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B-186922 April 5, 1977

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The Honorable Dick Clark United States Senate Federal Building Cedr Rapids, Iowa 52401

Dear Senator Clark:

This is in response to your request for our views on questions raised by your constituents, Curtis Utley and Mary C. Rae, regarding Mr. Utley's liability, as Agent-Cashier at the Veterans Administration Hospital, Iowa City, Iowa, for a shortage in his accounts of $1000. The matter first came to our attention by a request from the Controller of the Veterans Administration that we relieve Mr. Utley of liability pursuant to 31 U.S.C. Sec. 82a-1 (1970). In our letter to the Administrator of Veterans Affairs, concerning this matter (B-186922, August 26,1976), we said that there was insufficient evidence to grant relief for the unexplained shortage in the accounts of Mr. Utley. (We also pointed out that we are precluded by 31 U.S.C. Sec.82a-1 from granting relief on any evidence unless the head of the agency determines, among other things, that the loss occurred without fault or negligence on the part of the accountable officer, and that the Veterans Administration had given us no indication that this determination had been made.)

Mr. Utley, in his letter to you of January 9, 1977, which you enclosed with your referral, makes the point that, following an official inquiry into a shortage in his accounts in the amount of $176.01 which occurred in September, 1975, a Veterans Administration official recommended installing a pass-through type drawer or chute and an alarm system to increase the safety of the funds controlled by the Agent Cashier. Mr. Utley says that the pass-through window was not installed until April, 1976, after a second loss of $1000 occurred, and that the alarm system had not been installed as of the date of his letter.

Mr Utley contends that the Veterans Administration was negligent in not providing the recommended safeguards until after the second shortage. However, there is no evidence to indicate that the second shortage did in fact result from the allegedly insufficient safeguards in the Agent Cashier's office, or lthat the shortage would not have occurred if the Veterans Administration had installed the recommended safety features earlier. Moreover, the Assistant Chief, Supply Service, at the Hospital stated at the time the first shortage occurred that the procedures then being utilized were effective as well as efficient, although he did recommend the above-mentioned improvements. Even if the Veterans Administration could be considered to be negligent in not having a pass- through drawer in place at the time of lthe loss in question, there is no basis for concluding that Mr. Utley himself was not negligent. In fact, once Mr.

Utley was on notice, as a result of the first loss and the recommendations for safeguards, that a risk of theft existed without the pass-through drawer, he could be expected to exercise a higher degree of care than before.

Your constituent, Ms Rae, poses several additional questions. Ms. Rae asks how the General Accounting Office (GAO) can assume an accountable officer is negligent when no criminal charges are lodged against him and there is no evidence of how a shortage in his accounts occurred. The rules we apply derive from principles of law confirmed by the Supreme Court. The Court has held that an accountable officer of the Government is an insurer of the public funds in his custody and is excusable only for loss due to acts of God or the public enemy. United States v. Thomas, 15 Wall 337 (1872). This liability is unaffected by lack of negligence on the part of the accountable officer, or the absence of evidence that he misappropriated the funds or that the loss resulted from his fault. United States v. Prescott, 3 How. 578 (1845); Smythe v. United States, 188 U.S. 156 (1903); 18 Comp. Gen. 639 (1939) and cases cited therein; 48 Comp. Gen. 566 (1969).

However, relief of accountable officers is authorized under the provisions of 31 U.S.C. Sec. 82a-1 (1970) if:

(a) it is determined by the head of the department or independent establishment concerned--

(1) that the loss or deficeincy occurred while the officer was acting in the discharge of his official duties, or that it occurred by reason of the act or omission of a subordinate of the officer or agent; and

(2) that the loss or deficiency occurred without fault or negligence on the part of the officer; and

(b) the determinations by the department head are concurred in by the General Accounting Office.

Our Office has repeatedly held that when money disappears for an unexplained reason, the disappearance itself is sufficient to raise an inference or presumption of negligence. Relief cannot be granted under the relief statute unless the presumption is rebutted, and the accountable offecer must make good the loss. A Government employee charged with the handling of public money is expected to exercise the highest degree of care in the pervormance of his duty, and when funds disappear without evident reason, the presumption arises that the responsible officer was derelict in some way. The evidence required to overcome the presumption must be specific, complete, and convincing. It is not enough to point to a previously unblemished record or to blame the lack of mechanical safeguards as likely of facilitate a theft. There must be concrete evidence that a theft did in fact take place, that the cashier was not implicated, and that no negligent act or omission of the cashier enabled the theft to take place.

Our office and the courts have consistently held that the accountable officer was liable until he sustained the burden of prooving lack of negligence. 54 Comp. Gen. 112 (1974); 48 Comp. Gen. 566, supra, and cases cited therein. In Boggs v. United States, 44 Ct. Cl. 367 (1909), the Court of Claims stated on pgs 383 and 384;

It is, we think, a sound propositi9on 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 offecers from the rigors of lthe law and the consequent judgement of courts of law, by allowing them to go into a court of equity, and, by establishing the fact that 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 1886, which did not lessen the legal liability of disbursing officers, nor give them gernerally 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 ony 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 cannot 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 has sustained the loss."

Following the guidance provided by the court, we hold that until the burden of proof has been sustained, this Office has no authority to grant relief to an accountable officer.

Ms. Rae also questions how GAO can demand restitution from an accountable officer when a grand jury has considered the incident and has failed to return an indictment against the accountable officer.

The functions of a grand jury and GAO in matters of this kind are very different. As a general rule the proceedings of a grand jury pertain exclusively to the investigation of crimes. It is the function of a grand jury, in its proceedings, to ascertain whether prima facia grounds for a criminal prosecution have been made out, sufficient to warrant a trial by a petit jury. Ordinarily, unless authorized by statute, a grand jury cannot extend its investigation to matters not of a criminal nature. 38 C.J.S. Grand Juries Sec. 34, 37 (1943).

GAO is concerned with the civil liability of an accountable officer in cases where there are unexplained shortages. As discussed above, civil liability attaches as soon as public funds are lost, unless the loss is due to acts of God or a public enemy, and the accountable officer may not be relieved of lthis liability unless he proves the loss was not due to his negligence.

The bases of the determinations of criminal and civil liability are diferentr as are the burdens of proof. There is, in sum, no inconsistency between a grand jury vote not to indict for a criminal offense and a finding of negligence,

i.e., of failure to exercise the degree jof care required under the circumstances or to follow applicable regulations. Indeed, even an acquittal in a criminal trial would not be inconsistent with a finding of negiligence.

Ms. Rae also asked why accountable officers are not bonded, if they are subject to this liability. The Act of June 6, 1972, Pub. L. No. 92-310, 86 Stat. 210, codified in pertinent part at 31 U.S.C. Sec. 1201-1204 (Supp. V, 1975), eliminated all requirements for--in fact, prohibits-- Federal agencies from obtaining surety bonds for Federal civilian and military personnel.

House Report No. 92-932, 92d Congress, 2d session, dated March 20, 1972, entitled "Elimination of Surety Bonds for Federal Personnel," contains comments by GAO on lthe procedures which are used in recovering losses from a cashier and makes it clear that surety bonds on Federal personnel were purchased to protect the Government, not the employee. When the Congress determined that it would be less expensive for the Government to bear the risk of uncollectible losses, it enacted Pub. L. No 92-310 and made the Federal Government a self-insurer.

The elimination of the requirement for boding of accountable officers has not changed their basic liability. While section 101(a) of Pub. L. No. 92-310, 31 U.S.C. Sec. 1201(a), 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. Sec. 1201(b), also provides that:

"The personal financial liability to the Federal Government of such employees ans personnel shall not be affected by reason of subsection (a) of this section."

Therefore, it is the express intent of the act that the elimination of fidelity or surety bonds not diminish the basic liability of accoutable officers. In any event, bonding, even when it was authorized, did not protect the bonded employee personally. A bonding company which had to make good a loss to the Government would be entitled to proceed against the bonded employee to recover from him the amount paid.

Please let us know if we may be of fruther assistance. We are returning the enclosure to your letter as requested.

Sincerely yours,

R. F. Keller Comptroller General of the United States