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DIGEST

Lieutenant J. A. Harker Director, Administrative Division Office of the Secretary Department of the Navy

Dear Lieutenant Harker:

This responds to your request that we relieve Lieutenant James P. Tolle[1] from liability for an improper payment of $998.35. The loss occurred during Lt. Tolle's duties as disbursing officer, DSSN 8279, aboard the USS Aylwin during October 1989.

Lt. Tolle previously requested that we treat this as a physical loss under 31 U.S.C. Sec. 3527(b) (1988). See B-248804, Oct. 30, 1992. At that time, the Navy denied relief on the basis of its determination that the loss was an unexplained physical loss since Lt. Tolle had "presented insufficient affirmative evidence to overcome the presumption that [he was] negligent in safeguarding public funds." We declined to review that determination since administrative determinations by military departments under 31 U.S.C. Sec. 3527(b) are conclusive on the Comptroller General. 31 U.S.C. Sec. 3527(b)(2). Id.

Lt. Tolle now requests that we re-characterize the loss as an improper payment and relieve him from liability for the loss under 31 U.S.C. 3527(c), which does not make agency determinations binding on the Comptroller General. He states that he reviewed his disbursing records in March 1990, several months after the loss and discovered what he believes to be an overpayment to an Italian contractor in the amount of $1,000. He reported this theory in a telephone conversation with an individual at the Contract Negotiation Office, Naval Regional Contracting Center, Naples, Italy during April 1990. According to Lt. Tolle, that individual advised him in a May 17, 1990 telephone conversation that her investigation led her to believe that the contractor had received an overpayment of $1000. She attempted to contact the contractor but he had since ceased business operations.

The Secretary of Defense or the appropriate Secretary of the military department may relieve a disbursing officer from liability for a physical loss if it is determined that (1) the loss occurred in the line of duty and (2) without fault or negligence on the part of the disbursing officer. 31 U.S.C. Sec. 3527(b). The Secretary's determination on either of those issues is binding on the Comptroller General. However, the Secretary's determination as to what constitutes a physical loss is subject to review, since such determination is

not conclusive on the Comptroller General. B-151156, Dec. 30, 1963.

The burden of proof clearly rests with Lt. Tolle. See Serrano v. United States, 612 F.2d 525 (1979). Lt. Tolle has suggested a possible explanation for the loss, but has failed to provide any documentation to support his theory. Further, there is nothing in the endorsements forwarding Lt. Tolle's request to indicate that the Secretary of the Navy or his designee has approved Lt. Tolle's theory of the loss or reversed the prior Navy determination that it was a physical loss. Therefore, we conclude that Lt. Tolle has not met his evidentiary burden.

Even were we to agree with Lt. Tolle's theory of the loss, there would remain the question of whether he exercised reasonable care. See 31 U.S.C. Sec. 3527(c). Assuming that we were to characterize the loss as an improper payment, there is nothing in the present record which would overcome the Navy's determination that he was negligent in safeguarding public funds or on which to base a grant of relief. Lt. Tolle merely suggests a possible cause of the loss. He does not offer an explanation of why the loss occurred or a basis for a finding of reasonable care on his part, as required by section 3527(c).

On the basis of the above, we decline to grant Lt. Tolle's request.

Sincerely yours,

Gary L. Kepplinger Associate General Counsel

1. The submission incorrectly spells Lt. Tolle's name as "Toole."