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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205508 DATE: July 19, 1982

MATTER OF: Department of Justice—Deposit of amounts received from third parties as payment for damage for which Government has already compensated claimant.

DIGEST: Department of Justice may deposit funds received from carriers or insurers for damage to or loss of employee's personal property while in transit for which agency has paid claim pursuant to 31 U.S.C. § 241 in appropriation from which payment was made, and not in miscellaneous receipts in the Treasury, since amount received from carrier or insurer constitutes refund of payment made to employee.

The Assistant Attorney General for Administration (U.S. Department of Justice) has requested our opinion on whether amounts received from third parties for damages to or loss of personal property for which payment was made under the Military Personnel and Civilian Employees Claims Act of 1964, as amended, 31 U.S.C. § 240-243 (1976), may be lawfully deposited to the appropriation from which the payment was made. For the following reasons, we hold that such receipts may be credited to the appropriation from which monies were expended.

The Military Personnel and Civilian Employees Claims Act of 1964, as amended, authorizes the head of an agency or his designee to settle and pay a claim against the United States for not more than $15,000 made by an employee of that agency "for damage to, or loss of, personal property incident to his service." 31 U.S.C. § 241(b)(1). The submission indicates that most of these payments arise from accidents resulting in loss of or damage to employee household goods while in transit in a permanent change of station move (PCS). It is known at the time that the payment is made that there will likely be a recovery from the carrier at a minimum rate per pound (set by law), and that, in general, recovery from an insurer may also be anticipated. However, since in many cases the employee is forced to wait several months for his claim to be acted on by the carrier or its insurer and/or the employee's insurer, the Department of Justice "makes an advance payment to the employee which is subsequently refunded upon settlement of the claim by the carrier or insurer." Frequently, the employee's recovery will not fully reimburse the loss incurred.

The submission explains that where funds are "advanced," the claimant subrogates to the Department of Justice any rights he has against the carrier or insurer for the damages or loss up to the amount paid by the Department and accepted by the claimant. The employee also furnishes the Department with the evidence needed to enforce the claim. If and when the employee receives payment from the carrier or insurer, the employee repays the Department up to the amount "advanced" to him.

The Assistant Attorney General indicates that the Department of Justice has, until now, credited such repayments to the appropriation from which the claim was paid, since "the payment to the employee in the first instance was in the nature of an advance or an accommodation," and any payment subsequently received by the employee from a third party, which is returned to the employing agency, "constitutes a refund of the advance." It is also noted that the payment made to an employee is recorded as a receivable when disbursed.

Before addressing the issue of the account to which amounts received from third parties after a settlement under 31 U.S.C. § 241 are to be credited, we must determine whether payments by an agency which turn out to exceed the amount of an employee's claim against the United States for loss are in fact authorized. In other words, we must decide whether 31 U.S.C. § 241 authorizes an agency to reimburse an employee for that portion of the employee's loss which it knows or strongly believes will be covered by the carrier or insurer. In the given circumstances, we think that it is acceptable, though not required, for an agency to pay an employee the full amount of the loss suffered, even where a recovery from the carrier and/or insurer is contemplated, since it may be difficult to predict the amount of that recovery and thus to ascertain the ultimate extent of the Government's liability for the loss. As long as the claimant is required to subrogate any rights he has against the carrier and/or insurer to the agency, the agency will eventually stand in virtually the same position as it would have had it waited to make its payment until the employee recovered any payments from other sources. The cost to the Government of an initial overpayment amounts to the interest costs incurred by the U.S. Treasury for the period the amounts ultimately refunded are outstanding. On the other hand, the employee suffers detriment--measured by the "time value" of the money owed him or her—while he or she remains without compensation for the destroyed or lost goods. We realize that the agency comes closer to making its employee whole by recognizing and assuming the cost to the individual of delay by the carrier and/or insurer. Viewed this way, we do not characterize Justice's payment as an advance.

Since this Act places the responsibility for settling claims on the head of each agency, we will not object to this practice if any particular agency wishes to adopt it. However, it is equally clear that no agency is required to do so.

Turning then to the question of whether amounts recovered from the carrier/insurer must be deposited in miscellaneous receipts, we rely upon our line of cases which permit the crediting of refunds to the appropriations charged. In 5 Comp. Gen. 734 (1926), for example, we were asked whether money refunded to the Postal Service when mail which was thought to be lost and for which an indemnity had therefore been paid was found and restored to the owner should be deposited in miscellaneous receipts. We held that:

"The moneys appropriated by the Congress for the payment of indemnities for loss of or damage to registered, insured, or C.O.D. mails must be construed as appropriations chargeable with such indemnities only when the damage or loss actually exists, and if upon an erroneous assumption, based upon facts justifying the same, money is paid as indemnity for articles which are subsequently found and restored to the owner, the original charging of the appropriation upon such erroneous assumption is for correction, and the money recovered as refund is properly for credit to the appropriation originally debited with the indemnity payment. Such crediting will not operate to augment the amount appropriated, since upon the facts as subsequently developed no loss or damage actually existed, and hence the appropriation should not be charged with any indemnity on account thereof."

We recognize that the case now before us differs from the Postal Service case in that the agency is aware at the time that it settles the employee's claim that a recovery of at least a portion of the loss from a carrier or insurer may be anticipated. However, as previously stated, the agency cannot predict, without a degree of uncertainty, the extent of such a recovery. The appropriation charged with the loss will not be augmented if it is credited with amounts recovered from carriers and/or insurers, since upon the facts as subsequently developed, the extent of the employee's claim against the agency for loss is diminished. The payment received should be treated as a refund. See in this regard 7 GAO Policy and Procedures Manual § 13.2.

We think that our decision at 52 Comp. Gen. 125 (1972) is distinguishable from the given case. In 52 Comp. Gen. 125, we held that collections made under the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. § 2651-2652, for hospital, medical, surgical, or dental care and treatment of persons injured under circumstances creating a tort liability upon a third person were for deposit in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 484.

In the instant situation Justice is making a payment to its employee which it presumes may be too large because of potential recovery from a carrier, insurer or other third party precisely to achieve what it has determined to be the law's intent—namely, to make the employee as whole as possible. The instant situation differs from the situation in the FMCRA case in that Justice has the option of not making full payment by waiting until the employee recovers from the other sources. Thus, refund to the appropriation is proper in this case. In the FMCRA case, the agency furnishing the medical care must make the full expenditures therefor and then may or may not be involved in any proceedings against the alleged tort-feasors. The recovery action is independent of the expenditures for medical care in a way that it is not in the instant situation.

It is accordingly our conclusion that amounts received from third parties for damage to or loss of personal property for which payment was made under the Military Personnel and Civilian Employees' Claims Act of 1964 need not be deposited in the Treasury as miscellaneous receipts, but may be treated as authorized repayments; that is, the funds may be retained by the agency for credit to the appropriation from which payment was made in accordance with 7 GAO § 13.3. This applies regardless of whether the third-party recovery is paid directly to the Government or first to the employee (claimant) and then refunded to the Government by the employee. It also applies regardless of whether the form of recovery is direct payment or offset.

One prior decision of this Office, B-170663, January 21, 1971, suggests a contrary result. There, we concluded that funds withheld from a carrier representing an amount the Government had paid to an employee under 31 U.S.C. § 241 and for which the carrier was ultimately liable, should be deposited to miscellaneous receipts. Upon reconsidering this decision, we think it overlooked an essential point discussed above. In settling claims under 31 U.S.C. § 241, the agency has discretion either to allow the full amount of the claim up to the statutory limit and then pursue any third-party recoveries, or to require the employee to pursue third-party claims before presenting his claim to the agency. Naturally, the agency should express whichever policy it chooses in its regulations, and should apply that policy consistently. If the agency chooses the former policy, as Justice has done, it will be making payments in some cases that are, strictly speaking, higher than are required. In such cases, it is entirely legitimate to treat a third-party recovery as a reduction in the amount previously disbursed rather than as an augmentation of the agency's appropriation. Accordingly, to the extent it holds that third-party recoveries arising from the allowance of claims under 31 U.S.C. § 241 must be deposited as miscellaneous receipts, B-170663, January 21, 1971, is hereby overruled.

Milton J. Socolar

for Comptroller General
of the United States