

DECISION



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

FILE: B-215194

DATE: 2/25/85

MATTER OF: Liability of accountable officer for lost interest

- DIGEST:**
1. Accountable officer who embezzled collections is liable only for the actual shortage of funds in her account. Although her failure to deposit the funds in a designated depository caused the Government to lose substantial interest on the funds, the lost interest should not be included in measuring her pecuniary liability as an accountable officer.
 2. Upon convicting an accountable officer of embezzlement, court ordered restitution as condition of probation as authorized by 18 U.S.C. § 3651. Since agency was still attempting to mitigate its loss, amount submitted to court was an estimate not intended to reflect full amount of actual loss. In these circumstances, lower amount in restitution order does not preclude agency from asserting civil claim for actual loss as finally determined.

An Authorized Certifying Officer of the Forest Service, United States Department of Agriculture, has requested our opinion as to the liability of Bernette Floyd Jackson, a former Forest Service collection officer, for unrecovered losses caused by her misappropriation of funds and for interest lost to the Government as a result of her failure to place these funds in the designated depository. The question is whether Ms. Jackson should be held liable for both the actual loss of funds in her account and for the lost interest. For the reasons stated below, we find that Ms. Jackson is not liable for the lost interest. Ms. Jackson's liability is limited to the unrecovered losses in her account.

Ms. Jackson's position as a Forest Service collection officer required her to deposit funds in a local designated depository on a periodic basis. An investigation revealed that for several months, Ms. Jackson failed to deposit a total approximating \$760,000. Ms. Jackson was subsequently found guilty of 19 counts of embezzlement (18 U.S.C. § 649). Most of the

funds consisted of uncashed checks which were later replaced, and the actual loss of funds in Ms. Jackson's account has been determined to be \$973.10. However, Ms. Jackson's fraudulent scheme also caused the Government to lose \$56,279.56 it would have earned in interest had Ms. Jackson deposited the funds according to procedure.

An accountable officer of the Government is an insurer of the public funds in his custody and is excusable only for loss due to acts of God or the public enemy. United States v. Thomas, 82 U.S. (15 Wall) 337 (1872). Under 31 U.S.C. § 3527(a), the General Accounting Office is authorized to relieve an accountable officer from liability for the physical loss or deficiency of public funds, upon concurrence with agency determinations that the loss occurred while the accountable officer was acting in the discharge of official duties and that it occurred without fault or negligence on his part. Since the accountable officer in this case has been convicted of embezzlement, there is, of course, no question of relief. The only question is the extent of Ms. Jackson's liability.

In B-190290, November 28, 1977, we decided that an accountable officer of the Farmers Home Administration who negligently delayed forwarding collections from borrowers to the proper office for deposit was not liable for the interest charges that accrued during the delay. We held that the loss "is not the type of loss which is cognizable under the law applicable to accountable officers."

There are several points of distinction between that case and this one. First, in B-190290, the Farmers Home Administration actually had to pay the amount of the lost interest since it pays daily interest on money borrowed from the U.S. Treasury. There is no corresponding payment requirement here. Second, the lost interest here stems directly from a loss of funds for which the accountable officer is clearly liable, whereas there was no similar underlying loss or deficiency in the account of the accountable officer in B-190290. Finally, in B-190290, while there was a loss to the Farmers Home Administration, it is not clear that there was actually a net loss to the United States.

Nevertheless, we think the result in B-190290 is equally applicable here. The essence of our 1977 decision is that the strict liability of an accountable officer does not extend to money which the Government never had, even though the reason the Government never had it may have been fault or negligence on the part of the accountable officer. While there was certainly a loss to the Government in this case, the lost interest is not

money which was ever actually in the custody of or in the "account" of the accountable officer. As such, as in B-190290, we do not think the loss here is the type of loss contemplated by the laws relating to the liability and relief of accountable officers.

A conceptually similar situation is the acceptance of a personal check subject to collection. If the check proves uncollectible and the Government has not parted with something of value in exchange for the check, there is no loss or deficiency within the scope of the accountable officer laws. B-201673 et al., September 23, 1982. As we said in that case, "the Government incurs a loss in the sense that it does not have money to which it was legally entitled, but it has not lost anything that it already had."

Accordingly, while there may be other consequences flowing from Ms. Jackson's conduct in a situation like this,^{1/} her liability by virtue of her status as an accountable officer is limited to the actual loss or deficiency in her account.

Having said this, determining the proper amount of Ms. Jackson's liability in this case raises another issue. The Forest Service has computed the actual loss to be \$973.10. However, according to the Judgment and Probation/Commitment Order, the court suspended a portion of Ms. Jackson's sentence, placed her on probation for 5 years, and ordered restitution of \$700 as a condition of the probation. The question is the relationship of the \$700 to the \$973.10.

The order of restitution was authorized by 18 U.S.C. § 3651 which, as relevant here, provides that a defendant may, as a condition of probation, "be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."^{2/}

In discussing a state statute with restitution language similar to that of 18 U.S.C. § 3651, the Oregon Supreme Court noted that a court could order restitution in an amount less than the victim's actual loss, and that in any event, any amount paid as restitution should be set off against any civil judgment arising from the same incident. State v. Stalheim, 275 Ore.

^{1/} B-201673 et al., September 23, 1982, at 6. See also 45 Comp. Gen. 447 (1966).

^{2/} For offenses occurring after January 1, 1983, restitution is addressed in more detail in 18 U.S.C. §§ 3579 and 3580.

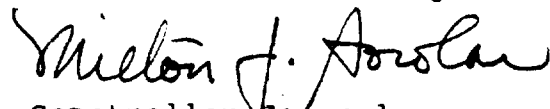
683, 552 P.2d 829, 832 n.8 (1976). While we are not aware of any Federal cases discussing this issue with respect to 18 U.S.C. § 3651, we see no reason why similar concepts should not apply.

As noted earlier, the receipts which Ms. Jackson failed to deposit totalled nearly \$760,000, consisting of some cash but mostly checks. The checks were apparently never negotiated. We have been informally advised that, during the course of the criminal proceedings, the Forest Service was in the process of contacting the makers of the checks to seek replacement checks, a process which turned out to be largely successful. When the court was ready for sentencing, the Forest Service had not yet completed this process and thus was not able to state the amount of its loss with certainty. The \$700 figure submitted to the court, we are advised, was merely an estimate based on the cash count, and was not intended to represent the actual amount of the loss.

Thus, assuming there is nothing in the record of the court proceedings to indicate the contrary, it would appear that the \$700 ordered as restitution was never intended to reflect the full amount of Ms. Jackson's civil liability. Accordingly, we think the Forest Service may proceed to assert its civil claim against Ms. Jackson for \$973.10 without the need to seek amendment of the restitution order. The \$700, of course, is to be treated as part of the \$973.10 and not in addition to it.

We understand further that there is approximately \$5,000 in Ms. Jackson's Civil Service Retirement account against which any unpaid portion of her indebtedness may be offset. Offsets against Civil Service Retirement monies are made in accordance with the Federal Claims Collection Standards, specifically, 4 C.F.R. § 102.4 (49 Fed. Reg. 8889, 8899, March 9, 1984). While the Forest Service should still notify Ms. Jackson of its intent to collect by offset, the court proceedings have obviated any need for further "administrative review" of the indebtedness. See 4 C.F.R. § 102.3(b)(2)(ii), 49 Fed. Reg. at 8898 (no need to duplicate "due process" protections).

As a final note, while we have concluded that lost interest may not be included in determining Ms. Jackson's liability as an accountable officer, there may be some basis for asserting a claim for the lost interest on common-law tort principles. Should the Forest Service wish to explore the feasibility of such a claim, we suggest that it consult with the Department of Justice.



Acting Comptroller General
of the United States