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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of Defense—Authority to Impose Pecuniary Liability by Regulation

File: B-280764

Date: May 4, 2000

DIGEST

In the absence of statutory authority, the Department of Defense (DOD) may not impose pecuniary liability on an employee, designated by a certifying officer as an "accountable official" pursuant to DOD regulation, for an erroneous payment resulting from the negligent performance of the employee's duties. We are aware of no statutory authority that would permit such action. Any decision inconsistent herewith is overruled.

DECISION

A recent Department of Defense (DOD) regulation authorizes DOD certifying officers to designate persons who approve time and attendance (T&A) records, receiving officials, and system administrators as "accountable officials." DOD Financial Management Regulation, DOD 7000.14-R, Vol. 5, Ch. 33, para. 330505 (August 1998). The regulation provides that these officials shall be pecuniarily liable for erroneous payments resulting from the negligent performance of their duties. Id. at para. 3302.

Apparently in response to this regulation, the Chief, Fiscal Management Division and Administrative Support, Fort Sam Houston, requests an advance decision pursuant to 31 U.S.C. § 3529. In his request letter, he poses three questions: (1) Is the person who approves the correctness of an individual employee's T&A record pecuniarily liable for an overpayment made as a result of erroneous data contained in the record? (2) Is the person who approves erroneous data in documents supporting a payment voucher, such as a receiving report or a vendor invoice, pecuniarily liable for improper payments resulting from a certifying officer's reliance on that approval? and (3) Is the determination of liability affected by the fact that an automated system has processed the approved data without the source documents being available to the certifying officer?

For purposes of this decision, we have consolidated Fort Sam Houston's three questions into what we think is the one overarching issue. In our opinion, the issue is whether an agency, in the absence of statutory authority, may impose pecuniary liability on government employees for the negligent performance of their duties, as DOD has attempted to do in its regulation. For the reasons explained below, we think the answer to that question is "no." We are aware of no statutory authority that would allow DOD to impose pecuniary liability on designated accountable officials.

BACKGROUND

Accountability for public funds rests primarily, although not exclusively, with certifying officers. 31 U.S.C. § 3528. Certifying officers are responsible for preparing payment vouchers and for the information contained in those vouchers. 31 U.S.C. § 3528 (a)(1), (2). Certifying officers also are responsible for the legality of proposed payments, and are liable for the amount of illegal or improper payments resulting from their certifications. 31 U.S.C. § 3528 (a)(3), (4). Specifically, a certifying officer's pecuniary liability extends to any payment that (1) is illegal, improper, or incorrect because of an inaccurate or misleading certificate; (2) is prohibited by law; or (3) does not represent a legal obligation under the appropriation involved. 31 U.S.C. § 3528 (a)(4). Agency officials who execute approving functions of the sort that Fort Sam Houston raises here are not certifying officers under 31 U.S.C. § 3528, and incur no pecuniary liability under that statute in the execution of such functions. See, e.g., 65 Comp. Gen. 19, 20-21 (1985); B-241856.2, Sept. 23, 1992; B-197109, Mar. 24, 1980.

A disbursing officer is also by statute an accountable officer. 31 U.S.C. § 3325. The functions of a disbursing officer are largely self-defining—to disburse public funds. By statute, a disbursing officer shall only disburse funds in conformity with a certified voucher. Id. A disbursing officer shall examine a payment voucher if necessary to decide if it is in proper form, certified, and computed correctly. Id. Other than for the accuracy of the computation, the disbursing official is accountable for the funds in his possession and for their disbursement in conformity with duly certified vouchers. 31 U.S.C. §§ 3325, 3527. See also 10 U.S.C. § 2773 (designation of deputy disbursing officer as an accountable official).

Fort Sam Houston officials identified several circumstances in which certifying and disbursing officers may make improper payments as a result of erroneous supporting documents. For example, neither a certifying nor a disbursing officer reviews and approves an individual's T&A record to attest to the accuracy of the data noted therein; yet, they use that data to calculate, authorize, and make individual biweekly salary payments. Fort Sam Houston officials explain that designated timekeepers routinely enter individual employees' T&A data into a DOD system called the Defense Civilian Personnel System based on pre-approved work schedules and leave and overtime requests. Each pay period, before the data are "posted" and available to the payroll offices and disbursing officers, the supervisors responsible for ensuring the accuracy of T&A data are provided printouts of the data to be posted and asked to sign the following statement on the printout, "certifying" the accuracy of the data:

> "All hours have been reviewed and are certified correct for the reporting period. All premium hours have been approved and worked according to the appropriate laws and regulations."

In other situations, certifying and disbursing officers rely on receiving reports and vendor invoices, or on data processed and submitted to them through automated systems.

A recent DOD regulation has imposed pecuniary liability on officials whom it refers to as "accountable officials" for erroneous payments resulting from information that they "negligently provide" certifying officers. DOD 7000.14-R, para. 3307 (1998). For purposes of the regulation, DOD defines "accountable officials" as "DOD military and civilian personnel, who are designated in writing and <u>not otherwise accountable under applicable law</u>, who provide source information, data, or service (such as a receiving official, cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process." DOD 7000.14-R, para. 331001 (emphasis added). Personnel are designated accountable officials by the certifying officer whose certifications are supported by these personnel. <u>Id.</u> at para. 330505.

DISCUSSION

The Chief of Fort Sam Houston's Fiscal Management Division asks whether "accountable officials" who "certify," or attest to the accuracy of, data ultimately used by certifying and disbursing officers to authorize and make payments are personally liable in the same manner as authorized certifying officers if errors in that data result in the Army making an erroneous payment. In our opinion, absent statutory authority, an agency may not administratively impose pecuniary liability on federal employees for the negligent performance of their duties. Since we are aware of no statutory authority in DOD to support this extension of pecuniary liability to "accountable officials," we would not view such officials as personally liable for any losses that result from the negligent performance of their duties.

It is, we think, an unassailable proposition that the federal employment relationship is primarily governed by statute, not by contract or by common law master-servant concepts. <u>Shaw v. United States</u>, 640 F.2d 1254, 1260 (Ct. Cl. 1981); <u>Lee v. United States</u>, 41 Fed. Cl. 36 (1998). Certainly, where a federal employee holds his position by virtue of appointment, any claims of entitlement to pay and allowances derive from applicable statutes and regulations, not from a claimed contract of employment. <u>See</u> <u>Army & Air Force Exchange Service v. Sheehan</u>, 456 U.S. 728 (1982)(no Tucker Act jurisdiction over employee's breach of contract claim for wrongful discharge); <u>United States v. Hopkins</u>, 427 U.S. 123 (1976)(no Tucker Act jurisdiction over Army employee's claim for breach of employment contract); <u>Chu v. United States</u>, 773 F. 2d 1226, 1229 (Fed. Cir. 1985); <u>Zucker v. United States</u>, 758 F. 2d 637, 640 (Fed. Cir. 1985); <u>Connolly v. United States</u>, 554 F. Supp. 1250, 1253 (Cl. Ct. 1982).

This proposition is equally true where the United States seeks to discharge, discipline or penalize its employees. In United States v. Gilman, for example, the United States had been held liable under the Federal Tort Claims Act for injuries caused by the negligent operation of a government automobile. 347 U.S. 507 (1954). The United States sought to recover the amount of its liability from its negligent employee, grounding its right of recovery not on federal statute or regulations, but on an employer's common law right of indemnity against an employee whose negligent conduct resulted in the employer's liability. The Supreme Court refused to create a new form of liability for government employees, deferring instead to Congress to balance the personnel and fiscal policy issues presented by the government's claimed right of indemnity. The Court explicitly recognized that Congress had dealt with "a myriad of problems" presented by "the relations between the United States and its employees," including "[t]enure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees." Id. at 509. The Court characterized "[t]he right of an employer to sue [for indemnity as] a form of discipline," id., and pointed out that Congress had not taken any position on the matter.

> "Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than those who interpret them." Id. at 512–513.[1]

As one court stated,

> "The holding and rationale of Gilman are that a court should not interpret a statute relating to federal employer-employee relations so as to imply regulation of an aspect of that relationship where Congress has been silent on the subject, and this is so because regulation of that relationship involves complex policy questions more properly the province of the Congress than the courts." Marion v. United States, 214 F. Supp 320, 323 (D.Md. 1963)

The Court's decision in Gilman is not an isolated holding. The Court employed much the same reasoning in United States v. Standard Oil Co., 332 U.S. 301 (1947). There

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[1] In Burks v. United States, 116 F. Supp. 337 (S.D. Tex. 1953), the district court permitted the United States to recover from its negligent employee the amount of damages that Burks had recovered from the United States under the Federal Tort Claims Act. The Supreme Court's decision a year later in Gilman implicitly overruled the Burks decision.

the government tried to recover for the loss of a soldier's services and its medical expenses in treating a soldier injured as a result of a traffic accident involving a Standard Oil truck. Like in Gilman, the government's claim had strong common law roots, but, like in Gilman, the Court declined "to create a new substantive liability without legislative aid and as at common law." Id. at 314. The government's reliance on principles developed at common law to adjust the rights and duties between private parties is misplaced, said the Court, because "the issue comes down in the final consequence to a question of federal fiscal policy," and "[w]hatever the merits of the policy [sought to be established by the government], its conversion into law is a proper subject for congressional action."[2] Id. at 314. See also McCullough v. Seamans, 345 F. Supp. 511 (E.D. Cal. 1972) holding that Air Force Academy graduates discharged as conscientious objectors before completing active duty had no common law contractual liability to reimburse the Air Force for the cost of their education. "Whether or not the United States should recoup its loss, however, is essentially a question of fiscal policy far too involved for simple contract principles to settle." Id. at 513.

Similarly, the Court has refused "to authorize a new nonstatutory damages remedy for federal employees." Bush v. Lucas, 462 U.S.367, 368 (1983). Petitioner Bush, a National Aeronautics and Space Administration (NASA) employee, claimed that NASA had demoted him for making public statements to news media critical of NASA's George C. Marshall Space Flight Center. Bush argued that the demotion violated his First Amendment rights, and sought to recover damages. The Court concluded that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, . . . it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." Id. The question, according to the Court, "is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy . . . ." Id. at 388. The Court declined to create a remedy, "because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." Id. at 390.

Here, as in the cases noted above, Congress has not spoken to the issue of the liability of government employees who provide information to certifying officers that they rely on when performing their statutory function.[3] Yet Congress has clearly

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[2] Congress responded to the Court's decision by enacting the Federal Medical Care Recovery Act, 42 U.S.C. § 2651–2653.

[3] We do not consider cases such as United States v. Tingey, 30 U.S. 115, 129 (1831) and Moses v. United States, 166 U.S. 571, 585-591 (1897), as relevant. In both Tingey and Moses, the Supreme Court recognized that the United States, acting through the proper officers of the government, had a right to obtain a bond from disbursing officers intrusted with public funds to secure the faithful performance of the duties

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legislated in detail on many features of the certifying and disbursing function as well as the government's employer-employee relationship. With respect to the certifying and disbursing function, Congress has specifically provided for the personal pecuniary liability of certifying and disbursing officers, but, significantly, has not extended liability beyond these officers to those governmental employees whose work supports these functions.[4] Pecuniary liability for negligent conduct, administratively imposed, is no less a penalty than would be an employee's judicially created obligation to indemnify the government for losses resulting from his negligent conduct. As noted above, the Supreme Court counseled in Gilman, Standard Oil Co. and Bush v. Lucas that these issues are for Congress to resolve. We think the same holds true for administrative extensions of personal liability beyond the existing statutory parameters.

We found no authority that would permit DOD to impose pecuniary liability on those employees whom the DOD regulations identify as "accountable officials," and DOD has not asserted any.[5] Indeed, in the regulation itself, DOD describes as potential accountable officials those who are "not otherwise accountable under applicable law." DOD 7000.14-R, para. 331001. Consequently, absent a statutory basis, DOD, by regulation, may not impose liability on those officials. Of course, DOD may respond to negligent performance of assigned duties either through authorized disciplinary actions or its performance appraisal process.

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of such office even if the bonds are not statutorily required. Id. In Tingey, the bond was void because the Navy had required the disbursing officer to give a bond, upon the peril of losing his office, containing conditions beyond those prescribed by the statute requiring the bond. In neither Tingey nor Moses did the Court create a new right; in both cases, the Court addressed only the scope of the government's right to require a bond to secure the disbursing officer's existing liability to faithfully expend and honestly account for all public money in his possession.

[4] Congress has recognized pecuniary liability in other circumstances. For example, Congress has authorized the Secretary of Air Force to prescribe regulations establishing pecuniary liability for loss, spoilage, destruction, or damage to property under the control of the Air Force. 10 U.S.C. §§ 9832, 9835 (b). Relying on this authority, we concluded that the Air Force, acting pursuant to property accountability regulations, could hold employees pecuniarily liable for loss of 298 pairs of sunglasses. B-192609, Sep. 18, 1978. See also 10 U.S.C. § 2775 (liability of service members assigned to military housing).

[5] The statutes noted earlier explicitly impose pecuniary liability on federal employees. See, e.g., 31 U.S.C. § 3528(a)(4); 10 U.S.C. §§ 9832, 9835(b); 10 U.S.C. § 2773. We need not decide here what degree of statutory specificity is needed to support regulations imposing pecuniary liability. Cf. Snepp v. United States, 444 U.S. 507 (1980).

Over the years our Office has taken the position in a number of different contexts that agencies may not hold employees liable for losses caused the government as a result of errors in judgment or neglect of duty in the absence of administrative regulations. See, e.g., 52 Comp. Gen. 964, 967 (1973); B-266245, Oct. 24, 1996; B-194782, Aug. 13, 1979. On one occasion, we concluded that an agency solely by regulation may establish pecuniary liability for employees supervising a certifying and disbursing process. 72 Comp. Gen. 49 (1992). This conclusion was repeated in passing or in dicta in some other decisions. See e.g., B-241856, Sept. 23, 1992. Regardless of the 1992 decision, in light of the Supreme Court decisions discussed above, we believe that an agency may impose pecuniary liability only with a statutory basis. Accordingly, we will no longer accept our earlier caselaw in this regard as precedent and any decision inconsistent herewith is overruled.

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of the United States