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B-238222, Feb 21, 1990, Office of General Counsel

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Date: 1990-02-21

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DIGEST: Where "flashroll' funds are lost during attempted drug arrest, and DEA determines that agent acted (1) without negligence and (2) in the performance of his official duties, the expenditure can be recorded as an investigative expense. In such circumstances, there is no need to seek relief from our Office. 61 Comp.Gen. 313 (1982).

Mr. John C. Lawn

Administrator

Drug Enforcement Administration

This responds to your December 29, 1989 request that we grant relief under 31 U.S.C. Sec. 3527(a) (1982) to special agents who lost $20,000 during a drug arrest. Under the circumstances presented in your letter, it appears that there is no need to seek relief from this Office; you may, instead, record the lost funds as a necessary investigative expense of the agency and thus clear the account.

You explained the facts as follows. On June 7, 1989, the group supervisor and three special agents of your Chicago Field Division made plans to conduct a surveillance of a suspected cocaine trafficker on the southeast side of Chicago, Illinois. The agents planned to use $20,000 of official advanced funds as a flashroll to obtain one kilogram of cocaine from the suspect.

Later that same day, one agent met with the suspected drug trafficker who showed the agent plastic bags filled with cocaine. An arrest signal was then given to the two other agents who took the cocaine from the suspect. The suspect, however, grabbed the $20,000, drove his car directly at the two agents, and fled. In your opinion, the special agents took the necessary precautions to safeguard the $20,000 and the loss was not attributable in any way to the fault or negligence of the special agents.

We were presented with similar facts in 61 Comp.Gen. 313 (1982). In that case, we were asked whether the loss of funds advanced to buy controlled substances is the kind of loss for which relief must be sought from GAO, or whether the loss may be cleared by recording it as an administrative expense under the authority of 21 U.S.C. Sec. 886 (1988). We were told that it was the Drug Enforcement Administration's (DEA) practice to convene a Board of Investigation to review the facts surrounding such losses. Then, if DEA's Controller is satisfied that the agent was acting without negligence and in the performance of his or her

official duties, the expenditure is recorded as an investigation expense under the authority of 21 U.S.C. Sec. 886.

We endorsed that approach. We held that where the agent performed his duties properly in every respect but the calculated risk of loss materialized anyway, it is appropriate to record the lost funds as a necessary investigative expense of the agency and thus clear the account. Under such circumstances, there is no need to seek relief from our Office. We did note, however, that if the Board finds the agent to have acted negligently, the agent must be held liable for all the funds lost, even though the loss took place in the course of a drug investigation. Moreover, DEA must still seek relief under 31 U.S.C. Sec. 3527 when an officer or employee loses funds under circumstances which are unrelated to carrying out the purposes for which the funds were entrusted. For example, the theft in a public place of a flashroll entrusted to an agent for the purpose of buying controlled substances while the agent to whom the flashroll was entrusted was on his way to make the drug purchase should still be referred to our Office if DEA wishes to recommend relief.

The circumstances presented in your letter appear similar to those in 61 Comp.Gen. 313. Hence, you may record the loss as an investigative expense, and need not seek relief from our Office.