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B-161457, Aug 14, 1974, 54 Comp Gen 112

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B-161457, AUG 14, 1974, 54 COMP GEN 112

ACCOUNTABLE OFFICERS - ACCOUNTS - IRREGULARITIES, ETC. - ADMINISTRATIVE AUTHORITY TO RESOLVE - AMOUNT INCREASED LIMITATION OF $150 ON ADMINISTRATIVE RESOLUTION OF IRREGULARITIES IN ACCOUNTABLE OFFICERS ACCOUNTS, AUTHORIZED BY GENERAL ACCOUNTING OFFICE LETTER OF AUGUST 1, 1969, B-161457, TO HEADS OF FEDERAL DEPARTMENTS AND AGENCIES, CANNOT BE ELIMINATED, BUT MAY BE INCREASED TO $500 WITHOUT APPRECIABLE RISK TO THE INTERESTS OF GOVERNMENT. LETTER INCREASING LIMITATION IS BEING ISSUED AND AMENDMENT TO 7 GAO 28.14 WILL BE FORTHCOMING. ACCOUNTABLE OFFICERS - BONDING ELIMINATION - LIABILITY - INSURER V. BAILEE GENERAL ACCOUNTING OFFICE DOES NOT AGREE THAT ELIMINATION OF BONDING OF ACCOUNTABLE OFFICERS PURSUANT TO ACT OF JUNE 6, 1972, PUBLIC LAW 92 310, 86 STAT. 201, REDUCED BASIC LIABILITY OF OFFICER FROM THAT OF INSURER LIABLE WITH OR WITHOUT NEGLIGENCE, TO THAT OF BAILEE RESPONSIBLE ONLY FOR PERFORMING DUTIES WITH DEGREE OF CARE, CAUTION, AND ATTENTION WHICH PRUDENT PERSON NORMALLY EXERCISES IN HANDLING OWN AFFAIRS. ACCOUNTABLE OFFICERS - RELIEF - NEGLIGENCE - WHAT CONSTITUTES REGARDING COMPLAINT THAT GENERAL ACCOUNTING OFFICE (GAO) IS TOO STRICT IN INTERPRETATION OF NEGLIGENCE IN CASES OF RELIEF OF ACCOUNTABLE OFFICERS AND SUGGESTION THAT STANDARD OF SUCH CARE AS REASONABLY PRUDENT AND CAREFUL MAN WOULD TAKE OF HIS OWN PROPERTY UNDER LIKE CIRCUMSTANCES BE USED, GAO IS NO MORE STRICT THAN LAW REQUIRES AND USES SUGGESTED STANDARD, BUT BECAUSE OF DIFFERENCE OF OPINION IN APPLICATION OF STANDARD GAO MAY SOMETIMES CONSTRUE NEGLIGENCE IN CIRCUMSTANCES WHERE AGENCY INVOLVED DOES NOT.

IN THE MATTER OF PERSONAL ACCOUNTABILITY OF ACCOUNTABLE OFFICERS, AUGUST 14, 1974:

THIS DECISION TO THE SECRETARY OF THE TREASURY IS IN RESPONSE TO A REQUEST BY THE COMMISSIONER OF ACCOUNTS OF THAT DEPARTMENT. HE REQUESTS THAT WE CONSIDER THE POSSIBILITY OF ELIMINATING THE PRESENT $150 LIMITATION AND RELATED RESTRICTIONS ON THE ADMINISTRATIVE RESOLUTION OF IRREGULARITIES IN THE ACCOUNTS OF ACCOUNTABLE OFFICERS, AS PRESCRIBED IN OUR LETTER OF AUGUST 1, 1969, B-161457, TO THE HEADS OF FEDERAL DEPARTMENTS AND AGENCIES, 7 GAO 28.14. HE ALSO REQUESTS THAT WE CONSIDER A MODIFICATION OF GENERAL ACCOUNTING OFFICE (GAO) STANDARDS TO PROVIDE FOR A LESS STRINGENT INTERPRETATION OF THE PRESENT LAWS IN DETERMINING WHETHER NEGLIGENCE EXISTS IN CONNECTION WITH REQUESTS FOR RELIEF OF ACCOUNTABLE OFFICERS.

PRIOR TO THE ISSUANCE OF OUR LETTER OF AUGUST 1, 1969, ALL IRREGULARITIES IN THE ACCOUNTS OF ACCOUNTABLE OFFICERS WERE REQUIRED TO BE SETTLED BY GAO. IN THE EXERCISE OF OUR AUTHORITY TO ESTABLISH MINIMUM AMOUNTS FOR EXCEPTIONS TAKEN BY OUR OFFICE IN OUR AUDIT OF ACCOUNTS OF ACCOUNTABLE OFFICERS, OUR LETTER OF AUGUST 1, 1969, AUTHORIZED ADMINISTRATIVE RESOLUTION OF IRREGULARITIES UNDER

$150. WE DO NOT BELIEVE THAT THE MONETARY LIMITATION ON IRREGULARITIES SUBJECT TO ADMINISTRATIVE RESOLUTION SHOULD BE ELIMINATED. HOWEVER, IN THE LIGHT OF OUR EXPERIENCE IN THE OPERATION OF THE $150 LIMITATION WE BELIEVE THE LIMITATION MAY BE INCREASED TO $500 WITHOUT APPRECIABLE RISK TO THE INTERESTS OF THE GOVERNMENT. A LETTER INCREASING THE $150 LIMITATION TO $500 IS BEING ISSUED TODAY TO THE HEADS OF FEDERAL DEPARTMENTS AND AGENCIES, AND AN AMENDMENT TO 7 GAO 28.14 WILL BE FORTHCOMING. THE INCREASE WILL BE EFFECTIVE IMMEDIATELY.

THE COMMISSIONER OF ACCOUNTS PRESENTED EXTENSIVE ARGUMENTS TO THE EFFECT THAT SINCE THE REQUIREMENT FOR FIDELITY BONDING OF ACCOUNTABLE OFFICERS HAS BEEN ELIMINATED PURSUANT TO THE ACT OF JUNE 6, 1972, PUBLIC LAW 92- 310, 86 STAT. 201, 31 U.S.C. 1201, THE LIABILITY OF AN ACCOUNTABLE OFFICER IS NO LONGER THAT OF AN INSURER, WHO IS LIABLE REGARDLESS OF THE PRESENCE OR ABSENCE OF NEGLIGENCE, BUT IS MERELY THAT OF A BAILEE, WHO IS RESPONSIBLE ONLY FOR PERFORMING HIS DUTIES WITH THE DEGREE OF CARE, CAUTION, AND ATTENTION WHICH A PRUDENT PERSON COULD NORMALLY BE EXPECTED TO EXERCISE IN HANDLING HIS OWN AFFAIRS.

WE DO NOT AGREE THAT ELIMINATION OF THE REQUIREMENT FOR FIDELITY BONDING OF ACCOUNTABLE OFFICERS HAS CHANGED THE BASIC LIABILITY OF SUCH OFFICERS. EVEN THE CASES RELIED UPON BY THE COMMISSIONER ACKNOWLEDGE THAT THE BASIC LIABILITY OF AN ACCOUNTABLE OFFICER AS AN INSURER OF THE FUNDS IN HIS CHARGE ARISES FROM "PRINCIPLES WHICH ARE FOUNDED UPON PUBLIC POLICY," IN ADDITION TO THE BOND. UNITED STATES V. PRESCOTT, 3 HOW. 578, 587 (1845). MOREOVER, WHILE SECTION 101(A), 31 U.S.C. 1201(A), OF PUBLIC LAW 92-310, SUPRA, PROVIDES THAT:

NO AGENCY OF THE FEDERAL GOVERNMENT MAY REQUIRE OR OBTAIN SURETY BONDS FOR ITS CIVILIAN EMPLOYEES OR MILITARY PERSONNEL IN CONNECTION WITH THE PERFORMANCE OF THEIR OFFICIAL DUTIES.

SECTION 101(B), 31 U.S.C. 1201(B), ALSO PROVIDES THAT:

THE PERSONAL FINANCIAL LIABILITY TO THE FEDERAL GOVERNMENT OF SUCH EMPLOYEES AND PERSONNEL SHALL NOT BE AFFECTED BY REASON OF SUBSECTION (A) OF THIS SECTION.

HENCE, IT IS THE CLEAR INTENT OF THE ACT THAT THE ELIMINATION OF FIDELITY OR SURETY BONDS WOULD NOT HAVE THE EFFECT ON THE BASIC LIABILITY OF ACCOUNTABLE OFFICERS FOR WHICH THE COMMISSIONER CONTENDS, BUT THAT SUCH LIABILITY WOULD CONTINUE TO EXIST AS BEFORE THE ACT WHEN BONDS WERE REQUIRED.

HOWEVER, THE QUESTION OF GRANTING RELIEF TO ACCOUNTABLE OFFICERS UNDER THE PROVISIONS OF THE RELIEF STATUTES FROM THEIR BASIC LIABILITY IS A SEPARATE AND DISTINCT MATTER. WHILE AN ACCOUNTABLE OFFICER MAY BE HELD LIABLE UNDER HIS BASIC LIABILITY AS AN ACCOUNTABLE OFFICER REGARDLESS OF THE PRESENCE OR ABSENCE OF NEGLIGENCE, HE MAY BE RELIEVED FROM SUCH BASIC LIABILITY UNDER THE RELIEF STATUTES PROVIDED THAT THE LOSS OR DEFICIENCY OCCURRED WITHOUT FAULT OR NEGLIGENCE ON THE PART OF THE OFFICER (31 U.S.C. 82A-1), OR THAT THE ILLEGAL, IMPROPER, OR INCORRECT PAYMENT WAS NOT THE RESULT OF BAD FAITH OR LACK OF DUE CARE ON THE PART OF THE OFFICER (31 U.S.C. 82A-2). SEE ALSO 31 U.S.C. 95A; 28 U.S.C. 1496; AND 28 U.S.C. 2512. IT IS AT THIS POINT THAT GAO EXERCISES ITS DISCRETION.

AN ACCOUNTABLE OFFICER IS AUTOMATICALLY LIABLE AT THE MOMENT EITHER A PHYSICAL LOSS OCCURS OR AN ERRONEOUS PAYMENT IS MADE. IF THE CASH OR ACCOUNTABLE ITEM WHICH WAS PHYSICALLY LOST CANNOT BE RECOVERED, OR THE ERRONEOUS PAYMENT CANNOT

BE RECOVERED FROM THE RECIPIENT THEREOF, CONSIDERATION IS GIVEN TO RELIEF OF THE ACCOUNTABLE OFFICER UPON PROPER ADMINISTRATIVE REQUESTS. RELIEF IS GRANTED BY OUR OFFICE UNLESS IT IS DETERMINED THAT THE ACCOUNTABLE OFFICER WAS NEGLIGENT OR GUILTY OF BAD FAITH OR LACK OF DUE CARE, AND THAT SUCH NEGLIGENCE, BAD FAITH, OR LACK OF DUE CARE WAS THE PROXIMATE CAUSE OF THE PHYSICAL LOSS OR ERRONEOUS PAYMENT. THERE IS NOTHING IN THE CITED STATUTES OR THEIR LEGISLATIVE HISTORIES TO INDICATE THAT ANYTHING MORE THAN SIMPLE NEGLIGENCE OR BAD FAITH OR LACK OF DUE CARE WAS REQUIRED TO DENY RELIEF TO AN ACCOUNTABLE OFFICER. ALL OF THE CITED RELIEF STATUTES HAVE BEEN INTERPRETED BY OUR OFFICE AND BY THE COURT OF CLAIMS AS REQUIRING DENIAL OF RELIEF FROM LIABILITY IN ANY INSTANCE WHERE IT IS SHOWN THAT THE OFFICER WAS NEGLIGENT (NOT GROSSLY NEGLIGENT) OR GUILTY OF BAD FAITH OR LACK OF DUE CARE (NOT GROSS BAD FAITH OR GROSS LACK OF DUE CARE), AND THAT SUCH NEGLIGENCE, BAD FAITH, OR LACK OF DUE CARE WAS THE PROXIMATE CAUSE OF THE LOSS OR ERRONEOUS PAYMENT.

THE COURTS AND OUR OFFICE HAVE ALWAYS HELD THAT THE ACCOUNTABLE OFFICER WAS LIABLE UNTIL HE PROVED THAT HE WAS FAULTLESS - THE BURDEN OF PROOF WAS ON HIM. IN BOGGS V. UNITED STATES, 44 CT. CL. 367 (1909), THE COURT OF CLAIMS STATED ON PAGES 383 AND 384:

IT IS, WE THINK, A SOUND PROPOSITION THAT THE STATUTES UNDER WHICH THE COURT, ON THE PETITION OF THE PLAINTIFF, HAS ACQUIRED JURISDICTION WERE INTENDED TO GIVE DISBURSING OFFICERS A GREATER RIGHT TO RELIEF THAN THEY ALREADY POSSESSED BEFORE THESE ACTS WERE PASSED.

THEY WERE PASSED TO RELIEVE INNOCENT DISBURSING OFFICERS FROM THE RIGORS OF THE LAW AND THE CONSEQUENT JUDGMENT OF COURTS OF LAW, BY ALLOWING THEM TO GO INTO A COURT OF EQUITY, AND, BY ESTABLISHING THE FACT THEY WERE FAULTLESS, OBTAIN A "DECREE" WHICH WOULD REQUIRE THE ACCOUNTING OFFICERS TO ALLOW TO SUCH OFFICER CREDIT IN THE SETTLEMENT OF HIS ACCOUNTS. THE PROVISIONS IN QUESTION ARE PREDICATED UPON THE ACT OF 1866, WHICH DID NOT LESSEN THE LEGAL LIABILITY OF DISBURSING OFFICERS, NOR GIVE THEM GENERALLY GREATER LEGAL RIGHTS THAN THEY POSSESSED. THE COURT OF CLAIMS ALONE, ACTING AS A COURT OF EQUITY, CAN ADMINISTER THE EQUITABLE PROVISIONS UNDER WHICH RELIEF IS HERE ASKED AND AWARD THE SPECIFIC REDRESS AUTHORIZED BY THE STATUTE IN AND ONLY IN EXCEPTIONAL CASES. THAT IS, WHERE THE OFFICER HAS ESTABLISHED THE FACT THAT HIS CONDUCT HAS REALLY BEEN FAULTLESS. BEFORE RELIEF CAN BE GRANTED IT MUST APPEAR WITH REASONABLE DEGREE OF CERTAINTY FROM ALL THE PROOF AND CIRCUMSTANCES OF THE CASE THAT THE OFFICER ENTRUSTED WITH PUBLIC MONEY HAS EXERCISED WATCHFULNESS OVER THE FUNDS AND SUCH DEGREE OF CARE AS FAIRLY AND EQUITABLY ENTITLE HIM TO A DECREE EXONERATING HIM FROM THE OBLIGATION OF HIS BOND.

FROM THE FOREGOING STATEMENT IT IS APPARENT THAT THE RESPONSIBILITY OF THE COURT IN THIS CLASS OF CASES IS VERY GREAT. IT IS EQUALLY APPARENT THAT THE COURT CAN NOT WELL UNDERTAKE TO FORMULATE ANY GENERAL RULE DECLARING WHAT ACTS MAY CARRY EXEMPTION FROM LIABILITY. EACH CASE MUST DEPEND UPON THOSE CONDITIONS AND CIRCUMSTANCES WHICH NECESSARILY ARISE OUT OF THE PROOF WHEN PRESENTED. AS, HOWEVER, REDRESS CAN ONLY BE HAD IN EXCEPTIONAL CASES THERE IS AT THE OUTSET A PRESUMPTION OF LIABILITY, AND THE BURDEN OF PROOF MUST REST UPON THE OFFICER WHO WAS SUSTAINED THE LOSS.

SEE ALSO, O'NEAL V. UNITED STATES, 60 CT. CL. 413 (1925). WE PERCEIVE NO COMPELLING REASON FOR DEPARTING FROM THIS PRINCIPLE NOW.

THE COMMISSIONER CONTENDS THAT AN ACCOUNTABLE OFFICER SHOULD BE HELD TO THE

STANDARD OF SUCH CARE OF PROPERTY OR FUNDS ENTRUSTED TO HIM AS A REASONABLY PRUDENT AND CAREFUL MAN MAY BE EXPECTED TO TAKE OF HIS OWN PROPERTY OF THE LIKE DESCRIPTION UNDER LIKE CIRCUMSTANCES, BUT THAT IN VIEW OF GAO'S POSITION THAT A CUSTODIAN OF PUBLIC FUNDS IS AN INSURER OF SUCH FUNDS GAO HAS NOT EVALUATED NEGLIGENCE ON THE BASIS OF THAT STANDARD. THIS APPEARS TO CONSTITUTE A CONFUSION OF TWO SEPARATE AND DISTINCT FACTORS. GAO DOES CONSIDER A CUSTODIAN OF PUBLIC FUNDS, OR ANY ACCOUNTABLE OFFICER, AS AN INSURER OF THE FUNDS ENTRUSTED TO HIM, BUT ONLY INSOFAR AS HIS BASIC LIABILITY IS CONCERNED. WHEN THE QUESTION OF RELIEF FROM THAT BASIC LIABILITY UNDER THE CITED RELIEF STATUTES ARISES, WE DO APPLY THE "REASONABLE CARE" STANDARD WHERE APPLICABLE, AND EVEN WHERE NEGLIGENCE UNDER THAT STANDARD EXISTS RELIEF WILL BE GRANTED IF SUCH NEGLIGENCE IS NOT THE PROXIMATE CAUSE OF THE LOSS OR THE ERRONEOUS PAYMENT. THE FACT THAT THE ACTIVITIES OF ACCOUNTABLE OFFICERS ARE GENERALLY PRESCRIBED BY REGULATIONS LEAVES NO ROOM FOR THE EXERCISE OF THE JUDGMENT OF A "REASONABLY PRUDENT AND CAREFUL MAN." IF AN ACCOUNTABLE OFFICER FAILS TO FOLLOW SUCH REGULATIONS, AND A LOSS OF FUNDS OR AN IMPROPER PAYMENT IS CAUSED THEREBY, SUCH FAILURE TO FOLLOW THE REGULATIONS MUST BE CONSIDERED NEGLIGENCE AND RELIEF DENIED. WHERE THERE ARE NO REGULATIONS COVERING THE ACTIONS IN QUESTION, THE CITED STANDARD IS APPLIED TO DETERMINE THE PRESENCE OR ABSENCE OF NEGLIGENCE. THERE OBVIOUSLY IS ROOM FOR AN HONEST DIFFERENCE OF OPINION IN THE APPLICATION OF THE STANDARD. CIRCUMSTANCES WHICH MAY BE CONSTRUED BY ONE PERSON AS INDICATING THE PRESENCE OF NEGLIGENCE MAY BE CONSTRUED BY ANOTHER AS INDICATING THE LACK OF NEGLIGENCE. THIS FACT APPEARS TO BE THE ESSENCE OF THE COMMISSIONER'S COMPLAINT, SINCE GAO MAY OCCASIONALLY CONSTRUE NEGLIGENCE IN CIRCUMSTANCES WHERE THE DEPARTMENT OF THE TREASURY DEEMS THERE WAS NO NEGLIGENCE.