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B-235048, Apr 4, 1991, Office of General Counsel

Number: B-235048

Date: 1991-04-04

B-235048, Apr 4, 1991, Office of General Counsel

APPROPRIATIONS/FINANCIAL MANAGEMENT - Accountable Officers - Relief - Physical losses - Embezzlement DIGEST: Upon reconsideration, we affirm our conclusion of B-235048, Nov. 14, 1990, that Prentis Kye, an Air Force accounting technician, is not pecuniarily liable as an accountable officer for the loss of funds embezzled by another accounting technician, Jeanna Carson. Whether Mr. Kye is liable, nonetheless, under Air Force regulation is for the Air Force to determine; however, a court-martial tribunal, which acquitted Mr. Kye of embezzlement, may have preempted the Air Force's determination in this regard. Ms. Carson's settlement does not discharge Mr. Kye of any liability he may still have in this matter. See 31 U.S.C. Sec. 3711(d).

Major M.G. Hilliard

United States Air Force

Accounting and Finance Officer:

This responds to your request that we reconsider our decision B-235048, Nov. 14, 1990. After thoroughly reviewing your submission of December 11, 1990, we find no basis for modifying our decision.

We concluded that Mr. Prentis Kye, a former member of and accounting technician for the Air Force, is not pecuniarily liable as an accountable officer for the loss of funds embezzled by another accounting technician, Ms. Jeanna Carson. There was nothing in the record to suggest that Mr. Kye ever had custody of or supervisory responsibility for the embezzled funds. Mr. Kye, at the time of the embezzlement, was not assigned to the office from which Ms. Carson embezzled the funds. Your December 1990 submission presents no evidence to controvert our conclusion.

You assert, instead, that Mr. Kye is pecuniarily liable for the loss under Air Force regulation. Subparagraph 11-3(e) of Air Force Regulation 177-101 provides that members and employees "may be held pecuniarily liable for losses or deficiencies resulting in total or in part from their actions." In this regard, you state that the Air Force, solely on the basis of allegations made by Ms. Carson, has determined that Mr. Kye had provided Ms. Carson with the detailed information that enabled her, without his participation, to prepare and submit false payment vouchers; /1/ Mr. Kye's action, therefore, led, at least in part, to the embezzlement.

Although Mr. Kye's participation in the embezzlement has no bearing on the issue

of whether he was an accountable officer, his actions, we agree, are critical in establishing liability under subparagraph 11 3e. As we pointed out in our 1990 decision, and as you note in your recent submission, subparagraph 11-3e addresses the pecuniary liability not of accountable officers, but of other Air Force members and employees, whose conduct, such as embezzlement or conspiracy to embezzle, results in a loss to the Air Force. See, e.g., 52 Comp.Gen. 964 (1973); B-223726, June 26, 1987. For that reason, the applicability of this regulation is for your determination, which is not subject to our review. See B-151136, June 26, 1963. Nevertheless, we would advise that in this instance, you carefully consider the significance of the court-martial's findings of fact.

We do not dispute your contention that an acquittal in a court martial, a criminal proceeding, does not necessarily dispose of the issue of civil liability under subparagraph 11-3e. In this regard, see Helvering v. Mitchell, 303 U.S. 391, 397-98 (1938), holding that the government may seek civil damages, if remedial and not punitive in nature, regardless of an acquittal on a criminal charge arising from the same conduct. The degree of proof in civil cases is generally much different from that in criminal cases. We would suggest that in applying subparagraph 11-3e to Mr. Kye, it is essential, nonetheless, to substantiate that Mr. Kye's conduct did, in fact, contribute to the embezzlement, a factual finding that the court-martial tribunal, in acquitting Mr. Kye of all charges relating to the embezzlement, may have preempted.

You also question the effect of a Justice Department settlement agreement on Ms. Carson's and Mr. Kye's liability as accountable officers. return for the government's promise to cease criminal prosecution, Ms. Carson agreed to plead guilty to the embezzlement, and "to make restitution in an amount (up to $19,290) and manner to be determined by the United States Probation Office and the court." The Probation Office set restitution at $1,000. You ask whether you may hold Ms. Carson liable, as an accountable officer, for more than $1,000, and whether, under 31 U.S.C. Sec. 3711(d), Ms. Carson's settlement discharges Mr. Kye from any liability he may still have. We have held that a settlement entered by the Department of Justice compromising a claim of the government terminates the liability of an accountable officer for any amount in excess of the settlement. See, e.g., 65 Comp.Gen. 371 (1986), citing 31 U.S.C. Sec. 3711(d): "An accountable officer is not liable for an amount paid ... if the amount ... is not recovered because of a compromise under this section." Because Mr. Kye is not an accountable officer, section 3711(d) does not apply to his liability in this matter, if any.

/1/ Although Mr. Kye denied Ms. Carson's allegations, the Air Force, finding inconsistencies in his testimony, concluded that Mr. Kye's denial was not credible.