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B-217114.7, May 6, 1991, 70 Comp.Gen. 463

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APPROPRIATIONS/FINANCIAL - Accountable Officers - Liability - Debt collection - Amount determination 1. Accountable officers should have their liability for improperly paying fraudulent travel subsistence expense claims determined on the basis of the actual fraudulent overpayments made. Accountable officers are strictly liable for losses of government funds under their control. Under the False Claims Act and the Program Fraud Civil Remedies Act, the government's loss for paying fraudulent subsistence claims is the amount overpaid due to the fraud. Accountable officers' liabilities also should be limited to those overpayments. Prior cases which included in the officer's liability non-fraudulent expenses claimed for the same day as fraudulent expenses are modified. 41 Comp.Gen. 285 (1961) and 57 Comp.Gen. 664 (1978) are modified in part. 65 Comp.Gen. 858 (1986); B-217114.3, Feb. 10, 1987; B-217114, Mar. 26, 1987; B-217114, Feb. 29, 1988; B-217114, Aug. 12, 1988; B-217114.5, June 8, 1990; B-217114.6, July 24, 1990, are modified. APPROPRIATIONS/FINANCIAL - Accountable Officers - Certifying officers - Relief - Illegal/improper payments - Overpayments 2. The False Claims Act and the Program Fraud Civil Remedies Act specify the government's rights to collect damages and penalties from employees who submit fraudulent travel expense claims. Agency actions to recoup fraudulent overpayments of subsistence expense claims from fraudulent payees should be taken in light of those Acts and other applicable statutes and regulations. Prior decisions advising agencies to recoup from fraudulent payees both the fraudulent overpayments and non-fraudulent subsistence expenses claimed for any day tainted by the fraudulent claim are overruled.

Determining The Amount of Accountable Officer Liability For Improperly Paying Fraudulent Travel Subsistence Expense Claims:

Mr. Paul F. Kane, an accountable officer within the U.S. Army Corps of Engineers, has asked for our opinion whether his liability for paying a fraudulent travel expense voucher should include the non fraudulent claims on the vouchers. Under our current "tainted day" rule, an accountable officer who pays a fraudulent claim for a per diem subsistence expense (i.e. lodging or meals) for a specific day is also liable for paying non- fraudulent per diem expenses claimed for that day.

Specifically, Mr. Kane has asked us to exclude the amounts covered under the "tainted day" rule from his liability for paying fraudulent travel expense vouchers which was fixed by our denial of relief in 65 Comp.Gen. 858 (1986). Mr. Kane also asked us to certify the amount of his liability to the Attorney General under the provisions of 5 U.S.C. Sec. 5512. Section 5512(b) provides that "the Attorney General, within sixty days, shall order suit to be commenced"

against Mr. Kane, affording him the opportunity for a judicial hearing on the issue of his liability.

For the reasons stated below, we conclude that accountable officers should not be held responsible for the non-fraudulent amounts covered under the "tainted day" rule. The officer's liability will be limited to the actual overpayments which occur when the government pays a fraudulent travel voucher.

BACKGROUND

As discussed in more detail in 65 Comp.Gen. 858, Mr. Kane was initially held liable for a number of erroneous payments made as a result of a long- running scheme of travel reimbursement fraud. The scheme was perpetrated by a number of employees at the Buffalo, New York District Office of the North Central Division, U.S. Army Corps of Engineers. Our decision addressed Mr. Kane's liability for $22,848.22 in payments made between October 19, 1981, and August 1982. /1/ We granted Mr. Kane relief for $7,515.72 in payments made before January 1, 1982, and denied him relief for $15,332.50 in payments made after that date. On June 8, 1990, we denied Mr. Kane's request for reconsideration of our decision.

Mr. Kane first questioned whether his liability should include amounts covered under the "tainted day" rule in a June 15, 1987, letter to this Office. In response to that letter, we stated that it would be premature to consider the question for two reasons. First, Mr. Kane had not yet submitted a request for reconsideration of our decision partially denying relief. Second, efforts were still being made to collect damages from the employees who received the erroneous payments. B-217114, Feb. 29, 1988. In light of our denial of Mr. Kane's request for reconsideration, B-217114.5, June 8, 1990, and his request that we certify the amount of his liability to the Attorney General, this issue is now ripe for consideration.

DISCUSSION

The "tainted day" rule states that a fraudulent claim for reimbursement for any part of a single day's subsistence expenses taints with fraud the entire day's claim for reimbursement of subsistence expenses. Comp.Gen. 99 (1979). We first articulated the rule in response to questions about the effect of 28 U.S.C. Sec. 2514 on government employee travel claims. Section 2514 provides:

"A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance thereof."

In 41 Comp.Gen. 285 (1961), we were asked to interpret how this section would apply to a voucher which included all of a military enlisted person's pay and allowances for a specific period, including some allowances (i.e. travel expense reimbursements) which were fraudulent. The Assistant Secretary of Defense (Comptroller) pointed out that if the "claim" in section 2514 were equated with the entire voucher, the enlisted member would lose his entitlement to any pay or allowance for the covered period. 41 Comp.Gen. at 287.

In our response, we agreed that "each separate item of pay and allowances is to be viewed as a separate claim. ..." Id. at 288. If fraud was suspected, these "items" were to be withheld and the claimant "should be left to his remedy in

the Court of Claims now the Claims Court." Id. This remedy then would include the analysis of whether the "item" withheld was forfeited under 28 U.S.C. Sec. 2514. Our subsequent cases further defined the "item" in the context of per diem expenses which we concluded should be withheld from payment. We concluded that the "items" which are fraudulently claimed are the per diem expenses applicable to a full day. 59 Comp.Gen 99 (1979); 57 Comp.Gen. 664 (1978). These are the amounts which are covered under our "tainted day" rule.

Although we acknowledged that section 2514 is not applicable to paid claims, we stated that an amount which has been paid, but which would have come under our "tainted day" rule, "is purely and simply an erroneous payment for recoupment as such." 41 Comp.Gen. at 287. We reached this view in order to fully serve the salutary purpose of section 2514. stated that an erroneously paid "item" (as we have defined that term) should be recouped, and the claimants should thereafter be limited to their recovery in the Claims Court. Id. at 288. Subsequently, we clarified this point by stating that "the recoupment for the improperly paid item should be made to the same extent and amount as the denial for an unpaid claim based on fraud." 57 Comp.Gen. 668 (1978).

We also applied these holdings to determine the liability of the accountable officer who made the erroneous payment. E.g., B-229274, Jan. 15, 1988; B-224832, July 2, 1987. Thus, we held accountable officers liable for amounts covered under the "tainted day" rule because we equated the amounts erroneously paid to fraudulent payees with the amounts which our cases state should be withheld from fraudulent claimants.

We now conclude, however, that we should not equate these amounts. As we acknowledged in 41 Comp.Gen. 285, the statutory basis for the "tainted day" rule, 28 U.S.C. Sec. 2514, does not apply to paid claims. The federal government's rights against fraudulent payees are generally governed by the False Claims Act, 31 U.S.C. Sec. 3729-3733, and the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. Sec. 3801 3812. /2/ Analyzing these statutes shows that the amount of a claim which is forfeited under 28 U.S.C. Sec. 2514 by committing a fraud is not the same as the amount which can be recovered from a fraudulent payee. The False Claims Act generally provides that a person who knowingly presents a false or fraudulent claim for payment "is liable to the United States Government for ... an amount equal to 2 times the amount of damages the Government sustains. ..." 31 U.S.C. Sec. 3729. The United States recovers these amounts in suits brought by either the Justice Department or private parties suing on behalf of the United States. 31 U.S.C. Sec. 3730. Our research has not revealed a case which has determined the extent of damages the United States suffers when its pays a fraudulent travel reimbursement claim. In U.S. v. Clay, 420 F.Supp. 853 (D.D.C. 1976), the court held that the False Claims Act applies to fraudulent travel reimbursement claims made by a congressman, but did not reach the issue of determining the amount of damages caused by paying fraudulently inflated claims. However, False Claims Act cases involving other types of fraudulent overpayments make clear that the damages from paying fraudulent travel expense claims is the amount overpaid, not the total amount claimed. "Ordinarily the measure of the government's damages would be the amount it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." U.S. v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966) (emphasis supplied). See also U.S. v. Country View Care Center, Inc., 797 F.2d 888 (10th Cir. 1986) (Damages were equal to overcharges paid on fraudulent Medicaid claims); U.S. v. Ehrlich, 643 F.2d 634 (9th Cir. 1981) (Damages were equal to inflated amount of HUD interest subsides paid to

claimant); and Annotation, Measure and Elements of Damages Under False Claims Act, 35 A.L.R. Fed. 805 (1977).

The difference between the forfeiture of an unpaid fraudulent claim under 28 U.S.C. Sec. 2514 and the more limited damages for a paid fraudulent claim under the False Claims Act is illustrated by two cases involving the same government program. In the case involving an unpaid fraudulent claim, Little v. United States, 152 F. Supp. 84 (Ct.Cl. 1957), a contractor sued to recover tuition and other payments under a Veterans Administration contract. The claimant had provided education and training to World War II veterans under a federal program. The United States filed a counterclaim under 28 U.S.C. Sec. 2514 asserting that the contractor had committed a fraud against the United States by submitting false and fraudulent vouchers for payment. However, the fraud did not involve the expenses which the contractor had sued to collect. The court held that the contractor's claim was forfeited, even though the fraud did not involve the claimed amounts. The court stated,

"... where, as in the present case, fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it."

152 F.Supp. at 87-88. Thus the court held that the fraud had tainted all claims made under the contract, regardless of whether those claims involved fraud themselves. The court did not specifically address the measure of damages caused by the fraud, other than to characterize those damages as "the amount overpaid the plaintiff." 152 F.Supp. 88.

In the case involving a paid fraudulent claim, First National Bank of Birmingham v. United States, 117 F. Supp. 486 (N.D. Ala. 1953), the court did reach the question of damages for the same sort of fraud. In that case, an assignee of a Veterans Administration contractor sued for payment on a contract similar to that in Little v. United States. The government filed a counterclaim alleging that the contractor had already been overpaid because of fraudulently inflated vouchers, and sought double damages and forfeitures under the False Claims Act. The court determined that the damages suffered from the fraud were the amounts overpaid to the contractor. 117 F.Supp. at 488.

These two cases show that courts do not treat fraudulent claimants and fraudulent payees the same. A fraudulent claimant who is not paid and who sues for collection in the Claims Court will, under 28 U.S.C. Sec. 2514, be denied recovery of amounts which would have been payable absent the fraud. This result is consistent with our "tainted day" rule as it has been applied to fraudulent unpaid subsistence expense claims. However, a fraudulent payee who is pursued under the False Claims Act will have to pay damages based upon the actual overpayment. The payees are not held responsible for any amounts which might have been forfeited under 28 U.S.C. Sec. 2514. This result is not consistent with our "tainted day" rule as it has been applied to recouping fraudulent payments and determining accountable officer liability. The conclusion that the treatment of unpaid fraudulent claims is different from the treatment of paid fraudulent claims is reinforced by the provisions of the Program Fraud Civil Remedies Act. That Act gives federal agencies the authority to administratively pursue remedies for false claims made against the government. The Act generally provides that a person who knowingly presents a false claim is liable for "an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim. ..." 31 U.S.C. Sec.

3802(a)(1). This assessment only applies to paid claims. 31 U.S.C. Sec. 3802(a)(3). The legislative history of the Act makes clear that the claim which is doubled by or pursuant to section 3802 is the amount which is fraudulently claimed and not any other amount which is also paid. S. Rep. 212, 99th Cong. 1st Sess. 18-19 (1985). /3/ In our opinion, an accountable officer who is jointly liable for fraudulent travel subsistence expense payments should similarly have his liability determined on the basis of the fraudulent overpayment, rather than amounts which could have been withheld under the "tainted day" rule. Accountable officers are strictly liable for losses of government funds under their control. E.g., Prescott v. United States, 44 U.S. (3 How.) 578 (1845) Serrano v. United States, 612 F.2d 525, 528 (Ct.Cl. 1979). In the context of paid fraudulent travel claims for subsistence expenses, the amounts that the government has lost are the amounts which have been overpaid due to the fraud. We therefore conclude that an accountable officer's liability also should be limited to those overpayments. Thus, we will no longer determine an accountable officer's liability for amounts erroneously paid under our "tainted day" rule. the future, such rule shall only apply when deciding how much of a partially fraudulent Eravel voucher should be paid. To the extent that 41 Comp.Gen. 285, 57 Comp.Gen. 668, and other cases equate the amounts erroneously paid to fraudulent payees with the amounts that should be withheld from fraudulent claimants, they are modified accordingly. Furthermore, our instructions in those cases that agencies apply the "tainted day" rule in recouping fraudulent travel reimbursements are overruled. Agency actions against fraudulent payees should be taken in light of the provisions of the False Claims Act, the Program Fraud Civil Remedies Act, the Debt Collection Act, the Federal Claims Collection Standards, as well as any other statutes and regulations applicable to recovering the fraudulent payment involved. In 65 Comp.Gen. 858, we denied Mr. Kane relief for $15,332.50 of payments he made on travel vouchers tainted by fraud. The record shows that $7,809.36 of that amount were actual payments of fraudulent claims. The $7,523.14 balance consisted of amounts included under the "tainted day" rule. Accordingly, we modify our decisions in this case to state that Mr. Kane is denied relief for the fraudulent payments in the amount of $7,809.36.

Furthermore, the record in this matter reflects that the amount of Mr. Kane's liability has been reduced by $1,325.12 by collections from the employees who received the fraudulent payments, and by collections of $3,126 from Mr. Kane. Therefore, Mr. Kane's current outstanding liability is $3,358.24. In accordance with his request, we are certifying Mr. Kane's liability for this amount to the Attorney General.

/1/ Mr. Kane's liability for improper payments made before October 19, 1981 was settled by operation of law upon the running of the applicable statute of limitations. 31 U.S.C. Sec. 3526(c) (1988). Payments made after that date were not subject to the statute of limitations because our Notice of Exception suspended the statute as of that date. 65 Comp Gen. at 861.

/2/ Both of these Acts have provisions regarding the federal government's rights against fraudulent claimants who are not paid. However, those provisions are not relevant to our analysis of accountable officer's liabilities for amounts erroneously paid.

/3/ This Senate Report discusses S. 1134, a predecessor bill to the Act. The Act was passed as part of Pub.L. No. 99-509. The legislative history of Pub.L. No. 99-509 states that the Act was based upon S. 1134 as that bill was reported out by S. Rep. 212. H.R. Rep. 1012, 99th Cong., 2d. Sess. 257 - 260 (1986).