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B-151156, Dec 30, 1963

Number: B-151156

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MR. SECRETARY:

REFERENCE IS MADE TO THE LETTER OF OCTOBER 26, 1963, FROM THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, WRITTEN IN RESPONSE TO OUR LETTER OF JULY 11, 1963, B-151156, CONCERNING CERTAIN PRACTICES OF THE DEPARTMENT OF THE AIR FORCE WITH RESPECT TO THE TREATMENT OF LOSSES OF FUNDS AND TO THAT DEPARTMENT'S INTERPRETATION OF THE PROVISIONS OF 31 U.S.C. 82A-1 AND 95A.

THERE APPEARS TO HAVE BEEN SOME MISUNDERSTANDING OF THE MEANING OF OUR LETTER. WE DID NOT INTEND TO CONVEY THE IMPRESSION THAT WE BELIEVED THAT A DISBURSING OFFICER SHOULD BE CHARGED WITH RESPONSIBILITY FOR FUNDS ACQUIRED BY A COMMISSARY OFFICER FROM THE SALE OF COMMISSARY SUPPLIES WHILE THOSE FUNDS WERE STILL IN THE OFFICIAL CUSTODY OF THE COMMISSARY OFFICER AND BEFORE THEY WERE DEPOSITED WITH THE DISBURSING OFFICER. RECOGNIZE THAT THE COMMISSARY OFFICER MUST BE RESPONSIBLE FOR SUCH FUNDS UNTIL HE OFFICIALLY TURNS THEM OVER TO THE DISBURSING OFFICER. THE POINT WE WISHED TO MAKE WAS THAT THE COMMISSARY OFFICER-- OR ANY OFFICER HAVING CUSTODY OF GOVERNMENT FUNDS- MUST BE HELD RESPONSIBLE FOR SUCH FUNDS AND REQUEST RELIEF FOR THE LOSS THEREOF IN ACCORDANCE WITH THE LAWS PERTAINING TO "FUNDS" AND NOT THE LAWS PERTAINING TO "PROPERTY." IN OTHER WORDS THE "PROPERTY" FOR WHICH SUCH AN OFFICER IS ACCOUNTABLE CEASES TO BE GOVERNMENT "PROPERTY" AT THE MOMENT IT IS SOLD, AND THE CASH RECEIVED FROM THE SALE OF SUCH PROPERTY BECOMES GOVERNMENT "FUNDS" IMMEDIATELY UPON RECEIPT THEREOF BY THE CALLING OFFICER AND IF SUCH FUNDS ARE LOST OR STOLEN RELIEF FROM LIABILITY FOR SUCH LOSS MUST BE REQUESTED UNDER THE STATUTES PROVIDING RELIEF FOR LOSS OF FUNDS AND NOT UNDER THE STATUTES CONCERNING LOSS OF PROPERTY. WHILE GOVERNMENT FUNDS ARE UNDOUBTEDLY "PROPERTY" IN THE BROAD LEGAL SENSE OF THAT WORD, I BELIEVE YOU WILL AGREE THAT FEDERAL LAWS CLEARLY CONSIDER FUNDS AS A SPECIAL TYPE OF PROPERTY AND REQUIRE SPECIAL AND SEPARATE TREATMENT THEREOF. WE WOULD APPRECIATE YOUR VIEWS ON THIS POINT.

ALSO, THE LETTER OF OCTOBER 26, 1963, FROM YOUR GENERAL COUNSEL INDICATES A MISUNDERSTANDING AS TO OUR VIEWS OF THE COVERAGE OF 31 U.S.C. 95A. CONSTRUE THE WORDS "ANY DISBURSING OFFICER" AS USED IN 31 U.S.C. 95A AS MEANING ALL PERSONNEL OF THE MILITARY ESTABLISHMENTS, WHETHER MILITARY OR CIVILIAN, TO WHOM PUBLIC FUNDS ARE ENTRUSTED FOR THE PURPOSE OF MAKING PAYMENTS OF OBLIGATIONS OF THE UNITED STATES. THIS INCLUDES NOT ONLY THE PRINCIPAL ACCOUNTING AND FINANCE OFFICER BUT ALSO HIS AGENTS, CASHIERS, DEPUTIES, ETC. THE POINT WE WISHED TO BE DISCUSSED WAS THE AIR FORCE'S CONTENTION THAT 31 U.S.C. 95A APPLIED TO ANY ACCOUNTABLE OFFICER CHARGED WITH THE LOSS OF GOVERNMENT FUNDS IN HIS CUSTODY, REGARDLESS OF WHETHER SUCH OFFICER'S DUTY INVOLVED THE DISBURSEMENT OF GOVERNMENT FUNDS. STATED IN OUR LETTER OF JULY 11, 1963, B-151156, WE BELIEVE 31

U.S.C. 95A IS APPLICABLE ONLY TO DISBURSING OFFICERS AS THAT TERM IS DEFINED ABOVE, AND NOT TO OTHER ACCOUNTABLE OFFICERS, SUCH AS THE COMMISSARY OFFICERS MENTIONED IN THE PRECEDING PARAGRAPH, WHO HAVE CUSTODY OF GOVERNMENT FUNDS BUT DO NOT DISBURSE. WHILE NO COURT CASES HAVE BEEN FOUND WHICH SPECIFICALLY DEFINE THE TERM "ANY DISBURSING OFFICER" AS USED IN 31 U.S.C. 95A, SEE THE CASES CITED IN U.S.C. ANNOTATED, RELATIVE TO THAT TERM AS USED IN 28 U.S.C. 1496 AND 2512. IN THIS CONNECTION THERE SHOULD BE NOTED ROMNEY V. UNITED STATES, 167 F.2D 521, WHEREIN, WHILE NOT INVOLVING THE STATUTE HERE IN QUESTION, THE COURT STATED WITH REGARD TO DISBURSING OFFICERS ON PAGE 526:

"WE DO NOT FIND THE TERM 'DISBURSING OFFICER' STATUTORILY DEFINED, PROBABLY BECAUSE IT IS SELF-DEFINITIVE. IT CAN MEAN NOTHING EXCEPT AN OFFICER WHO IS AUTHORIZED TO DISBURSE FUNDS OF THE UNITED STATES."

WE WOULD APPRECIATE YOUR VIEWS ON THIS POINT.

MOREOVER, THE LETTER OF OCTOBER 26, 1963, FROM YOUR GENERAL COUNSEL CONCURS WITH THE VIEW OF THE AIR FORCE THAT 31 U.S.C. 82A-1 DOES NOT APPLY TO THE MILITARY DEPARTMENTS. WE DO NOT AGREE WITH THIS VIEW. RECOGNIZE THE VALIDITY OF THE STATEMENTS MADE IN THE LETTER CONCERNING THE HISTORY OF THAT PROVISION, BUT DO NOT CONCUR WITH THE INTERPRETATION THEREOF. AS STATED IN THE LETTER, THE BILL WHICH EVENTUALLY BECAME 31 U.S.C. 82A-1 AS ORIGINALLY INTRODUCED COVERED ONLY PRESENT AND FORMER DISBURSING PERSONNEL OF THE DIVISION OF DISBURSEMENT OF THE TREASURY DEPARTMENT. HOWEVER, AT THE REQUEST OF THE GENERAL ACCOUNTING OFFICE, SECTION 1 OF THE BILL WAS AMENDED TO COVER ALL DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS OF THE GOVERNMENT-- INCLUDING THE MILITARY DEPARTMENTS-- AND A SECTION WAS ADDED TO REPEAL 31 U.S.C. 95A, BECAUSE OF OBJECTION BY THE MILITARY DEPARTMENT TO REPEAL OF 31 U.S.C. 95A, THE REPEALER CLAUSE WAS DELETED, BUT NO CHANGE WAS MADE IN THE WORDING OF SECTION 1 WHICH WAS INTENDED TO COVER ALL DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS OF THE GOVERNMENT. ACCORDINGLY, IT IS OUR BELIEF THAT WHILE DELETION OF THE REPEALER CLAUSE SAVED 31 U.S.C. 95A FOR THE MILITARY DEPARTMENTS, THE FAILURE TO CHANGE THE EXPANDED WORDING OF SECTION 1 (WHICH BECAME 31 U.S.C. 82A-1) LEFT THAT SECTION LIKEWISE APPLICABLE TO THE MILITARY DEPARTMENTS. THERE CLEARLY IS NOTHING IN THE LANGUAGE OF THE SECTION ITSELF TO PREVENT ITS APPLICATION TO DISBURSING PERSONNEL OF THE MILITARY DEPARTMENTS, AND IT IS OBVIOUS FROM WHAT IS STATED HEREIN REGARDING THE MEANING OF THE TERM "DISBURSING OFFICER" THAT SUCH TERM AS USED IN 31 U.S.C. 82A-1 WOULD APPLY TO SUCH PERSONNEL, AS WELL AS TO DISBURSING PERSONNEL OF THE CIVILIAN AGENCIES. ALSO, THE LAST SENTENCE OF 31 U.S.C. 95A SPECIFICALLY PROVIDES THAT THAT SECTION "SHALL NOT DEPRIVE ANY DISBURSING OFFICER OF ANY RIGHT WHICH HE OTHERWISE MAY HAVE TO OBTAIN RELIEF BY ANY OTHER MEANS ***." THUS, 31 U.S.C. 95A DOES NOT PRECEDE APPLICATION OF 31 U.S.C. 82A-1 TO DISBURSING OFFICERS OF THE MILITARY DEPARTMENTS. UNDER THIS CONCEPT, WHEN COUPLED WITH OUR VIEWS ON THE LIMITATION OF 31 U.S.C. TO DISBURSING OFFICERS AS DEFINED ABOVE, A DISBURSING OFFICER OF A MILITARY DEPARTMENT IS ELIGIBLE FOR CONSIDERATION FOR RELIEF FROM LOSS OF FUNDS UNDER EITHER 31 U.S.C. 82A 1 OR 31 U.S.C. 95A AT HIS OPTION (OR THE OPTION OF THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED), WHEREAS ANY NONDISBURSING ACCOUNTABLE OFFICER OF THE MILITARY DEPARTMENTS IS ELIGIBLE ONLY UNDER 31 U.S.C. 82A-1. IT IS WORTHY OF NOTE THAT THE DEPARTMENT OF THE NAVY REQUESTED CONSIDERATION FOR RELIEF UNDER 31 U.S.C. 82A-1 FOR A NAVY DISBURSING OFFICER WHO HAD BEEN HELD LIABLE FOR A LOSS OF FUNDS AND HAD MADE RESTITUTION THEREOF. SEE B- 142597, APRIL 29, 1960, TO THE SECRETARY OF THE NAVY. WE WOULD APPRECIATE RECONSIDERATION OF THIS POINT IN THE LIGHT OF THE ABOVE AND A FURTHER EXPRESSION OF YOUR VIEWS.

THERE IS ALSO FOR CONSIDERATION THE STATEMENT MADE IN THE THIRD PARAGRAPH OF YOUR GENERAL COUNSEL'S LETTER TO THE EFFECT THAT ANY DETERMINATION MADE BY THE SECRETARY CONCERNED UNDER 31 U.S.C. 95A IS CONCLUSIVE UPON THE GENERAL ACCOUNTING OFFICE. IF THIS IS INTENDED TO MEAN THAT THE SECRETARY MAY MAKE A DETERMINATION THAT A PARTICULAR LOSS IS A PHYSICAL LOSS, WE CANNOT AGREE WITH THE STATEMENT. AN EXAMINATION OF THE LANGUAGE OF THAT SECTION, AS WELL AS THE LANGUAGE OF ITS PREDECESSOR, CLEARLY INDICATES THAT BEFORE THE SECRETARY MAY MAKE ANY DETERMINATION AT ALL THEREUNDER THERE MUST EXIST IN FACT AN ACTUAL PHYSICAL LOSS OR DEFICIENCY. AFTER THAT CONDITION PRECEDENT IS MET, THEN THE STATUTE AUTHORIZES THE SECRETARY OF THE DEPARTMENT CONCERNED TO MAKE TWO DETERMINATIONS: FIRST, THAT THE LOSS OR DEFICIENCY IN QUESTION OCCURRED "WHILE THE OFFICER WAS IN LINE OF HIS DUTY," AND, SECOND, THAT THE LOSS OR DEFICIENCY OCCURRED "WITHOUT FAULT OR NEGLIGENCE" ON THE PART OF THE DISBURSING OFFICER. ONLY THESE TWO DETERMINATIONS ARE CONCLUSIVE UPON THE GENERAL ACCOUNTING OFFICE UNDER 31 U.S.C. 95A.