

DECISION



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

10,949

FILE: B-193431 *Personal Name* DATE: August 8, 1979

MATTER OF: Robert W. Lochridge ^{of} Forfeited
annual leave - Restoration

- DIGEST:
1. Employee entitled to use sick leave requested to use annual leave to avoid forfeiture at end of leave year. Request was granted. Employee may not thereafter have sick leave substituted for the annual leave used.
 2. Employee who received benefits under Federal Employees Compensation Act forfeited 102 hours of annual leave. Under 5 U.S.C. § 6304(d)(1)(C), the leave may be restored because in cases of prolonged illness preceding the end of a leave year, the employee may be presumed to have requested proper scheduling of annual leave otherwise subject to forfeiture.

Mr. Robert W. Lochridge requests reconsideration of his claim for the restoration of 102 hours of annual leave forfeited at the close of the 1974 leave year which was denied by our Claims Division. Additionally, he has set forth a new claim for substitution of 72 hours of sick leave for annual leave which he used in the 1973 leave year. While we find no merit in Mr. Lochridge's new claim, we agree with him that he should not have forfeited the 102 hours of annual leave at the end of the 1974 leave year.

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Mr. Lochridge, an employee of the National Aeronautics and Space Agency (NASA), received an on-the-job injury on October 18, 1973. Due to this injury, he initially was out of work from October 19, 1973, until February 28, 1974. After return to work on March 1, 1974, he remained in active work status until July 19, 1974. From July 20, 1974, until September 27, 1976, he was out of work because of his injury. He retired on September 28 due to disability from the injury.

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During his initial period of convalescence from October 19, 1973, to February 28, 1974, Mr. Lochridge used both sick and annual leave to remain in pay status. Because he had 72 hours in excess of the 240 hours permissible carry-over from the 1973 leave year to the 1974 leave year (see 5 U.S.C. § 6304), he used 72 hours of annual instead of sick leave to avoid forfeiture.

Mr. Lochridge now requests that sick leave be substituted for the 72 hours of annual leave on the basis of 5 U.S.C. § 6304(d)(1) as added by section 3 of Public Law 93-1818, December 14, 1973, 87 Stat. 705, which provides:

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

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

"(B) exigencies of the public business when the annual leave was scheduled in advance; or

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

shall be restored to the employee."

Mr. Lochridge alleges administrative error because NASA approved his request to use annual leave instead of sick leave for an illness and because NASA did not counsel him relative to the provisions of law regarding leave forfeiture and compensation for the job injury. The use of annual leave instead of sick leave for an illness is allowable if requested by the employee and approved by the agency. Eugene W. Whitwam, 54 Comp. Gen. 1086 (1975). Lack of counseling here would constitute administrative error only if NASA had promulgated written regulations, making counseling mandatory. Walter E. Blank, 58 Comp. Gen. _____, B-194187, May 9, 1979; John J. Lynch, 55 Comp. Gen. 784 (1976).

Mr. Lochridge also stresses that he had scheduled leave in advance of the end of the leave year. Apparently, he deems this significant because of the statutory provision which allows an employee to have leave restored to him which is scheduled in advance and not used because of sickness. However, this section only relates to leave forfeited and not leave taken. While he may have not been able to use his annual leave in the manner he originally contemplated, it is a fact that he did take his leave. We have repeatedly held that 5 U.S.C. § 6304(d)(1) does not allow the retroactive substitution of sick leave for annual leave because an employee, with the aid of hindsight, realizes that his choice of leave was injudicious. Eugene W. Whitwam, 54 Comp. Gen. 1086 (1975); Hugh L. Daly, B-190662, July 7, 1978.

While there is no basis to allow Mr. Lochridge to substitute sick leave for the annual leave year, there is a basis to restore the 102 hours of annual leave which he forfeited at the end of that 1974 leave year.

During the 1974 leave year, the claimant was on active work status from January 5, 1974, until July 19, 1974, and accrued 102 hours of annual leave in excess of 240 hours. On July 20, 1974, he went into a nonpay status under the Federal Employees Compensation Act, 5 U.S.C. § 8101, et. seq. (1976), and was in that status at the end of 1974 leave year. At this point, the claimant forfeited the 1974 accrual of 102 hours.

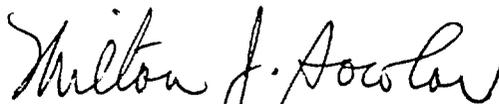
Under 5 U.S.C. § 6304(d)(1)(C), forfeited leave may be restored if it was scheduled in advance and illness precluded the employee from taking it. While Mr. Lochridge did not schedule leave in advance, we have recognized that when an employee has been ill for a considerable period of time up to and preceding the end of a leave year and is effectively precluded from using his annual leave, the employee may be presumed to have scheduled annual leave otherwise subject to forfeiture. Robert T. Good, B-182608, February 19, 1976.

Thus, we hold that Mr. Lochridge should not have forfeited the 102 hours of annual leave in 1974 and should have received

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pay for 342 hours of accrued leave upon his retirement on September 28, 1976. See 5 U.S.C. § 5551 (1976).

Accordingly, Mr. Lochridge should receive payment for 102 hours of accrued leave.



For The Comptroller General
of the United States