The Comptroller General
of the United States

Washington, D.C. 20548

Cpt-9

Decision

Matter of: Restoration of a Deficiency in a Department of Veteran Affairs Trust Account

File: B-227202

Date: August 14, 1989

DIGEST

Pursuant to the authority contained in 31 U.S.C. § 1552(a)(2), Department of Veterans Affairs (VA) may credit the Personal Funds of Patients Trust Account, Boston Medical Center, for a deficiency resulting from a 1979 erroneous payment from the unobligated balance of its 1979 expired appropriations because VA is liable for the loss and because under the circumstances we consider the covering of the loss a necessary expense of administering the trust account.

DECISION

The Department of Veterans Affairs (VA) has asked whether it may use the authority contained in 31 U.S.C. § 3530 to restore a $10,829.91 loss in the VA Boston Medical Center's Personal Funds of Patients Trust Account (hereafter referred to as "the trust account") with appropriated funds. Although section 3530 is not available to restore the trust account under the factual situation presented, the loss may be restored under other authority discussed below.

BACKGROUND

The VA Boston Medical Center administers a Personal Funds of Patients Trust Account for the convenience of patients admitted to the Center. *See* 38 U.S.C. § 3204. Patients may deposit their funds in the account for safekeeping and withdrawal of funds as needed. A VA employee serves as agent cashier of the trust account.

In April 1979, Mr. Dennis Torris, a patient at the Center, fraudulently obtained a State of Illinois retirement check for $11,479.91, payable to Mr. Richard M. Peterson. Mr. Torris fraudulently endorsed the check as "Richard M. Peterson" and changed his Medical Center wrist-band identification to read "Richard M. Peterson". While impersonating Mr. Peterson and displaying his false wristband identification, Mr. Torris convinced Mr. Viega,

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the VA agent cashier of the trust account, to accept the check for deposit to the account of "Richard M. Peterson".

Five days later, on April 25, 1979, Mr. Torris returned to the cashier's office, again identifying himself as Mr. Peterson, and asked to withdraw the entire account balance. Mr. Viega explained that he could not withdraw the entire amount in cash, so Mr. Torris instead accepted $1,479.91 in cash and asked the cashier to issue a Treasury check for $10,000 to Dennis Torris, whom "Peterson" claimed was his brother-in-law. Mr. Viega issued the check, which Mr. Torris later negotiated.

After receiving notice that the retirement check had been fraudulently endorsed, the VA reviewed its records and discovered that during the period in question, the VA Boston Medical Center had not admitted a patient named "Richard M. Peterson". The VA's review of the Center's records for April 1979 indicated that Mr. Dennis Torris had been admitted and discharged during that period. Mr. Torris was soon arrested, and charged with fraudulently negotiating the retirement check. The federal district court found him guilty, placed him on probation for 3 years, and ordered him to make full restitution.

On January 23, 1980, the Department of the Treasury, after having refunded the drawee bank the amount of the fraudulently negotiated check, debited the trust account for the same amount, which left a deficiency in the trust account. Of the $11,479.91 it had lost, the VA recovered $650 during the 3 years Mr. Torris was on probation. The court discharged him from probation after this period and ordered the balance of the restitution be forgiven. The court order did not discharge Mr. Torris' civil debt to the VA, but due to his lack of financial resources, the VA decided not to pursue the debt.

The VA conducted an investigation into the circumstances surrounding the improper payment from the trust fund. The investigation determined that Mr. Viega, as the accountable officer for the trust fund, was without fault or negligence in making the improper payment, because he followed established procedures in identifying the patient making the deposit and withdrawal. The investigation report did not address the adequacy of the procedures to preclude similar improper payments.

DISCUSSION

The VA has a shortage in the trust account of $10,829.91 to restore. Apparently, on the assumption that 31 U.S.C. § 3530 contains the only available authority to restore the account, VA asks whether pursuant to 31 U.S.C. § 3530 it may adjust the trust account from available appropriations.

Although the money involved here was patient money, not government money, we have held that the loss of VA patient funds while in the custody of the United States constitutes a liability of the United States for which an accountable officer may be liable. B-215477, Nov. 5, 1984. Indeed we have treated officials charged with the custody and safe-keeping of such funds as accountable officers for purposes of our account settlement authority, 31 U.S.C. § 3526, and our authority to relieve accountable officers, 31 U.S.C. § 3527. B-215477, supra.

Our authority to settle accounts, however, is limited by law to 3 years after the accounts are substantially complete. 31 U.S.C. § 3526(b); B-227538, July 1987. Thus, although 31 U.S.C. § 3527(d) permits us to adjust the accounts of accountable officers that we have relieved of liability for losses resulting from non-negligent payments, passage of time now precludes us from opening the accounts for purposes of settlement and relief.1/ Similarly, 31 U.S.C. § 3530 permits us to adjust accounts where among other things, the loss to the United States results from the fault or negligence of the accountable official. Here however, even apart from the 3 year limitation on our account settlement authority, the VA has determined that Mr. Viega, the accountable officer, was without fault or negligence. Accordingly, if we presume the correctness of VA's determination, 31 U.S.C. § 3530 would not be applicable authority to adjust the deficiency in Mr. Viega's account in any event.

Although sections 3530 and 3527(d) provide adequate authority to adjust accounts when requests for relief of an accountable officer are timely submitted, there is no indication from these provisions that they are necessarily the exclusive means of administratively adjusting accounts. Given the nature of the trust account in question in this case and the VA's liability for the erroneous payment, we

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1/ Although VA was aware of the deficiency in 1979, VA did not report it to us until 1987, well after the running of the 3 year settlement period.

are of the opinion that the VA is responsible for the shortage in the account. We understand that the VA recognizes this responsibility and considers the Department indebted to the trust fund for the loss. As explained below, we think the covering of the loss in the trust account can be considered a necessary expense of managing the trust fund chargeable to the appropriation account supporting the administration of the trust fund.

The VA established the trust account under the authority contained in 38 U.S.C. § 3204 governing the administration of VA trust funds. The VA as the trustee of the account has the duty to exercise reasonable care over the patients' funds in the account. Restatement (Second) of Trusts § 174 (1959). If the trustee commits a breach of trust by making an unauthorized or improper payment, the trustee is chargeable with any loss resulting from the breach of trust. United States v. Mitchell, 463 U.S. 206,226 (1983). The fact that the accountable officer may be relieved or, as in this case, have his account settled by operation of law, does not affect the government's responsibility for erroneous payments from the trust account.

Costs associated with the VA's administration of patient trust accounts such as the loss at issue here can be viewed as a necessary expense of the function and may be paid out of the VA's regular appropriations covering this function. In an analogous situation involving a Bureau of Indian Affairs (BIA) trust fund, we authorized BIA to adjust deficiencies in the fund resulting from erroneous payments, through a charge to agency appropriations as an operating expense. 67 Comp. Gen. 342 (1988). Similarly we permitted the Drug Enforcement Administration to write off losses in funds used by undercover agents to buy drugs as a necessary investigative expense, when the funds were lost while being used for the investigation of sales of controlled substances, which is the purpose for which the funds were entrusted to the agents. 61 Comp. Gen. 313 (1982). Accordingly, under the circumstances presented, we consider the covering of the deficiency in these accounts as a necessary expense of providing the services authorized by 38 U.S.C. § 3204.

The VA may reimburse the $10,829.91 deficiency in the patients' funds trust account from the account used to manage it. Since the loss occurred in fiscal year 1979, the VA may liquidate the heretofore unrecorded obligation from VA's fiscal year 1979 expired appropriations pursuant to the authority contained in 31 U.S.C. § 1552(a)(2). B-201110, Dec. 30, 1980.

Finally, we recommend that the VA review procedures used by patient trust fund cashiers to identify patients making withdrawals from the fund to determine whether such procedures are adequate to prevent future erroneous payments.

Milton J. Socolar

Acting Comptroller General
of the United States