his annual leave balance to a level where he had no excess annual leave at the conclusion of the leave year. We concluded that since he had already exercised his option and there was no annual leave forfeited by operation of law, there was no basis upon which a retroactive substitution of sick leave for annual leave during that preceding leave year could be premised.

In the present case, Mrs. Gibson made a similar request before the close of the leave year, which request was approved. As a result, since she did not have any annual leave otherwise subject to forfeiture at the end of the leave year immediately preceding the leave year in which she retired, 54 Comp. Gen. 1086, above, controls her situation.

Accordingly, the agency may not retroactively substitute any sick leave for annual leave in her case, and may not recredit any annual leave for lump-sum payment purposes in the succeeding leave year.

for Milton J. Jocular
Comptroller General
of the United States