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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

B-191440

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MAY 25 1979

Mr. William E. Foley, Director
Administrative Office of the United States Courts
Washington, D.C. 20544

AGC 00439

Dear Mr. Foley:

You requested that we reconsider our decision B-191440, July 19, 1978, denying relief under 31 U.S.C. § 82a-1 to Rebecca Bunnell, a deputy clerk of a U.S. District Court and an accountable officer. We have decided, based on additional information which the Clerk of the Court provided at our request, that, for the reasons set forth below, we will grant relief. While we still believe there was negligence, we are unable to place responsibility for the loss definitely on either Ms. Bunnell or her superior, Ms. Norma Blackmon, because both operated from the same drawer and used the same vault. However, with regard to the broader issues you raise about the liability of an accountable officer, we are unable to change our position, for reasons discussed below.

We based our original denial of relief on the understanding that Ms. Bunnell was accountable for the funds and was in sole charge of them. We found that Ms. Bunnell was negligent in failing to follow the internal operating procedure which called for her to place the funds in the vault which was provided as soon as she received them, and in failing to lock the vault. It now appears that during part of the period when the loss took place, Ms. Blackmon and Ms. Bunnell worked side by side in collecting and receipting for fines paid into the court. Both used the same drawer, which was unlocked. The commingled funds were later taken to the unlocked vault.

Each employee charged with custody of Government funds should have exclusive control over the funds. (With respect to cashiers in the executive branch, this principle is incorporated in section 0402 of the Treasury Department's "Manual of Procedures and Instructions for Cashiers" (1976), and would seem to be fundamental to sound cash control practices.) When the cashier has exclusive control, it is reasonable to hold him liable when an unexplained loss occurs. However, Ms. Bunnell did not have exclusive control over these funds since both she and Ms. Blackmon operated from the same drawer, depending only on which one was available to conduct a particular transaction. In effect, each was an accountable officer for a portion

[Reconsideration of a Prior Decision of Negligence in Fund Handling]

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of the funds. This arrangement, which, as noted above, was contrary to sound principles of cash control, precludes the definite placement of responsibility for the shortage in this case. See B-182386, April 24, 1975. Under such circumstances, although it is clear that there was negligence, we are unable, because of the administrative laxity in fundhandling procedures, to assign responsibility for the loss to either clerk. Id. Accordingly, Ms. Bunnell is hereby relieved of liability.

More generally, you question the basis for the rule that an accountable officer is an insurer of public funds in his custody. You suggest that this rule was legislatively overturned by Public Law No. 92-310, which eliminated the requirement for surety bonds for accountable officers. You say in addition that the implications of our decision for court clerks are most serious because the clerks are uninsured, as a result of the discontinuance of position bonds, and would have to use their own funds to procure adequate surety bonds. This, you say, would be a heavy financial burden for them.

We addressed the same argument in our decision, Personal Accountability of Accountable Officers, 54 Comp. Gen. 112 (1974). We pointed out that Public Law No. 92-310 expressly says that "the personal financial liability to the Federal Government of such employees and personnel [that is, those formerly required to have surety bonds] shall not be affected by reason of subsection (a) of this section [eliminating the bonding requirement]." Accordingly, we cannot agree with you that "the theory that an accountable officer is the primary insurer of public funds in his custody can no longer be valid."

In fact, the exposure to risk of an accountable officer before and after enactment of Public Law No. 92-310 is essentially the same. The bonds were not insurance policies for the protection of the accountable officer but were for the protection of the United States. Under the former system, when the United States was compensated for a loss by the bonding company, that company succeeded to the rights of the United States and hence could seek reimbursement from the bonded accountable officer.

We see no reason why the presumption of negligence which is applied by us in cases of this sort denies due process of law to accountable officers, as you contend. It is a rebuttable presumption, not a conclusive one, and therefore merely shifts the evidentiary burden to the accountable officer. We refer you to the discussion in the enclosed letter to the Administrator of Veterans Affairs of a similar argument. B-167126, August 28, 1978. (That letter also discusses the basis, in judicial precedent, for the rule that an accountable officer is an insurer of the funds in his custody. In his letter to you, a copy of which you forwarded to us, Judge Dupree questions the basis for that rule.)

The Supreme Court decisions which you cite in this connection require in essence, that before property is taken, there must be opportunity for a hearing. But those cases involve ordinary debtors, not accountable officers of the United States who, as insurers of the funds in their custody, must keep those funds safely and return them intact to the Government when so ordered. See 31 U.S.C. § 521 (1976).

Under the relief statute applicable herein, 31 U.S.C. § 82a-1, it is the head of the department (or establishment) who is to make findings and determinations with respect to a physical loss or deficiency of Government funds in his department and it is he who can recommend relief. We cannot grant relief without such a recommendation. The role of the General Accounting Office is to decide whether we concur with the establishment head's determinations and recommendations and, if so, to grant relief. Of course, this Office must exercise independent judgment and cannot accept any determination not supported in the record.

You suggest further that it is difficult to reconcile the procedures and outcomes in cases of losses by accountable officers as opposed to cases of losses resulting from the negligence of an employee under the Federal Tort Claims Act. In the latter case, the Government bears the cost of the employee's negligence. (Contrary to your assertion, the United States has no right to recover from an employee committing a tort even though the United States may have been liable to a third party as a result. United States v. Gilman, 347 U.S. 507 (1954).) Since these are different statutory procedures for different situations, we see no reason why they must be consistent. As discussed above, since the accountable officer is an insurer, his liability is not dependent on whether or not he was negligent; under the relief statutes, freedom from negligence is a basis for granting relief, but the initial liability from which relief may be sought arises simply by virtue of the failure to account for funds.

It is not merely the absence of an aggrieved third party claimant which explains the difference between liability under the Federal Tort Claims Act and the liability of an accountable officer. As we pointed out in the enclosed letter to the Administrator of Veterans Affairs, the United States needs an effective means of protecting itself when it entrusts public funds to an employee. As a result of the relief statute, the employee will not be held if he is free of negligence. However, a system under which he would be relieved unless the Government could affirmatively prove that he was negligent or otherwise at fault would afford little if any protection for the Government against a dishonest employee. This consideration is, of course, irrelevant to tort claims.

You contend, in addition, that 31 U.S.C. § 82a-1, the relief statute, does not govern accountable officers in the employ of the judicial branch. It is quite true that there may be some doubt whether judicial employees are covered. The statute includes employees of "departments" or "independent establishments." Those terms are not defined for purposes of 31 U.S.C. § 82a-1.

The term "department and establishment" is defined (in 31 U.S.C. § 2) for purposes of other portions of title 31, not including section 82a-1, to exclude expressly the legislative branch and the Supreme Court. Under that definition, therefore, portions of the judiciary other than the Supreme Court are establishments of the Government, but not necessarily for purposes of 31 U.S.C. § 82a-1.

Compare, in this connection, 31 U.S.C. § 82b, which specifies the duties of "disbursing officers under the executive branch" and which, we have held, does not apply to your Office. B-6061, A-51607, April 27, 1942 (copy enclosed). Thus, the Congress clearly excluded the judiciary in 31 U.S.C. § 82b, a statute closely related to the relevant relief statute, 31 U.S.C. § 82a-1. While we have not reviewed the legislative history of 31 U.S.C. § 82a-1 for this purpose, a comparison with 31 U.S.C. § 82b suggests that application of the former was intentionally not limited to the executive branch.

In any event, while we have been aware of this issue, we have accepted the apparent position of your Office that section 82a-1 was applicable to the judicial branch. For example, on December 1, 1975, your Office requested relief for a Clerk for the Eastern District of Virginia "under provisions of 31 U.S.C. 82a-1," and we granted the requested relief. B-185486, February 5, 1976.

There is no authority other than that in 31 U.S.C. § 82a-1 for us to grant relief to accountable officers for physical losses. You say that such authority may be found in 31 U.S.C. §§ 71, 72, 84, and 1202. The first two sections cited give us authority to settle claims, and to settle accounts relating to the judiciary and the United States Courts. Section 84 requires accounts of officers of the courts (except the Supreme Court and Consular Courts) to be sent to your Office and examined under your supervision. Section 1202 deals with restoration of the account of an accountable officer who has been held liable to the United States when the debt is uncollectible. Nothing in these statutes nor in any other of which we are aware empowers us to grant relief to an accountable officer not covered by the specific relief statutes such as 31 U.S.C. § 82a-1.

In the absence of a statute authorizing the granting of relief and a grant of relief thereunder, accountable officers are to be held liable for losses even if free from negligence. B-167126, supra, and cases cited therein. Accountable officers of all three branches are held to the same standards. See 31 U.S.C. § 521, delineating the duty of "all public officers of whatsoever character" to keep safely all public money in their custody.

Accordingly, if section 82a-1 indeed does not apply to employees of the judicial branch, relief could not be granted by this Office, and we are aware of no statutory basis for the granting of relief. Indeed, it is at least in part because we are aware of no other basis to relieve these employees that we have been willing to assume that they are covered by 31 U.S.C.

§ 82a-1. Compare: 2 U.S.C. § 142b, allowing us to relieve certifying officers of the Library of Congress.

Finally, although we have granted relief in this case, this is not a situation in which to hold either employee liable would result in an injustice, as you suggest. The evidence in the record was uncontroverted that persons other than the two deputy clerks had access to the room in which the unlocked drawer and the unlocked vault were located. Ms. Bunnell's attorney now says that the vault was locked at all times, but he offers no evidence in support of this contention, which is contradicted by Ms. Blackmon's statement to the Federal Bureau of Investigation. In any event, there was also negligence (and a violation of prescribed internal operating procedures) in keeping the cash in a drawer at the counter before taking it to the vault. The fact that a person was recently appointed and may not have been thoroughly trained would not in and of itself relieve that individual from liability if the person was otherwise negligent.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel

Enclosure