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DECISION



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

FILE: B-191713

DATE: May 22, 1978

**MATTER OF: John L. Swigert, Jr. -- Lump-sum Payment
for Annual Leave**

- DIGEST:**
1. NASA employee went on leave without pay (LWOP) in order to accept position with Congressional committee. Employee later resigned from NASA and his right to lump-sum payment for annual leave accrues at date of separation rather than date he was placed on LWOP.
 2. NASA employee who was on leave without pay (LWOP) while employed by Congressional committee, later resigned from NASA position without returning to duty. Employee is not entitled to within-grade increases at NASA since nonpay status under these circumstances does not constitute creditable service for purposes of within-grade increase. See 5 C.F.R. § 531.404. In addition, employee's pay rate at NASA may not be adjusted upward based on highest previous rate rule. Employee did not undergo position or appointment change which warrants consideration of highest previous rate. See 5 C.F.R. § 531.203(c).
 3. NASA employee who was on leave without pay (LWOP) from 1973 to 1977 while employed by Congressional committee, later resigned from NASA. Employee's annual leave balance in excess of 240 hours at end of leave year 1973 is forfeited under 5 U.S.C. § 6304(a) (1976) and remainder would be paid in lump-sum upon separation. Sick leave balance would be available for recredit if employee is reemployed within 3 years from date of separation. 5 C.F.R. § 630.502.
 4. NASA employee, who was on leave without pay (LWOP) for extended period while he was employed by Congressional committee, resigned from NASA position but remained in Congressional position. Lump-sum payment for annual leave accrued in NASA position does not violate limitation on dual compensation since lump-sum payment is considered pay for taxation purposes only.

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This action is in response to the request for an advance decision from Joyan F. Thompson, an authorized certifying officer with the National Aeronautics and Space Administration (NASA), reference BFP-6, concerning the computation of lump-sum payment for annual leave due Mr. John L. Swigert, Jr., a former NASA employee.

The record indicates that effective April 29, 1973, Mr. Swigert was placed on leave without pay (LWOP) from his position with NASA in order to accept a position as Executive Director of the Committee on Science and Astronautics, U.S. House of Representatives. Mr. Swigert remained on LWOP from his position with NASA until July 18, 1977, when he resigned without having returned to duty. Mr. Swigert later resigned from his position with the House Committee on August 31, 1977. NASA questions whether it has correctly computed Mr. Swigert's lump-sum payment for annual leave which the agency paid on the basis of 297 hours of annual leave at the 1973 salary rate for grade GS-15, step 5. In connection with this computation, NASA questions whether Mr. Swigert's salary rate with NASA should be adjusted in accordance with the highest previous rate rule and whether the receipt of a lump-sum payment for leave while Mr. Swigert was still employed by the House Committee violates the limitation on dual compensation.

The authority for lump-sum payments of annual leave is contained in 5 U.S.C. § 5551 (1976) which provides, in pertinent part, as follows:

"(a) An employee * * * who is separated from the service* * * is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered pay for taxation purposes only."

We have long held that the employee's right to a lump-sum payment of annual leave accrues to the employee at the time of separation and that the payment is based on the

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employee's rights at the time of separation under all laws and regulations which would have affected his compensation had he remained in the service for the period covered by the leave. See 33 Comp. Gen. 115 (1953); and 26 id. 102 (1946). Therefore, since Mr. Swigert remained on LWOP until 1977, he was not entitled to a lump-sum payment for his annual leave until he resigned from his position with NASA on July 18, 1977. His lump-sum leave payment should be computed beginning July 19, 1977, rather than the date chosen by NASA, April 30, 1973.

In considering the computation of Mr. Swigert's lump-sum leave payment, NASA questions whether Mr. Swigert is entitled to within-grade increases in his position at NASA while he was on LWOP and was employed by the House Committee. The authority for the granting of periodic or within-grade increases is contained in 5 U.S.C. § 5335 (1976) and 5 C.F.R. Part 531, Subpart D (1977). In accordance with those provisions, employees must complete certain waiting periods for advancement between step-rates consisting of 52, 104, or 156 calendar weeks of "creditable service." See 5 C.F.R. § 531.403. However, nonpay status for more than 2, 4, or 6 workweeks does not constitute creditable service for the purposes of a within-grade increase, except in situations involving a work-related injury, service during a national emergency, or an assignment to a State or local government or other institution under the provisions of 5 U.S.C. §§ 3371-3376 (1976). See 5 C.F.R. § 531.404. Therefore, while Mr. Swigert was on LWOP from his position with NASA he earned no creditable service for the purposes of a within-grade increase. However, we believe Mr. Swigert's salary rate would be adjusted in accordance with the annual salary increases provided under 5 U.S.C. § 5332.

The agency also questions whether Mr. Swigert's rate of pay should be adjusted in accordance with the highest previous rate rule and based upon the higher salary rate he received with the House Committee. The authority for the highest previous rate rule is contained in 5 U.S.C. § 5334 (1976) and the implementing regulations contained in 5 C.F.R. Part 531, Subpart B (1977). Under those regulations, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate. 5 C.F.R. § 531.203(c). However,

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in the present case it does not appear that Mr. Swigert underwent any of the position or appointment changes listed above which would warrant consideration of the highest previous rate rule. Therefore, we find no basis for adjustment of Mr. Swigert's salary rate at NASA based on the highest previous rate rule.

With regard to the amount of leave for which Mr. Swigert should receive a lump-sum payment, we note that when Mr. Swigert was placed on LWOP in 1973 he had 297 hours of annual leave to his credit. While Mr. Swigert was on LWOP, he earned no leave in his position at NASA. See 5 C.F.R. § 630.208. However, under the provisions of 5 U.S.C. § 6304(a) (1976), any leave in excess of 240 hours at the end of leave year 1973 would be forfeited, and such forfeited leave does not appear to be restorable under the provisions of 5 U.S.C. § 6304(d)(1) (1976). Thus, Mr. Swigert's lump-sum payment for annual leave should be computed on the basis of 240 hours of annual leave. Mr. Swigert's sick leave balance of 713 hours would be available for recredit if he is reemployed within 3 years from the date of separation from his position with NASA. See 5 C.F.R. § 630.502.

Finally, the agency questions whether receipt of a lump-sum payment of leave while Mr. Swigert was still employed by the House Committee violates the limitation on dual compensation. Under the provisions of 5 U.S.C. § 5533 (1976), an employee may not receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week. However, since the statute governing lump-sum payment of leave specifically provides that the lump-sum payment is considered pay for taxation purposes only, we believe that Mr. Swigert's receipt of a lump-sum payment while he was still employed by the House Committee does not violate the limitation on dual compensation.

The agency also asks whether Mr. Swigert could be placed on annual leave for 57 hours in 1973 so as to avoid the forfeiture of leave as discussed above and whether this action would violate the limitation on dual compensation. We have held generally that annual leave may be substituted for LWOP only when there is a mistake of law or fact, which, based on the record before us, does not appear to be present in this case. See B-180870, August 27,

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1974. In addition, we believe that the payment for annual leave while Mr. Swigert was receiving basic pay from the House Committee would violate the limitation on dual compensation contained in 5 U.S.C. § 5533.

Accordingly, we conclude that Mr. Swigert should receive a lump-sum payment for 240 hours of annual leave which should be computed beginning July 19, 1977, at the applicable salary rate for grade GS-15, step 5, on that date. Any overpayment would be subject to waiver under 5 U.S.C. § 5584 (1976) and 4 C.F.R. Part 91 (1977).


Acting Comptroller General
of the United States