95340

DECISION

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

50550

FILE: B-182005 DATE: FEB 18 1975

MATTER OF: Jacob B. Lishchiner - Recredit of accrued sick leave

DIGEST: Although substitute teachers in District of Columbia do not earn sick leave under D.C. Teachers' Leave Act of 1949 or Annual and Sick Leave Act of 1951, service as substitute in D.C. is service for purpose of leave regulations which provided during period in question that sick leave could be recredited after separation from service of less than 52 continuous calendar weeks. Former substitute reemployed by HEW is, therefore, entitled to recredit of sick leave earned prior to substitute teaching, but amount for recredit is limited by Sick Leave Act of 1936 which, until 1952, limited accrued sick leave to 90-day maximum.

This action is in response to a letter dated July 18, 1974, from a finance and accounting officer in the Department of the Army (forwarded to our Office as an enclosure in letter of August 5, 1974, from the Acting Executive Officer of the Office of the Comptroller, Department of the Army), requesting an advance decision concerning the propriety of retroactively recrediting Mr. Jacob B. Lishchiner, presently a civilian Army employee, with accrued sick leave and sick leave allegedly earned while he was serving as a substitute teacher in the District of Columbia.

From October 13, 1941, when he accepted an appointment in the United States Treasury Department, until December 26, 1952, when he left his position with the United States Air Force, Mr. Lishchiner was, except for a period from October 22, 1945, to July 29, 1946, a full-time employee of the Federal Government, allegedly accruing 875 hours of sick leave. Mr. Lishchiner then served as a substitute teacher in the District of Columbia from October 12, 1953, to January 23, 1955, and is now claiming that he accrued an additional 80 hours of sick leave during this period. (Mr. Lishchiner also was temporarily employed by the United States Post Office during part of the period from December 7, 1953, to January 10, 1954.) On January 24, 1955, he was hired by the Department of Health, Education, and Welfare (HEW) and was subsequently transferred without a break in service to a position with the Army at Picatinny Arsenal where he is presently employed.

PUBLISHED DECISION
54 Comp. Gen.....

Mr. Lishchiner has now requested that he be recredited with both the 875 hours of sick leave he claims he had accrued upon his separation from the Air Force on December 26, 1952, as well as the additional 80 hours of sick leave allegedly "earned" as a District of Columbia substitute teacher from October 12, 1953, to January 23, 1955.

In his letter of July 18, 1974, the finance and accounting officer asked the following specific questions in relation to the foregoing:

> "a. Did Mr. Lishchiner earn sick leave as a substitute teacher for the District of Columbia assuming that substitute teaching is considered Federal Service for the purposes of continuity of service. If he did so earn sick leave, what amount did he earn, and can it now be recredited?
>
> "b. If substitute teachers are not under the District of Columbia Leave Act, does the lapse of the period from December 26, 1952 to January 24, 1955 (in excess of one year) prevent recrediting Mr. Lishchiner's sick leave of 875 hours at this time.
>
> "c. Assuming Mr. Lishchiner had 875 hours of unused sick leave credit at the time he resigned from the Air Force, could this full amount be carried forward for recrediting of sick leave at this time in view of the limitations of the Sick Leave Act of 1936."

Concerning the question of whether substitute teachers in the District of Columbia earn sick leave, it is clear that they are not now and never have been so entitled to accrue sick leave under the act which is applicable generally to employees of the United States and District of Columbia Governments, namely the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 et seq. In this regard, section 202 of the act, presently 5 U.S.C. § 6301, is specific in removing substitute teachers in the District of Columbia from the coverage of the act. During the period in question, section 202 provided in pertinent part as follows:

"(a) Except as provided in subsection (b), this title shall apply to all civilian officers and employees of the United States and of the government of the District of Columbia * * *.

"(b)(1) This title shall not apply to—

"(A) teachers and librarians of the public schools of the District of Columbia;

"(B) part-time officers and employees * * * for whom there has not been established a regular tour of duty each administrative workweek * * *."

However, the District of Columbia Teachers' Leave Act of 1949, approved October 13, 1949, 63 Stat. 842, did authorize District of Columbia teachers to be credited with paid cumulative sick leave and provided in pertinent part as follows:

"* * * all teachers and attendance officers in the employ of the Board of Education of the District of Columbia shall be entitled to cumulative leave with pay for personal illness, presence of contagious disease or other death in the home, or pressing personal emergency, in accordance with such rules and regulations as the said Board of Education may prescribe. Such cumulative leave with pay shall be granted at the rate of one day for each month from September through June of each year, both inclusive. The total cumulation shall not exceed sixty days for probationary and permanent teachers and attendance officers, and the total cumulation shall not exceed ten days for temporary teachers and attendance officers.

"SEC. 2. In addition to the cumulative leave provided by the first section of this Act each probationary and permanent teacher shall be credited on July 1, 1949, with one day of leave with pay for each complete year of service in the public schools of the District of Columbia prior to July 1, 1949 * * *.

* * * * *

"SEC. 6. The Board of Education is hereby authorized to employ substitute teachers and attendance officers for service during the absence of any teacher or attendance officer on leave with pay and to fix the rate of compensation to be paid such substitutes.

"SEC. 7. The Board of Education is hereby authorized to prescribe such rules and regulations as it may deem necessary to carry this Act into effect. The term 'teacher' used in this Act shall include all employees whose salaries are fixed by article I of title I of the District of Columbia Teachers' Salary Act of 1947. The term 'attendance officers' shall include all employees whose salaries are fixed by class 32 in article II of title I of the District of Columbia Teachers' Salary Act of 1947."

Although this statute did not specifically provide that substitute teachers were not entitled to earn sick leave, a careful reading of the statute indicates that it was not intended to apply to substitutes. Section 1 of the act does provide that "all teachers * * * in the employ of the Board of Education of the District of Columbia shall be entitled to cumulative leave with pay for personal illness * * *" but that section only refers specifically to probationary, permanent and temporary teachers. Furthermore, use of the term "substitute teachers" in section 6 indicates that temporary teachers and substitute teachers are not, in fact, one and the same. The term "teacher" as used in the act is defined in section 7 to include "all employees whose salaries are fixed by article I of title I of the District of Columbia Teachers' Salary Act of 1947." Examination of the District of Columbia Teachers' Salary Act of 1947, approved July 7, 1949, ch. 208, section 1, 61 Stat. 248 (which was later repealed as of July 1, 1955, by the District of Columbia Teachers' Salary Act of 1955, approved August 5, 1955, 69 Stat. 530), reveals that article I of title I makes no reference to the salaries of substitute teachers, which subject was dealt with in title V of the act. Although the

District of Columbia Teachers' Leave Act of 1949 has subsequently been amended and the Teachers' Salary Act of 1947 has since been repealed, the applicable law as it relates to such leave for substitutes has not been changed since 1949.

Consequently, it appears that during the period in question from October 1953 to January 1955, substitute teachers in the District of Columbia were not legally entitled to be credited with paid sick leave. This view is in accordance with the position we adopted in B-113052, February 12, 1953, concerning the applicability of the 1949 Leave Act to the use of sick leave by several District of Columbia teachers in which we stated in pertinent part the following:

> "Referring to the case of Mary R. Vail, it appears that she had no service as a school teacher prior to her appointment as a temporary teacher on September 1, 1952, other than a short period of service as a substitute teacher on a per diem when actually employed basis which did not entitle her to earn leave." (Emphasis added.)

Furthermore, we have learned that the District of Columbia Board of Education neither credited substitute teachers with paid sick leave in the period from 1953 to 1955 nor does it do so today but, rather, substitutes have been and presently are employed on a per diem basis.

In accordance with the foregoing, it is the opinion of this Office that Mr. Lishchiner did not earn and is not now entitled to be credited with any sick leave for the period during which he was employed as a substitute teacher in the District of Columbia from October 12, 1953, to January 23, 1955.

The second question submitted asks whether Mr. Lishchiner can now be recredited with the sick leave he accrued during his Federal employment prior to his appointment as a substitute teacher or whether "the lapse of the period from December 26, 1952 to January 24, 1955 (in excess of one year) prevent/s/ recrediting Mr. Lishchiner's sick leave * * * at this time." Although we note that during the period in question Mr. Lishchiner was also employed as a seasonal employee with the Post Office from December 7, 1953, to January 10, 1954, for the purpose of this inquiry we will disregard this brief period of employment.

When an employee is reemployed after a break in service, his right to recredit of sick leave is determined under the applicable laws and regulations in effect at the time of his reemployment. See B-146610, September 13, 1961. Although the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 et seq., has no specific provisions concerning recrediting of sick leave, section 206 of that act, now 5 U.S.C. § 6311, authorizes the Civil Service Commission to prescribe such rules and regulations as may be necessary for the administration of the act. The pertinent regulations in effect at the time of Mr. Lishchiner's employment by HEW were contained at 5 C.F.R. 30.702 and provided in pertinent part as follows:

> "(a) Upon reemployment of an employee subject to this act who was separated on or after January 6, 1952, without a break in service, or a break of not more than 52 continuous calendar weeks, the employee's sick leave account shall be certified to the employing agency for credit or charge to his account."

Mr. Lishchiner left his position with the Air Force on December 26, 1952, and was employed as a substitute teacher in the District of Columbia on October 12, 1953, a period less than 1 full year (52 continuous calendar weeks). Insofar as Mr. Lishchiner was appointed by HEW on January 24, 1955, immediately after his separation from the District of Columbia, it is readily apparent that if employment as a substitute teacher in the District of Columbia is determined to be within the scope of the term "service" as used in 5 C.F.R. 30.702(a), Mr. Lishchiner would now be entitled to have his prior sick leave recredited since he would not have experienced a "break in service" of more than "52 continuous calendar weeks."

As stated previously, Mr. Lishchiner's employment by the District of Columbia as a substitute teacher was not subject to the Annual and Sick Leave Act of 1951, pursuant to which 5 C.F.R. 30.702 was issued. However, this fact alone does not necessarily imply that such employment does not constitute "service" within the scope of that term as used in the regulations so as to avoid a break in service of more than 1 year. In this regard our decision in 47 Comp. Gen. 308 (1967) is relevant. That case involved an employee of the Office of the Architect of the Capitol, Mr. Robert J. Wallace, and the question of whether accumulated sick leave could be recredited to his account. After a period of full-time employment

with the Office, Mr. Wallace was voluntarily separated and within 1 year was subsequently reemployed by the Office under several temporary appointments during which he was paid on a "when-actually-employed" basis. Later when Mr. Wallace was transferred to a full-time position on the staff of the Office of the Architect of the Capitol, he requested that he be recredited with the sick leave he earned during his initial full-time employment with the Office. Although we concluded that Mr. Wallace's temporary employment was not subject to the Annual and Sick Leave Act of 1951, we stated the following in regard to his request for recredit:

> "In 31 Comp. Gen. 485, it was held that an employee serving under a when-actually-employed appointment does not necessarily forfeit the sick leave he has previously accrued in that if subsequently assigned to a position having a regularly scheduled tour of duty his accrued sick leave may be used in accordance with the Annual and Sick Leave Regulations. Counting the periods of temporary employment there was no single break in Mr. Wallace's service which was as much as 52 weeks in length.
>
> "We understand from the Civil Service Commission that the term 'break in service' as used in the above regulation was intended to refer to an actual separation from the Federal service. That view appears to be supported by the wording of past regulations and we perceive no objection thereto.
>
> "Since Mr. Wallace's service was not interrupted by an actual break of 52 weeks, his sick leave should have been recredited to him upon reemployment in a regular position on July 14, 1956. * * *"

Since the Annual and Sick Leave Act of 1951 applies equally to both employees of the United States and those of the District of Columbia (5 U.S.C. § 6301), and since we determined in the above case that Mr. Wallace's temporary employment in the Office of the Architect of the Capitol did constitute "service" within the meaning of 5 C.F.R. 30.702, even though such service was specifically excluded from the coverage of the act (5 U.S.C. § 6301(b)(1)(B)), it logically follows that Mr. Lishchiner's employment by the District

Government, although specifically excluded from the application of the act itself, can also be considered "service" for the purposes of 5 C.F.R. 30.702.

Apparently, the Civil Service Commission which promulgated the regulation in question is in agreement with our interpretation. In this regard the Director of the Commission's New York Regional Office stated the following in a letter dated September 10, 1973, to the civilian personnel officer at Picatinny Arsenal:

> "The key question in this case is whether Mr. Lishchiner's service as a D.C. substitute teacher from October 12, 1953 to January 23, 1955, was Federal or D.C. Government service; if it was then there was no break-in-service, for sick leave recredit purposes, of more than one year. As previously noted * * * it was District of Columbia service, and this is equivalent to Federal service under leave provisions. Since the gap between the termination of his Air Force employment as of December 24, 1952, and his employment by the District of Columbia starting October 12, 1953, was less than one year upon employment by HEW on January 24, 1955, he was entitled to recredit of the previously accumulated sick leave in question."

Furthermore, our conclusion as regards Mr. Lishchiner is in accordance with our holding in B-113052, supra, in which we considered, among other matters, whether sick leave earned by a temporary teacher in the District of Columbia during a prior appointment was available for use at the beginning of the school year although the continuous service of the teacher was interrupted by a period of substitute service in excess of 1 year. In our decision which made reference to 5 C.F.R. 30.702, we held that the teacher in question had not forfeited her sick leave by reason of her service as a substitute since she was continuously on the rolls as a school teacher, and we voiced no objection to her being placed on sick leave as of the beginning of the school year.

In accordance with the foregoing, it is the opinion of our Office that all of the sick leave properly creditable to Mr. Lishchiner

when he left the Air Force on December 26, 1952, can now be recredited to his account since at no time did he suffer a "break in service" of more than 52 continuous calendar weeks.

However, as suggested in question 3, the proper amount of sick leave for recredit remains to be determined. Prior to January 6, 1952, which was the effective date of the Annual and Sick Leave Act of 1951, there was a statutory limit on the amount of sick leave that could be accrued by a Government employee. Section 2 of the Sick Leave Act of March 14, 1936, ch. 141, 49 Stat. 1162 (5 U.S.C. 30g (1948)), provides in pertinent part as follows:

> "On and after January 1, 1936, cumulative sick leave with pay, at the rate of one and one-quarter days per month, shall be granted to all civilian officers and employees, the total accumulation not to exceed ninety days * * *."

At the end of 1951 while the above quoted provision was still in effect, Mr. Lishchiner could only have legally accumulated a maximum of 720 hours of sick leave (90 days). In other words, until the Annual and Sick Leave Act of 1951 became effective on January 6, 1952, the amount of sick leave that could accrue during or at the end of a calendar or leave year could not exceed 90 days, with any leave in excess of that amount to be forfeited. See 22 Comp. Gen. 986 (1943). Therefore, assuming Mr. Lishchiner had accumulated the maximum amount of accrued sick leave at the end of 1951, 720 hours, and assuming further that no sick leave was used during 1952, Mr. Lishchiner could have accumulated, at most, an additional 104 hours (13 days) of sick leave during 1952 for an absolute maximum of 824 hours of sick leave for possible recrediting at this time.

In accordance with the foregoing, it is the opinion of this Office that up to 824 hours of sick leave can now be recredited to Mr. Lishchiner's account, the precise amount to be determined in accordance with prescribed procedure.

B.F.KELLER

Deputy Comptroller General
of the United States