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B-202074, Jul 21, 1983, Office of General Counsel

Number: B-202074

Date: 1983-07-21

B-202074, JUL 21, 1983, OFFICE OF GENERAL COUNSEL

MR. JOHN F. WALLACE, DEPUTY FOR MANAGEMENT SYSTEMS OASA (IL&FM) DEPARTMENT OF THE ARMY:

THIS RESPONDS TO YOUR REQUEST FOR RELIEF FROM LIABILITY IN THE AMOUNT OF $300 ON BEHALF OF LT. COL. J.P. GRIFFEY, DISBURSING OFFICER, U. S. ARMY TRAINING CENTER AND FORT DIX, NEW JERSEY. YOU ALSO ASKED THAT WE CONSIDER WHETHER THIS AND SIMILAR CASES SHOULD BE TREATED AS IMPROPER PAYMENTS OR AS PHYSICAL LOSSES. AS WILL BE DISCUSSED BELOW, WHILE RELIEF IN THIS PARTICULAR CASE IS NO LONGER NECESSARY, THE CASE MUST BE REGARDED AS AN IMPROPER PAYMENT AND NOT A PHYSICAL LOSS.

ON NOVEMBER 6, 1979, PRIVATE MARK A. LASECKI PRESENTED A MILITARY PAY VOUCHER (DA FORM 2139) TO SP5 KEVIN CHARBONEAU, CASHIER TO LT. COL. GRIFFEY AT THE FORT DIX FINANCE AND ACCOUNTING OFFICE, AND WAS PAID. THE VOUCHER REPRESENTED PRIVATE LASECKI'S FINAL PAY SETTLEMENT INCIDENT TO HIS DISCHARGE FROM THE ARMY. ON NOVEMBER 27, IT WAS DISCOVERED THAT THE VOUCHER HAD BEEN FRAUDULENTLY ALTERED FROM $167.66 TO $467.66. SINCE THE APPLICABLE STATUTE OF LIMITATIONS HAS EXPIRED, IT IS NO LONGER NECESSARY FOR US TO RELIEVE EITHER LT. COL. GRIFFEY OR SP5 CHARBONEAU. 31 U.S.C. SEC. 3526(C) (FORMERLY 31 U.S.C. SEC. 82I); B-198451.2, SEPTEMBER 15, 1982.

THE INDIVIDUAL RELIEF REQUEST IS A MATTER OF SECONDARY IMPORTANCE IN THIS CASE, HOWEVER. MORE SIGNIFICANT IS THE THRESHOLD QUESTION OF THE PROPER RELIEF STATUTE TO APPLY. YOUR SUBMISSION INCLUDED A MEMORANDUM FROM THE ARMY FINANCE AND ACCOUNTING CENTER (USAFAC) ARGUING THAT THE CASE SHOULD BE TREATED AS A "PHYSICAL LOSS OR DEFICIENCY." IF THE CASE IS VIEWED AS A PHYSICAL LOSS, RELIEF WOULD BE GOVERNED BY 31 U.S.C. SEC. 3527(B) (FORMERLY 31 U.S.C. SEC. 95A). UNDER THIS PROVISION, APPLICABLE ONLY TO THE MILITARY DEPARTMENTS, RELIEF IS MANDATORY IF THE AGENCY DETERMINES THAT THE DISBURSING OFFICER WAS ACTING IN THE LINE OF DUTY AND WAS FREE FROM CONTRIBUTING FAULT OR NEGLIGENCE. THERE IS NO NEED TO SEND INDIVIDUAL RELIEF REQUESTS TO THE GENERAL ACCOUNTING OFFICE (GAO), REGARDLESS OF THE AMOUNT OF THE LOSS. B-198451, FEBRUARY 5, 1981 (CIRCULAR LETTER).

IF, HOWEVER, THE CASE IS VIEWED AS AN ILLEGAL OR IMPROPER PAYMENT, RELIEF IS GOVERNED BY 31 U.S.C. SEC. 3527(C) (FORMERLY 31 U.S.C. SEC. 82A-2), UNDER WHICH RELIEF MAY BE GRANTED ONLY IF GAO FINDS THAT THE PAYMENT WAS NOT THE RESULT OF BAD FAITH OR LACK OF DUE CARE ON THE PART OF THE DISBURSING OFFICER. IN ADDITION, WE CAN DENY RELIEF UNDER SEC. 3527(C) IF WE DETERMINE THAT THE AGENCY HAS NOT DILIGENTLY PURSUED COLLECTION ACTION AGAINST THE RECIPIENT OF THE IMPROPER PAYMENT.

THE LOSS IN THIS CASE OCCURRED WHEN THE DISBURSING OFFICER'S SUBORDINATE, ON THE BASIS OF A FRAUDULENTLY ALTERED VOUCHER, PAID OUT PUBLIC FUNDS TO MR. LASECKI IN EXCESS OF THE AMOUNT MR. LASECKI WAS LAWFULLY ENTITLED TO RECEIVE. USAFAC ARGUES THAT THE LEGISLATIVE HISTORY OF 31 U.S.C. SEC. 3527(C) DEMONSTRATES THAT A LOSS OF THIS TYPE SHOULD BE TREATED AS A PHYSICAL LOSS. APPLYING THE PLAIN MEANING OF THE STATUTORY TERMS, IT SEEMS CLEAR TO US THAT THIS IS NOT A PHYSICAL LOSS OR DEFICIENCY, BUT RATHER IS A LOSS RESULTING FROM AN "ILLEGAL, IMPROPER, OR INCORRECT PAYMENT." AS WILL BE DISCUSSED IN MORE DETAIL BELOW, WE THINK USAFAC HAS APPLIED EXCERPTS FROM THE LEGISLATIVE HISTORY OUT OF CONTEXT. A REVIEW OF THE EVOLUTION OF THE TWO RELIEF STATUTES MAKES THIS CLEAR.

THE FIRST PERMANENT STATUTE TO AUTHORIZE RELIEF OF MILITARY DISBURSING OFFICERS WAS THE ACT OF JULY 11, 1919, CH. 9, 41 STAT. 132, DEALING WITH THE NAVY. BECAUSE THIS STATUTE IS THE ORIGIN OF THE PRESENT-DAY 31 U.S.C. SEC. 3527(B), WE QUOTE IT BELOW:

"THE ACCOUNTING OFFICERS OF THE TREASURY SHALL RELIEVE ANY DISBURSING OFFICER OF THE NAVY CHARGED WITH RESPONSIBILITY ON ACCOUNT OF LOSS OR DEFICIENCY WHILE IN THE LINE OF HIS DUTY, OF GOVERNMENT FUNDS, VOUCHERS, RECORDS, OR PAPERS, IN HIS CHARGE, WHERE SUCH LOSS OR DEFICIENCY OCCURRED WITHOUT FAULT OR NEGLIGENCE ON THE PART OF SAID OFFICER: PROVIDED, THAT THE SECRETARY OF THE NAVY SHALL HAVE DETERMINED THAT THE OFFICER WAS IN THE LINE OF HIS DUTY, AND THE LOSS OR DEFICIENCY OCCURRED WITHOUT FAULT OR NEGLIGENCE ON HIS PART: PROVIDED FURTHER, THAT THE DETERMINATION BY THE SECRETARY OF THE NAVY OF THE AFORESAID QUESTIONS SHALL BE CONCLUSIVE UPON THE ACCOUNTING OFFICERS OF THE TREASURY."

UNTIL ITS REPEAL IN 1955, THE 1919 STATUTE WAS CODIFIED AS 31 U.S.C. SEC. 105 (SEE 1952 ED.), WITH THE NECESSARY TECHNICAL AMENDMENT TO REFLECT THE 1921 CREATION OF GAO.

THIS OFFICE INTERPRETED AND APPLIED THE 1919 STATUTE IN AN EARLY DECISION WHICH IS STILL RELEVANT TODAY, 2 COMP.GEN. 277 (1922). IN THAT CASE, AN EMPLOYEE OF THE PEARL HARBOR NAVAL STATION CAUSED A FICTITIOUS INDIVIDUAL TO BE CARRIED ON THE STATION PAYROLL. HE THUS DREW TWO SALARIES, ONE FOR HIMSELF AND ONE FOR THE NON-EXISTENT PERSON HE HAD FRAUDULENTLY CREATED. THE SECRETARY OF THE NAVY ISSUED A "CERTIFICATE OF RELIEF" ON BEHALF OF THE DISBURSING OFFICER AND SUBMITTED IT TO GAO FOR CONCURRENCE. WE DENIED RELIEF, HOWEVER, HOLDING THAT THE STATUTE DID NOT APPLY. OUR DECISION STATED:

"IF THE PROPER FACTS APPEAR, NO QUESTION ARISES AS TO THE GIVING OF THE CERTIFICATE. IF THE FACTS SHOW THERE IS NO QUESTION OF 'LOSS OR DEFICIENCY' OF FUNDS, VOUCHERS, RECORDS, OR PAPERS, BUT THE QUESTION IS THE LAWFULNESS OF A PAYMENT MADE, THE GIVING OF THE CERTIFICATE IS CONCLUSIVE ON NONE AND CAN NOT BE ACTED UPON BY THIS OFFICE. IN THE PRESENT MATTER THERE WAS NO LOSS OF FUNDS, NO DEFICIENCY IN THE VOUCHERS, RECORDS, OR PAPERS. IT WAS SIMPLY AN UNLAWFUL PAYMENT - SUCH A PAYMENT AS IT IS INHERENTLY THE DUTY OF THE ACCOUNTING OFFICERS TO ACT UPON." ID., AT 378.

AFTER WE ISSUED OUR DECISION AT 2 COMP.GEN. 277, THE SECRETARY OF THE NAVY OBTAINED A CONTRARY OPINION FROM THE ATTORNEY GENERAL, TO THE EFFECT THAT "LOSS OR DEFICIENCY" AS USED IN THE 1919 STATUTE INCLUDED ILLEGAL PAYMENTS. WE DISAGREED, HOWEVER, AND REAFFIRMED OUR EARLIER POSITION IN A MORE EXTENSIVE DECISION, 7 COMP.GEN. 374 (1927).

THE DESIRABILITY OF PERMANENT LEGISLATION TO EXTEND THE RELIEF AUTHORITY OF THE

1919 STATUTE TO THE ARMY SOON BECAME APPARENT. ALTHOUGH IT WAS NOT BE BE ENACTED UNTIL 1944, BILLS WERE INTRODUCED ON SEVERAL OCCASIONS IN THE INTERVENING YEARS. ONE SUCH INSTANCE WAS S.2046, 73D CONGRESS. THE BILL HAD BEEN RECOMMENDED BY THE WAR DEPARTMENT AND WAS FAVORABLY REPORTED BY THE HOUSE COMMITTEE ON MILITARY AFFAIRS. H.R. REP. NO. 1411, 73D CONG., 2D SESS. (1934). A FEW WEEKS AFTER ISSUING ITS REPORT, THE COMMITTEE ISSUED A SUPPLEMENTAL REPORT TO AMEND THE BILL TO EXPRESSLY EXCLUDE "ILLEGAL OR ERRONEOUS PAYMENTS" FROM THE RELIEF AUTHORITY. H.R. REP. NO. 1411, PART 2, 73D CONG., 2D SESS. (1934). THE SUPPLEMENTAL REPORT INCLUDED DETAILED ACCOUNTS OF THE DISAGREEMENT BETWEEN GAO AND THE WAR AND NAVY DEPARTMENTS UNDER THE 1919 STATUTE AND, ON THE FIRST PAGE, STATED:

"THIS BILL CONCERNS A MATTER OF DEPARTMENT ACCOUNTING WHEREIN THE VIEWS OF THE COMPTROLLER GENERAL AND THE WAR DEPARTMENT ARE NOT IN ACCORD. YOUR COMMITTEE IS OF THE OPINION THAT THE POSITION TAKEN BY THE COMPTROLLER GENERAL IS THE CORRECT POSITION."

EFFORTS TO OBTAIN PERMANENT RELIEF AUTHORITY FOR ARMY DISBURSING OFFICERS INTENSIFIED DURING WORLD WAR II. FOR EXAMPLE, LEGISLATION WAS CONSIDERED IN THE 77TH CONGRESS (S.2722). AS REPORTED BY THE HOUSE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, THE LAST PROVISO OF THE BILL EXPRESSLY EXCLUDED ILLEGAL OR ERRONEOUS PAYMENTS. THE REASON FOR THE EXCLUSION WAS SET FORTH IN A SEPTEMBER 16, 1942 LETTER FROM THE COMPTROLLER GENERAL TO THE COMMITTEE. THE LETTER, PRINTED IN THE COMMITTEE'S REPORT, OUTLINED THE DISPUTE OVER THE SCOPE OF THE 1919 STATUTE AND THEN STATED:

"IN VIEW OF THIS BACKGROUND OF CONFLICTING OPINION BETWEEN THE ACCOUNTING OFFICERS OF THE GOVERNMENT AND THE ADMINISTRATIVE BRANCH, *** IT SEEMED EVIDENT THAT ENACTMENT OF AN ACT FOR RELIEF OF ARMY DISBURSING OFFICERS IN LANGUAGE IDENTICAL TO THAT OF THE NAVY ACT OF JULY 11, 1919; WOULD PROBABLY RESULT IN SIMILAR CONFLICT ***. THEREFORE, WHEN THE DRAFT OF THE ORIGINAL PROPOSAL OF THE WAR DEPARTMENT WAS CALLED TO OUR ATTENTION, THIS OFFICE SUGGESTED THE LANGUAGE NOW APPEARING AS THE LAST PROVISO OF S.2722 IN ORDER THAT THERE MAY BE NO FURTHER QUESTION AS TO THE LIMITED SCOPE AND EFFECT THEREOF." H.R. REP. NO. 2478, 77TH CONG., 2D SESS. 3-4 (1942).

THE ARMY DISBURSING OFFICER LEGISLATION WAS ENACTED ON DECEMBER 13, 1944, 58 STAT. 800, AND CODIFIED AS 31 U.S.C. SEC. 95A (SEE 1952 ED.). THE ENACTED VERSION, AS WITH THE VARIOUS BILLS THAT HAD BEEN CONSIDERED BUT NOT ENACTED IN PRIOR YEARS, WAS PATTERNED AFTER THE 1919 NAVY STATUTE, BUT CONTAINED THE EXPLICIT EXCLUSION FOR LOSSES RESULTING FROM ILLEGAL OR ERRONEOUS PAYMENTS. SEE H.R.REP. NO. 1932 (TO ACCOMPANY S.218), 78TH CONG., 2D SESS. (1944).

THE NEXT STEP IN THIS LEGISLATIVE EVOLUTION WAS THE ENACTMENT OF PUBLIC LAW 84-365 ON AUGUST 11, 1955, 69 STAT. 687. FOR PURPOSES OF THIS DISCUSSION, PUBLIC LAW 84-365 DID TWO THINGS: (1) IT EXPANDED THE EXISTING 31 U.S.C. SEC. 95A TO COVER ALL OF THE MILITARY DEPARTMENTS (AND CORRESPONDINGLY REPEALED THE NOW UNNECESSARY 1919 NAVY STATUTE), AND (2) IT AUTHORIZED GAO TO RELIEVE DISBURSING OFFICERS OF THE MILITARY DEPARTMENTS AND THE CIVILIAN AGENCIES FROM LIABILITY FOR LOSSES RESULTING FROM ILLEGAL, IMPROPER, OR INCORRECT PAYMENTS. THE LATTER PROVISION WAS CODIFIED AS 31 U.S.C. SEC. 82A-2. THE FINAL STEP IN THE PROCESS WAS THE RECODIFICATION OF TITLE 31 ON SEPTEMBER 13, 1982 (PUB.L. NO. 97-258, 96 STAT. 877). AS NOTED PREVIOUSLY, 31 U.S.C. SEC. 95A BECAME 31 U.S.C. SEC. 3527(B), AND SEC. 82A-2 BECAME SEC. 3527(C) AND (D).

WITH RESPECT TO THE 1955 REVISION OF THE OLD 31 U.S.C. SEC. 95A, THE LEGISLATIVE

HISTORY OF PUB.L. NO. 84-365 SHOWS THAT IT WAS INTENDED TO CONSOLIDATE THE 1944 VERSION OF SEC. 95A WITH THE 1919 NAVY STATUTE, AND TO MAKE THE AUTHORITY APPLICABLE TO ALL MILITARY DEPARTMENTS. H.R.REP. NO. 966, 84TH CONG., 1ST SESS. 2 (1955); S.REP. NO. 1185, 84TH CONG., 1ST SESS. 3 (1955). THERE IS NO INDICATION OF ANY INTENT TO ALTER THE EXISTING CONCEPTS OF PHYSICAL LOSS OR IMPROPER PAYMENT. ON THE CONTRARY, PUB.L. NO. 84-365 RETAINED THE PROVISION IN THE 1944 VERSION OF SEC. 95A EXPRESSLY EXCLUDING LOSSES RESULTING FROM ILLEGAL OR ERRONEOUS PAYMENTS. IN VIEW OF THE HISTORY OF THIS PIECE OF LEGISLATION, AS DISCUSSED ABOVE, WE THINK 31 U.S.C. SEC. 3527(B) INCORPORATES OUR INTERPRETATIONS AS SET FORTH IN 2 COMP.GEN. 277 AND 7 COMP.GEN. 374 JUST AS CLEARLY AS IF THE STATUTE ACTUALLY CITED THOSE DECISIONS.

AS NOTED, PUBLIC LAW 84-365 ALSO ENACTED WHAT IS NOW 31 U.S.C. SEC. 3527(C). TWO EXCERPTS FROM THE LEGISLATIVE HISTORY SHOULD BE NOTED:

"YOUR COMMITTEE WISHES TO STRESS THAT THE AUTHORITY BEING GRANTED *** TO THE COMPTROLLER GENERAL IS PURELY PERMISSIVE AND IS TO BE EXERCISED AT HIS DISCRETION. THE AUTHORITY BEING GRANTED IS NOT INTENDED TO EXCUSE CASES WHICH INVOLVE FRAUD OR NEGLIGENCE IN ANY WAY. 'ILLEGAL' OR 'IMPROPER' PAYMENT WITHIN THE SENSE OF THIS LEGISLATION IS ONE WHICH THE COMPTROLLER GENERAL FINDS IS NOT IN STRICT TECHNICAL CONFORMITY WITH THE REQUIREMENTS OF LAW APART FROM ANY QUESTION OF FRAUD OR NEGLIGENCE. IN EFFECT THIS LEGISLATION WOULD PERMIT THE COMPTROLLER GENERAL TO PROVIDE RELIEF WITHOUT RESORTING TO PRIVATE RELIEF BILLS WHERE PAYMENTS ARE MADE WHICH ARE NOT IN ACCORDANCE WITH ADMINISTRATIVE REGULATIONS PRESCRIBED BY THE COMPTROLLER GENERAL OF THE UNITED STATES IN INTERPRETING STATUTORY LAW." H.R.REP. NO. 996, SUPRA, AT 3.

"IT SHOULD BE NOTED THAT THE TERMS 'ILLEGAL' AND 'IMPROPER' AS HERE USED DO NOT IMPLY FRAUDULENT OR WRONGFUL CONDUCT, BUT REFER TO A PAYMENT WHICH THE COMPTROLLER GENERAL FINDS IS NOT IN STRICT TECHNICAL CONFORMITY WITH THE LAW."

S.REP. NO. 1185, SUPRA, AT 2. IT IS THESE TWO PASSAGES WHICH USAFAC INTERPRETS AS MEANING THAT ALL CASES INVOLVING FRAUDULENT OR WRONGFUL CONDUCT ARE TO BE TREATED AS PHYSICAL LOSSES, WITH THE IMPROPER PAYMENT STATUTE LIMITED TO PAYMENTS RESULTING FROM MISUNDERSTANDING OR MISINTERPRETATION OF APPLICABLE STATUTES OR REGULATIONS. THIS READING IGNORES THE PRIOR DEVELOPMENT OF THE LAW, STARTING WITH THE DISPUTE OVER THE SCOPE OF THE ORIGINAL NAVY RELIEF PROVISION OF 1919. WE BELIEVE THAT THE LEGISLATIVE HISTORY SUMMARIZED ABOVE DEMONSTRATES THE CLEAR CONGRESSIONAL ACCEPTANCE OF THE POSITIONS EXPRESSED IN OUR EARLY DECISIONS. THE 1955 LEGISLATION MUST BE INTERPRETED IN THIS CONTEXT, ESPECIALLY SINCE THE NEW RELIEF AUTHORITY FOR IMPROPER PAYMENTS AND THE REVISION OF THE MILITARY DISBURSING OFFICER STATUTE WERE PART OF THE SAME BILL. THE PASSAGES QUOTED ABOVE DO NOT MEAN THAT PAYMENTS RESULTING FROM FRAUD SHOULD NO LONGER BE TREATED AS IMPROPER PAYMENTS. THEY SIMPLY EXPRESS THE CONGRESSIONAL EXPECTATION THAT GAO WOULD NOT USE THIS AUTHORITY TO RELIEVE DISBURSING OFFICERS WHO WERE THEMSELVES GUILTY OF FRAUD OR NEGLIGENCE. WE RECOGNIZE, AS YOUR SUBMISSION POINTS OUT, THAT WE HAVE DRAWN A DISTINCTION IN THE PAST BETWEEN FRAUD BY SUBORDINATE FINANCE PERSONNEL, WHICH MAY BE TREATED AS A PHYSICAL LOSS, AND FRAUD BY OTHERS, WHICH WE VIEW AS AN IMPROPER PAYMENT. SEE GAO'S "PRINCIPLES OF FEDERAL APPROPRIATIONS LAW" (1ST ED. 1982), PAGES 10-36 AND 10-43. WHILE THE REASONS FOR THIS DISTINCTION MAY BE OPEN TO SOME DEBATE, IT AFFORDS NO BASIS TO ALTER ANYTHING WE HAVE SAID IN THIS LETTER WITH RESPECT TO FRAUD BY NON-FINANCE PERSONNEL, AND IN ANY EVENT WE SEE NO NEED TO DISTURB THAT DISTINCTION HERE.

IN SUM, "PHYSICAL LOSS OR DEFICIENCY" INCLUDES SUCH THINGS AS LOSS BY THEFT OR

BURGLARY, LOSS IN SHIPMENT, AND LOSS OR DESTRUCTION BY FIRE, ACCIDENT, OR NATURAL DISASTER. IT ALSO INCLUDES THE TOTALLY UNEXPLAINED LOSS, THAT IS, A SHORTAGE OR DEFICIENCY WITH ABSOLUTELY NO EVIDENCE TO EXPLAIN THE DISAPPEARANCE. E.G., 48 COMP.GEN. 566 (1969). FINALLY, AS NOTED ABOVE, LOSSES RESULTING FROM FRAUD OR EMBEZZLEMENT BY SUBORDINATE FINANCE PERSONNEL MAY CONTINUE TO BE TREATED AS PHYSICAL LOSSES. WITH THIS EXCEPTION, HOWEVER, THE DISBURSEMENT OF PUBLIC FUNDS BY A DISBURSING OFFICER OR HIS SUBORDINATE IS A PAYMENT, AND IF IT IS ILLEGAL OR ERRONEOUS, THE PROPER RELIEF STATUTE IS 31 U.S.C. SEC. 3527(C).

AS A FINAL NOTE, TWO ASPECTS OF THIS CASE WARRANT FURTHER COMMENT. FIRST, RELIEF SHOULD HAVE BEEN REQUESTED FOR BOTH LT. COL. GRIFFEY, THE DISBURSING OFFICER, AND SP5 CHARBONEAU, THE INDIVIDUAL WHO ACTUALLY MADE THE PAYMENT. 62 COMP.GEN. (B-211440 ET AL., JUNE 20, 1983). SECOND, THE RECORD INCLUDES A HANDWRITTEN NOTE BY MR. LASECKI INDICATING A WILLINGNESS TO REPAY THE OVERPAYMENT, BUT DOES NOT DOCUMENT THE ARMY'S COLLECTION EFFORTS. FUTURE RELIEF REQUESTS SHOULD INCLUDE SUCH DOCUMENTATION, WHICH WILL BE A SIGNIFICANT ELEMENT IN OUR REVIEW. 31 U.S.C. SEC. 3527(C); 62 COMP.GEN. (B-211440, SUPRA); 62 COMP.GEN. 91 (1982).