



Office of the General Counsel

B-239483.2

July 8, 1991

Lieutenant Colonel S.C. Shoemake, Jr.  
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Denver, Colorado 80279

Dear Colonel Shoemake:

This responds to your April 23, 1990, request that we address a number of questions about granting relief to Air Force accountable officers, and settling their accounts, in cases involving erroneous payments. Your questions were prompted by a deficiency in the account of Major [redacted] which was caused by cashing uncollectible personal checks.

The fundamental question you asked about Major [redacted] was whether cashing an uncollectible check is a physical loss or an erroneous payment. We did not answer your question about uncollectible checks generally. Rather, we concluded that Major [redacted] had exceeded his authority in cashing the checks in question and, for that reason, the deficiency resulted from erroneous payments. We then concluded that Major [redacted] liability had been settled by operation of law because the applicable statute of limitations had expired. B-239483, Apr. 15, 1991. We now respond to your question about the nature of losses from cashing uncollectible checks, and your more general questions about relief and settlement in erroneous payment cases.

1. Losses From Cashing Uncollectible Checks.

You first asked whether deficiencies from cashing forged or otherwise uncollectible checks should be considered the result of physical losses or erroneous payments. The distinction between physical losses and erroneous payments is important because it determines which agency may relieve the accountable officers involved. The military departments may grant relief to their accountable officers for physical losses under 31 U.S.C. § 3527(b) but only GAO can grant relief to accountable officers for erroneous payments under 31 U.S.C. § 3527(c).

However, our decision in B-239438 illustrated the importance of consulting the statute that authorizes disbursing officials to cash checks, 31 U.S.C. § 3342, in any analysis of

addressing a deficiency from such activity. For purposes of that statute, the distinction between physical losses and erroneous payments is not relevant. We will address that distinction in our later discussion of accountable officer relief statutes.

A. Adjustment for Deficiencies Under 31 U.S.C. § 3342.

Our analysis of section 3342, and our related decisions, convinces us that an official's account may be adjusted for deficiencies from cashing uncollectible checks without obtaining relief from this Office.

As relevant here, section 3342 authorizes two administrative actions. First, under section 3342(a), disbursing officers may, under certain circumstances, cash negotiable instruments, exchange U.S. and foreign currencies, and cash Treasury checks. These transactions have been referred to in the Air Force's regulations, our decisions, and your submission as "accommodation exchanges" or "exchange transactions". Second, section 3342(c) provides a basis to adjust for losses from cashing uncollectible checks. Section 3342(c)(2) specifically allows an agency to offset, within the same fiscal year, gains and losses from section 3342(a) transactions, including cashing checks. If offsetting gains and losses results in a net loss, section 3342(c) authorizes appropriations necessary to adjust the account of the disbursing official for the deficiency.

In 27 Comp. Gen. 211 (1947), we held that a deficiency from cashing a check over a forged endorsement could be adjusted under the statute now codified in section 3342(c). 27 Comp. Gen. at 213. We further held that if the account was adjusted under section 3342, the disbursing official would be relieved of his liability for the deficiency. Id. See also, 61 Comp. Gen. 649 (1982) (losses from foreign currency exchange transactions); B-82565, June 1, 1949; B-82108, Jan. 17, 1949 (losses from cashing stolen military payment orders).

In 61 Comp. Gen. at 651 we stated,

"it is clear that the Congress expected that foreign exchange transactions would result in gains and losses throughout the year. The losses incurred periodically throughout the year in making accommodation exchanges and exchange transactions are an expected result of doing business this way. Provided the Finance Officer is neither negligent nor guilty of fraud, he will not be held liable as an accountable officer for these losses. Relief under the applicable accountable officer relief

statutes need not be requested on account of these losses." (citations omitted).

Although 61 Comp. Gen. 649 was concerned only with losses from foreign currency exchange transactions under subsection 3342(a), the provision being construed is equally applicable to cashing checks. Moreover, the legislative history cited in our decision shows that the gains and losses which Congress expected throughout the year were those resulting from "operations under the act," which included cashing checks. H.R. Rep. No. 511, 83rd Cong., 1st Sess. 1-2 (1953); S. Rep. No. 210, 83rd Cong., 1 Sess. 2-3 (1953).

Based on our review of section 3342, 27 Comp. Gen. 211, 61 Comp. Gen. 649, and other cases discussed above, we conclude that section 3342 may be applied to check cashing losses. Thus, an agency may use section 3342 to offset losses from cashing uncollectible checks with gains from other section 3342(a) activities.

If a deficiency remains, the next question is whether the agency has been given an appropriation of the type authorized by 31 U.S.C. § 3342(c). With respect to disbursing officials in the Department of Defense (DoD), permanent legislation was enacted which provides that DoD appropriations are available to pay "losses in the accounts of disbursing officials and agents in accordance with law." 10 U.S.C. § 2781(2) (1988). Thus, the Air Force and other DoD agencies may use their appropriations to reimburse their disbursing officers' accounts for net losses suffered as a result of cashing checks and other operations under the authority of 31 U.S.C. § 3342. With that authority, DoD agencies may adjust their officers' accounts for net losses without requesting relief for these losses. Agencies that have similar permanent legislation, or an appropriation expressly available for this purpose, may also use their appropriated funds in like fashion.<sup>1/</sup>

#### B. Good Faith or Due Care Under Section 3342.

Our cases state that deficiencies in accountable officers' accounts may not be adjusted under section 3342 unless the agency determines that the officer was not negligent or guilty of fraud. E.g., 27 Comp. Gen. at 213; 61 Comp. Gen. at 651. Those statements are consistent with the requirement to find that a loss was not caused by an accountable officer's bad

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<sup>1/</sup> We note that the Treasury Department's current regulations simply direct disbursing officers who cash uncollectible checks to repay the deficiency, if the amount cannot be recovered. Treasury Financial Manual, vol. 1, sec. 4-9070.20 (T.L. No. 496).

faith or lack of due care before granting relief under 31 U.S.C. § 3527. While we consider this policy salutary, neither the text of section 3342 nor its legislative history makes a finding of due care or good faith a precondition to making up any deficiency in a disbursing officer's account. Thus, we conclude that an agency does not have to find that a disbursing officer acted in good faith or with due care before reimbursing or otherwise adjusting an officer's account under section 3342.

Of course, we encourage agencies not to take such action under section 3342 unless they find that the officer acted in good faith and with due care. The authority to offset gains and losses under section 3342(c)(2), and to adjust a disbursing officer's account for any net deficiency under section 3342(c)(3), is discretionary rather than mandatory. For example, section 3342 states that the head of an agency may offset gains and losses, but in contrast states that any gain not used to offset deficiencies shall be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 3342(c)(2). The requirement to deposit gains which are not offset into the Treasury is clearly mandatory. Presumably if section 3342 was intended to require agencies to offset gains and losses, the language used would also have been mandatory, rather than permissive. In our view, an agency would properly exercise its discretion by refusing to adjust a disbursing officer's account when the agency is unable to determine that the officer involved acted in good faith and with due care.

#### C. Cases Excluded From Section 3342 by Agencies.

If an agency decides not to adjust a disbursing official's account under section 3342, there remains a question of whether the accountable officer relief statute, 31 U.S.C. § 3527, still applies. Section 3527(e) provides that "[r]elief provided under this section is in addition to relief provided under another law." While your inquiry about whether check cashing losses are erroneous payments is not relevant for purposes of section 3342, it is critical to granting or denying relief under section 3527.

Your primary argument for treating uncollectible check losses as losses of funds under section 3527(b) and not erroneous payments under 3527(c) is that the negotiation or cashing of a check "does not involve the purchase of goods or services that is supported by a voucher authorizing a payment." You also ask us to consider that cashing a check does not involve a charge to an appropriation, "as would be the case in a payment for goods or services," or where both original and replacement U.S. Treasury checks are paid for the same obligation (one payment made on a forged endorsement and the other to the proper payee). Finally, you believe that Army cases involving

losses from cashing uncollectible checks receive different treatments. You state that our Army cases treating check cashing losses as erroneous payments all involved forged personal checks, and that the Army treats other "bad check" losses as physical loss cases. You advocate giving the losses from forged and otherwise uncollectible checks the same treatment, as physical losses. For the reasons discussed below, we do not find these arguments persuasive.

In response to your first argument, it is correct that cashing a check is not a voucher-supported transaction. However, we do not believe that this distinction is dispositive, but only reflects the difference between a disbursing officer's authority to pay for goods or services and to cash checks. In general, U.S. disbursing officers are not authorized to pay for goods or services until the payment is supported by a properly certified voucher. 31 U.S.C. § 3325. Although disbursing officers in the military departments perform the function of certifying the vouchers themselves, GAO Policy and Procedures Manual For Guidance of Federal Agencies, tit. 7, sec. 7.1.B (TS No. 3-16, Feb. 12, 1990), the payments still must be supported by proper disbursing vouchers, e.g., Air Force Regulation 177-108, para. 11-7. In contrast, cashing a check does not require a supporting voucher because each transaction is fully authorized under section 3342. In both instances, the disbursing official is making a legally authorized payment. We see no reason why the additional administrative requirements for vouchered transactions support treating the payments differently under section 3527.

Your second argument is that cashing a check is not "charged to an appropriation". We assume you mean either that the check is not cashed with appropriated funds, or that the fund which cashed the check is not going to be reimbursed from an appropriated account.

We believe cashing a check clearly must be viewed as a disbursement of appropriated funds. Section 3342 states that "[a]n amount held by the disbursing official that is available for expenditure may be used to [cash checks]." 31 U.S.C. § 3342(c)(1). The amounts held available for expenditure by disbursing officials can only be some sort of appropriated funds. See 27 Comp. Gen. 276 (1947) (holding that VA canteen officers could not cash checks because there was no authorization to use appropriations for that purpose). In the Air Force, the funds used to cash checks are the operating cash amounts which Accounting and Finance Officers draw from the Operations and Maintenance, Air Force appropriation. Air Force Regulation 177-108, paras. 5-1, 5-5. Therefore, check cashing by Air Force finance offices can only be viewed as disbursements of appropriated funds.

We also believe that the anticipated source of reimbursement to the fund that financed the transaction does not determine whether a deficiency is a physical loss or an erroneous payment. Arguing that check cashing losses do not result from payments because the operating cash account will not be reimbursed from an appropriation is a repetition of the argument that cashing a check is not a vouchered transaction. As discussed above, we feel that the more important factor is that, in both cases, losses result from transactions which are generally authorized.

Finally, we do not agree that our cases on losses from cashing checks, which have principally come from the Army, have been limited to losses from checks which were uncollectible because of forged drawer signatures or endorsements. Our cases have also involved checks which were uncollectible because of insufficient funds. E.g. B-223285, Aug. 28, 1986. We have not limited our cases which treat losses from cashing checks as erroneous payments to particular types of check cashing losses.

We have consistently viewed the jurisdiction of the military departments to treat deficiencies as physical losses as limited. In B-202074, July 21, 1983, we recited the long history of the statutes conferring physical loss jurisdiction upon the military departments. Based on that history, we concluded that the Congress had adopted our view that the authority given to those departments was limited. Id. We stated that a physical loss or deficiency under 3327(b) includes: a loss by theft, burglary, or in shipment; a loss or destruction by fire, accident, or natural disaster; a shortage or deficiency with absolutely no evidence to explain the disappearance; and a loss resulting from fraud or embezzlement by subordinate finance personnel. Id. However, we also stated that "the disbursement of public funds by a disbursing official or his subordinates is a payment, and if it is illegal or erroneous, the proper relief statute is 31 U.S.C. [§ 3527(c)]." Id. As discussed above, cashing a check must be viewed as a disbursement of public funds. Therefore, within the framework recited in B-202074, losses from cashing checks--to the extent that they are not adjusted under section 3342(c)--are erroneous payments to be treated under section 3527(c).

#### D. Summary

Losses occurring in transactions authorized under section 3342(a), including cashing checks, may be adjusted in a disbursing officer's account under section 3342(c). GAO will not need to consider requests for relief in such cases, unless an agency decides, in its discretion, not to adjust the disbursing officer's account under section 3342. We will

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continue to treat such cases as erroneous payments under section 3527(c). Our decisions which indicate that agencies must forward all losses from cashing uncollectible checks to GAO for review under section 3527(c), as well as our cases which hold that agencies must determine that the disbursing officials acted in good faith and with due care before adjusting for losses incurred under section 3342, are modified to be consistent with this decision.

## 2. Additional General Questions

Your letter contained a number of questions concerning the proper handling of accountable officer cases involving erroneous payments. We have categorized your questions which were not specifically addressed in either B-239483, April 15, 1991, or in the discussion above, into six general questions.

Most of these questions involve 31 U.S.C. § 3526, which requires an accountable officer's account be settled as of three years after the account is transmitted to the Comptroller General. In responding to these questions, we assume that the conditions in 31 U.S.C. § 3526 for tolling the three year period by suspending a settlement occurring by operation of law are not present.<sup>2/</sup>

### A. When does the three year settlement period begin?

In general, the three year statute begins to run when an agency's accounts are "substantially complete." 7 GAO-PPM, § 8.7. Normally, accounts are considered substantially complete once an accountable officer has completed a periodic statements of accountability and transactions. Id. In some instances, the three year period will begin later. For deficiencies caused by duplicate payments or forgeries, the period begins when an agency receives notice of a loss from the Treasury. Id. If the deficiency is caused by embezzlement, fraud or other criminal activity, the three year period does not begin until the loss has been discovered and reported to the appropriate agency officials. Id. Finally, a delay in obtaining the documentation supporting a statement of accountability will suspend the running of the three year period. Id. However, the general failure of an agency to realize that a particular payment is improper or erroneous will not suspend the running of the three year period.

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<sup>2/</sup> The accountable officials involved did not fraudulently or criminally cause a loss, the United States has not been involved in a war, and the GAO has not suspended an item in the accountable officer's accounts.

B. What actions must be taken within the three year period to allow an agency to begin collecting a shortage caused by an erroneous payment from an accountable officer?

Before an agency can begin collection action, an accountable officer's liability for the erroneous payment must be permanently established. The debt is permanently established either by the officer's agreement to repay the erroneous payment, or by a denial of relief made by the appropriate agency. Since section 3526 will settle the account by operation of law at the end of the three year period (without holding the officer permanently liable), the liability must be made permanent within the three year period.

However, GAO may suspend an item in an account in order to prevent the account from being settled by operation of law under section 3526. This suspension, referred to as a Notice of Exception, allows the appropriate agency to either grant or deny the accountable officer relief.

C. Can an agency which decides not to recommend that GAO grant an accountable officer relief from liability for an erroneous payment collect the shortage from the officer pursuant to 5 U.S.C. § 5512?

Section 5512 allows an agency to collect the amounts owed by an accountable officer by offsetting those amounts against the officer's salary payments. However, as stated above, collection can not begin until the accountable officer's liability is permanently established. If the debt can only be permanently established by GAO's decision to deny relief, an agency's decision not to recommend relief will not permanently establish the liability. If the agency does not submit the case to GAO in time to either decide the case or suspend the item within the settlement period, the expiration of the three year period will foreclose the agency's right to offset under section 5512.

D. What effect does the passing of the three year settlement period have in a case where an accountable official other than a disbursing official is responsible for having caused an erroneous payment?

In general, section 3526(c) applies the three year period to settling the accounts of all accountable officials. Thus, the passage of the three year term will conclusively settle the accounts of all the accountable officials involved. See e.g., 7 GAO-PPM, §§ 8.1, 8.5-8.7.



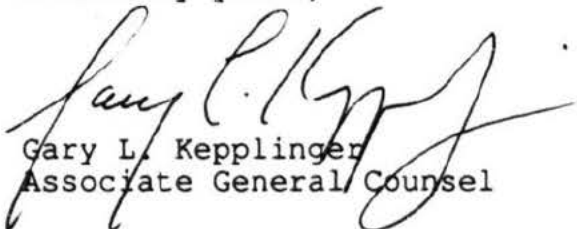
E. May an agency collect a debt permanently established against an accountable officer even if collection action was not begun within the three year settlement period? May an agency collect any balance due in a case where collection action began before, but was not completed until after, the end of the three year settlement period?

Assuming that all necessary actions to permanently establish the accountable officer's liability have been completed, the passage of the period does not prohibit the recovery of the amounts owed by the official. 31 U.S.C. § 3526(c)(4)(B).

F. If an agency must treat losses from cashing uncollectible checks as erroneous payments, and if GAO grants relief for the loss, does the agency need to establish an appropriation against which to draw a check to the accountable officer?

Our discussion above addresses when agencies must treat losses from cashing uncollectible checks as erroneous payments. In cases where GAO also grants relief and decides that it is necessary to adjust the account involved, the amount will be charged either to "an appropriation specifically to be charged," or to "the appropriation or fund available for the expense of the accounting function." 31 U.S.C. § 3527(d)(1). In order to help determine which account should be charged, agencies requesting relief should indicate the appropriation of fund they propose to charge. 7 GAO-PPM § 8.14. GAO will then approve the use of that appropriation or fund, or explain why a different appropriation or fund should be used. Id.

Sincerely yours,



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