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B-188894 September 29, 1974

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Michael H. Barkow, Esquire Associate General Counsel ACTION Washington, D.C. 20525

Dear Mr. Barkow:

You have requested our opinion on several questions arising under the facts discussed below.

According to your letter, during July and August of 1973, Peace Corps/Washington Overseas Administrative Support Team discovered indications that the collectin of monies by the Peace Corps administrative officer in Kinshasa, Zaire, and their subsequent transmittal to the United States Embassy cashier for deposit in the United States Disbursing Officer's account, for credit to the Peace Corps, were not being handled properly. This led to a discussion with Elton Kin, Peace Corps Administrative officer, concerning the methods and procedures utilized in collecting and depositing funds for the Peace Corps.

It was learned that Mr. King placed the money in a sealed envelope and dispatched it to an Embassy accountant, Charles Muhelo, for the preparation of a Form 459 and further transmittal to the cashier for deposit. Apparently, it was customary for Peace Corps administrative officers to deal directly with Mr. Muhelo, who had a reputation of being highly trustworthy, even though the regulations required that sums transmitted to the Embassy be deposited with the Embassy cashier.

An investigation reveled that $4,744.41 (2324.72 Zaires) has been transmitted by mr. King to Mr. Muhelo, on various occasions, using the method described. It was also learned that Mr. Muhelo had signed for the money on at least two of the occasions but did not deposit it. In fact, Mr. Muhelo admitted that he "mixed U.S. funds with his own" referring to the above two occasions. He stated that he would repay all losses, while not admitting guilt, "to protect his reputation."

In July, 1973, Mr. King described the method he used to collect and transmitted funds to the Embassy for deposit. He admitted that he failed to follow proper procedures and demand receipts for the money transmitted to Mr. Muhelo. Nevertheless, he stressed that he believed that mr. Muhelo was, in fact, the proper Embassy person with whom to deal.

ACTION has been able to collect $1,083 (530 Zaires), which represents Mr. Muhelo's final pay and allowances. You indicate that additional payment by mr. Muhelo will not be forthcoming. Hence, your letter in effect poses the following

questions:

(1) Under the facts of this cases, was Elton king, Peace Corps Administrative Officer, an accountable officer within the meaning of 31 U.S.C. Sec. 82a-1 (1970)? If so, must his conduct he heald to bar his relief from liability for the losses in question?

(2) Is the Federal Government required to institute collection action against an employee who may be "secondarily responsible" for a loss when it is unable to obtain reimbursement from the individual who is adjudge "primarily responsible"?

31 U.S.C. Sec. 82a-1 (1970) provides in pertinent part:

"The General Accounting Office is authorized, after consideration of the pertinent findings and if in concurrence with the determinations and recommendations of the head of the department or independent establishment concerned, to relieve any disbursing or other accountable officer or agent or former disbursing or other accountable officer or agent of any such department or independent establishment of the Government charged with responsibility on account of physical loss or deficiency of Government funds, vouchers, records, checks, securities, or papers in his charge, or to authorize the reimbursement, from any appropriation of fund available for purposes of the activity in which the loss or deficiency occurred, of amounts unpaid subsequent to August 1, 1947, by or on behalf of the officer or agent in restitution of the loss or deficiency, if the head of the department of independent establishment determines (1) that such loss or deficiency occurred while such officer or agent was acting in the discharge of his official duties, or that such loss or deficiency offucrred by reason of the act or omission of a subordinate of such officer or agent; and (2) that such loss or deficiency occurred without fault or negligence on the part of such officer or agent. * * *"

An "accountable officer" is generally considered to be any Government officer or employee, Civilian or military, who by reason of his employment is responsible for, or has custody of, Government funds. See, e.g., B- 155149, October 21, 1964; B-151196, December 30, 1963; B-144467, December 19, 1960. Such an officer is personnaly liable to the Government for any losses the Government may incur due to the officer's actions or failure to act, unless and until relief is granted or the loss is made up. Moreover, an officer who receives or collects money for the Government is accountable to the Government for all money collected. It is clear from the record that Mr. King collected payments on behalf of the Government in the course of his official duties. Accordingly, as you appear to recognize, Mr. King is an accountable officer with the meaning of 31 U.S.C. Sec. 82a-1.

Under the terms of 31 U.S.C. Sec. 82a-1, an accountable officer may be relieved of liability for a deficiency of Government funds, provided that the head of the Government agency concerned determinies that the (1) loss or deficiency occurred while the officer was acting in the discharge of his official duties or by reason of the act of omission of a subordinate of such officer, and that (2) the loss or deficiency occurred without fault or negligence on the part of the officer, and provided further that the General Accounting Office concurs in these determinations.

There has not been any determination by the Director of ACTION that Mr. King was without any fault. Absent such a finding, this Office may not formally consider

or grant relief under section 82a-1, However, it seems clear from the facts as presented that had Mr. King followed the pertinent regulations, the money would not have been lost in this manner. We have held that failure to follow specific official instructions constitutes negligence. See 54 Comp. Gen. 112, 116 91974). Hence, Mr. King's negligence is failing to follow his specific instructions was the proximate cause of the loss. Since the statute states that in order for relief to granted "such loss or deficiency" must have "occurred without fault or negligence on the part of such officer or agent, " we would be unable to concur in a finding that Mr. King was without fault, had such a finding been made. Therefore, if relief were requested on the present record, we could not concur.

Your letter states that Mr. King's "negligence arose not out of his handling the funds while in his custody, but rather from the manner in which he relieved himself of that custody." However, this distinction does not, in our view, affect his liablility. Clearly Mr. King's responsibility and accountability for the funds in his custody extends to making a proper disposition thereof. He cannot divest himself of accountability by turning over the funds, in violation of the applicable instructions, to person not authorized to receive them. Thus, in response to your first question, Mr. King was and remains accountable for the loss; and there appears to be no basis to grant him relief.

Your second question suggests that Mr. Muhelo was "primarily responsibility for the loss and that Mr. King was only "secondarily responsible." While Mr. Muhelo would also be liable for restitution of the funds, this does not detract from Mr. King's accountability and personal liability for the loss in his capacity as the accountable officer. Any amounts collected from Mr. Muhelo would, of course, serve to reduce the loss and thus the amount of Mr. King's liability as the accountable officer. However, Mr. King remains liable to the extent that collection from Muhelo cannot be effected.

Sincerely yours,

PAUL G. DEMBLING General Counsel