

DECISION

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

FILE: B-183566

DATE: APR 16 1976

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MATTER OF: Henry G. Steele - Reinstatement After Removal -
Illness During Interim - Annual Leave

DIGEST: Employee was reinstated November 5, 1973, after
improper removal on March 20, 1969. Agency may,
at his request, charge his annual leave account for
periods during the interim between removal and
reinstatement which otherwise would be charged to
sick leave.

This decision is in response to a request by the Department
of the Army Finance and Accounting Officer at Fort Monmouth,
New Jersey, as to whether the Department may charge annual
leave which has been treated as forfeited for periods for which
sick leave has been charged during the interim between the
removal and reinstatement of Mr. Henry G. Steele as an em-
ployee of the Department.

The facts as stated by the Department read as follows:

"Mr. Steele was reinstated to his job at
Fort Monmouth, New Jersey, on 5 November
1973 after an improper removal on 20 March
1969. His annual leave account was settled
to include annual leave which would have been
forfeited for the leave year 1973 based on Public
Law 93-181. Mr. Steele's sick leave account
was charged for 672 hours for the time hospital-
ized in Patterson Army Hospital during the
periods 2 Aug 70 through 18 Sep 70 and 7 Feb
72 through 17 Apr 72. Mr. Steele, in his affi-
davit (Incl 2) stated that had he been actively
employed during the periods he was hospitalized,
he would have used his annual leave in lieu of sick
leave. The annual leave in question, during leave
years 1970 and 1972, has been forfeited. * * *"

Both Mr. Steele and his representative, Mr. Joseph Meehan,
Attorney at Law, Long Branch, New Jersey, requested that action
on the request be suspended until the Congress could take action on
H. R. 7976. That bill was enacted as Pub. L. 94-172, December 23,
1975, 89 Stat. 1025, and provides for restoration of annual leave in

B-183566

excess of the maximum leave accumulation permitted by law under regulations to be prescribed by the Civil Service Commission in a situation such as that of Mr. Steele. For the rule regarding the reconstruction of an employee's leave account in this situation prior to the cited legislation, see next to the last paragraph, B-182526, July 3, 1975.

The Department in making its charge of sick rather than annual leave for the subject periods relied upon the material set forth in the Federal Personnel Manual Supplement 990-2, Book 630, para. S3-4(b)(3), including our decisions cited therein to the effect that annual leave may not be substituted for sick leave on a retroactive basis solely for the purpose of avoiding a forfeiture of annual leave at the end of the leave year. See 31 Comp. Gen. 524 (1952); 38 Comp. Gen. 354 (1958).

The Department attorneys point out that such cases do not consider the situation where an employee is improperly removed from office and is thus prevented from exercising his option to use annual instead of sick leave. The inference from the material submitted is that had the employee been in a duty status at the time of hospitalization the Department would have granted annual leave at his request for the periods for illness in question. This would have been consistent with the general rule that an approved absence which would otherwise be chargeable to sick leave may be charged to annual leave if requested by the employee and approved by his agency. B-142571, April 20, 1960; 37 Comp. Gen. 439 (1957). With respect to the exercise of agency discretion, we see no reason in situations such as here why the agency cannot, in restoring an employee to its rolls, charge him annual leave in lieu of sick leave for periods during the interim otherwise properly chargeable to sick leave just as it could have done had the employee not been removed improperly. The reconstruction of the leave accounts looks to the time of occurrence, and the charging of annual leave in a situation like Mr. Steele's is not any more retroactive than the charging of sick leave would be. In other words, as the agency reconstructs the leave accounts as part of the make-whole remedy for the improper removal, it is in the same position as far as granting annual in lieu of sick leave is concerned as though it were making the decision originally.

B-183566

The question raised by the Department is answered accordingly,
and the leave records may be appropriately adjusted.

E.F. KELLER

Deputy

Comptroller General
of the United States