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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Defense Accountable Officials—Local Nationals Abroad

File: B-305919

Date: March 27, 2006

DIGEST

The Department of Defense may use appropriated funds to employ foreign local nationals as Departmental Accountable Officials under 10 U.S.C. § 2773a even though foreign local nationals may not be subject to pecuniary liability under United States law. The Department of Defense should formulate a written policy addressing the consideration and circumstances under which local nationals may serve as Departmental Accountable Officials.

DECISION

A certifying officer at the headquarters of U.S. Army Materiel Command Europe has requested an advance decision under 31 U.S.C. § 3529 regarding the propriety of using appropriated funds to employ foreign local nationals as Departmental Accountable Officials¹ under 10 U.S.C. § 2773a. E-mail from Jerome J. Markiewicz to U.S. Government Accountability Office Redbook Queries, June 6, 2005 (Markiewicz e-mail). The certifying officer's inquiry stems from the fact that under treaties and other agreements between the United States and foreign governments, foreign local nationals employed by the United States abroad may not be subject to United States law that might otherwise pertain to their employment. One such law is 10 U.S.C. § 2773a, which authorizes the Secretary of Defense to designate civilian employees of the Department of Defense (DOD) as Departmental Accountable Officials.

¹ This decision uses the term "Departmental Accountable Officials" to mean those employees designated as such under 10 U.S.C. § 2773a, and uses the term "accountable officers" to mean government employees who are otherwise responsible for government funds under Title 31 of the United States Code, such as disbursing and certifying officers.

Employees so designated are liable for fiscal irregularities in the same manner as certifying and disbursing officers. 10 U.S.C. § 2773a(c)(2).

In light of the possibility that foreign local nationals' employment abroad might not be subject to section 2773a and the accountability it imposes, the certifying officer asks whether DOD may use appropriated funds to employ foreign local nationals as Departmental Accountable Officials. We conclude that even though foreign local nationals serving as Departmental Accountable Officials may not be subject to the accountability normally coupled with such positions, DOD may use appropriated funds to employ foreign local nationals as Departmental Accountable Officials abroad. We caution, however, that DOD should craft a written policy detailing the circumstances, if any, under which local nationals should be placed in positions of accountability.

BACKGROUND

An accountable officer is any government officer or employee who by reason of his or her employment is responsible for government funds. B-304233, Aug. 8, 2005. Accountable officers are strictly liable for fiscal irregularities associated with the funds for which they are responsible. 62 Comp. Gen. 476, 479-80 (1983). The ranks of accountable officers include certifying officers, disbursing officers, collecting officers, and other employees having custody of government funds.²

In 2002, Congress authorized the Secretary of Defense to create another accountable position by adding section 2773a to title 10 of the United States Code.³ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, div. A, title X, § 1005(a), 116 Stat. 2458, 2631 (Dec. 2, 2002). Under section 2773a, the Secretary of Defense may designate those civilian employees of DOD as Departmental Accountable Officials who provide to DOD certifying officers

² For further discussion of the role of accountable officers, see U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, vol. 2, 3rd ed., ch. 9, GAO-06-382SP (Washington, D.C.: February 2006).

³ In 2000, we concluded that a DOD regulation authorizing agency certifying officials to designate DOD employees as "accountable officials" was impermissible, as only Congress, by statute, may impose pecuniary liability. B-280764, May 4, 2000. Subsequent to our decision, Congress enacted section 2773a. The House Committee on Armed Services reported that section 2773a would allow DOD "to enforce responsibilities . . . [in] areas where personnel are required to review and submit data that the Department [of Defense] will rely on to make payments." H.R. Rep. No. 107-436, at 340 (2002).

“information, data, or services that are directly relied upon by the certifying official in the certification of vouchers for payment.” 10 U.S.C. § 2773a(b)(1). DOD’s Financial Management Regulation (FMR) lists functions that are to be performed by Departmental Accountable Officials. Department of Defense Financial Management Regulation 7000.14-R, vol. 5, ch. 33, *Departmental Accountable Officials, Certifying Officers and Review Officials* (April 2005). These include execution of purchase card programs, authorization of travel orders, and preparation of contract modifications. *Id.* The FMR notes that the list of functions is not exhaustive. *Id.*

The Secretary of Defense may not designate as Departmental Accountable Officials individuals who are otherwise accountable, such as certifying or disbursing officers. 10 U.S.C. § 2773a(b)(2). Departmental Accountable Officials are pecuniarily liable for illegal, improper, or incorrect payments resulting from their fault or negligence. 10 U.S.C. § 2773a(c). The FMR directs that individuals designated as Departmental Accountable Officials sign DOD Form 577, which acknowledges their personal pecuniary liability to the United States. DOD-FMR 7000.14-R. Such liability is joint and several with the certifying or disbursing officer who makes a payment based on the Departmental Accountable Official’s erroneous information, 10 U.S.C. § 2773a(c)(3), and is the same as that incurred by certifying and disbursing officers government-wide under subtitle III of title 31 of the United States Code. Thus, even though Departmental Accountable Officials under section 2773a do not handle government funds or certify their payment, they share personal liability with certifying or disbursing officers of DOD for improper payments if their negligence or fault is a contributing factor.

Agencies of the federal government are generally authorized to hire nationals of foreign countries to staff their operations in those countries. 22 U.S.C. § 3968(b). DOD entrusts local national labor at its facilities overseas with various duties, including budgetary and accounting functions. Markiewicz e-mail. Many of these duties are of such a nature that the Secretary of Defense could properly designate those who fulfill them as Departmental Accountable Officials under section 2773a and the FMR. *Id.* See DOD-FMR 7000.14-R. As discussed above, Departmental Accountable Officials are personally liable under section 2773a for improper payments resulting from their fault or negligence.

ANALYSIS

The policy underlying the concept of pecuniary liability for accountable officers is almost as old as our republic. As the Supreme Court stated in 1845, those responsible for the public purse must be strictly liable for losses occurring on their watch, and “[a]ny relaxation of this condition would open a door to frauds, which might be practised [sic] with impunity. . . . [W]hat losses might not be anticipated by the public?” *United States v. Prescott*, 44 U.S. (3 How.) 578, 588-89 (1845) (a depositary of public money is pecuniarily liable for funds stolen from his possession through no fault or negligence of his own). DOD imposes pecuniary liability on Departmental Accountable Officials so that they share responsibility for

erroneous payments with certifying officers, who may make such payments based on the Departmental Accountable Officials' negligent furnishing of information. DOD-FMR 7000.14-R.

Employing local nationals as Departmental Accountable Officials under section 2773a involves these policy matters. While United States citizens' employment overseas is subject to United States law, local nationals' employment often is not. *See* Department of Defense Manual 1400.25-M, ¶ SC1231.4.1.1 (December 1996). The law that applies to United States employment of local nationals abroad is determined by agreements negotiated between the Department of State and the government of the nation hosting the United States operation. *See* Manual 1400.25-M, ¶ SC1231.3.1. Such agreements often provide that the employment of local nationals is subject to the law of the host country, rather than United States law. For example, by international agreement with Germany,⁴ United States employment of German nationals is governed by German law, as opposed to United States law. Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, art. 56, July 1, 1963, 14 U.S.T. 531. *See* United States Army Europe, Reg. 690-60, *Employment of Local National Personnel in Germany*, ¶ 8 (Sept. 29, 1987) (“[Local National] employment in [Germany] is governed by [German] labor law. . .”). Thus, whether a German national employed by the United States as a Departmental Accountable Official is subject to the accountability imposed by section 2773a is itself a matter to be determined by German law.

A United States citizen designated a Departmental Accountable Official could act in such a manner as to incur pecuniary liability under section 2773a, yet because of the Status of Forces Agreement and German law, a German local national in the same position acting in an identical manner may not be held accountable. For instance, section 2773a permits the Secretary of Defense to impose pecuniary liability for acts of simple negligence, while German law, in fact, may impose a higher standard of culpability.⁵ Memorandum from Michael J. Litak, Military and Civil Law division, to

⁴ The request for decision here does not ask that we focus our analysis on Germany or any one country. Nevertheless, because of the myriad agreements between the United States and foreign governments regarding United States employment of local nationals, we use one country's agreement with the United States—the Federal Republic of Germany—as an illustration.

⁵ Liability under German law is restricted when the work being performed is “damage-prone,” defined as “work . . . that includes a very high probability of an occasional oversight, even by an employee who generally uses required care.” United States Army Europe, Reg. 690-62, *U.S. Forces Claims Against Local National Employees in Germany*, ¶ 5b (Oct. 30, 1984).

Ralf Schoenstein, Civil Personnel Directorate, G1, HQ, USAREUR and 7th Army 5, ¶ 10a (Aug. 27, 2005) (Schoenstein Memo). Thus, while a local national Departmental Accountable Official might act in a manner that would subject a United States citizen in the same position to pecuniary liability, the local national might be legally unaccountable. *Id.*

The possibility that DOD may not be able to enforce accountability against a local national employed by the United States as a Departmental Accountable Official although a United States citizen in identical circumstances would be pecuniarily liable is troubling. However, we are unaware of any legal authority prohibiting DOD from hiring local nationals to serve as Departmental Accountable Officials under section 2773a. Whether or not to hire local nationals for such positions is a policy matter to be decided by DOD.

According to section 2773a, the Secretary of Defense may designate “any civilian employee of the Department of Defense” a Departmental Accountable Official. The FMR defines “employee” as a “current or retired civilian[] paid from appropriated funds.” DOD-FMR 7000.14-R, Definition 58 (May 2005). Local national employees are not members of the United States military; they are civilians.⁶ In addition, most, if not all, local nationals working in positions that could be designated Departmental Accountable Officials are paid with appropriated funds. *See* Mike Litak, *U.S. and Them: Citizenship Issues in Department of Defense Civilian Employment Overseas*, Army Law., June 2005, at 1, 5-8 (2005). As stated above, we are aware of no specific authority barring such employment. Thus DOD, consistent with section 2773a and DOD policy, may properly employ local nationals as Departmental Accountable Officials.

Nevertheless, we suggest that DOD consider the wisdom of hiring local nationals as Departmental Accountable Officials in countries where by agreement local law applies to the employment, and local law may not subject the local national to the same accountability as other DOD employees.⁷ B-188715, Jan. 31, 1978 (concluding

⁶ Department of Defense Manual 1400.25-M, Subchapter 1231 addresses employment of local nationals in general. It does not discuss the hiring of local nationals as Departmental Accountable Officials. Because Departmental Accountable Officials exercise judgment and discretion in providing information upon which certifying officers rely, we assume for purposes of this decision that local nationals in Departmental Accountable Official positions are direct rather than indirect hires of the United States, and are therefore employees of the United States. *See* Manual 1400.25-M, ¶¶ 1231.4.2.1-1231.4.2.2.4. *See also* Schoenstein Memo at 4, ¶ 5c (“It is well established that [local national] employees in Germany are legally the employees of the U.S. Government”).

⁷ The State Department follows a similar policy in its hiring of foreign local nationals overseas. Department of State Foreign Affairs Handbook, vol. 4, H-113.2, *FSN Direct* (continued...)

that when local national employees in accountable positions, not subject to United States law, cannot be held liable under law of host nation, United States should “reconsider its policy of appointing to accountable officer positions . . . citizens” of the host nation). Section 2773a is available only to DOD and was meant to give DOD power to subject to fiscal accountability those employees whose exercise of discretion and judgment in the performance of their duties DOD certifying officers rely on when certifying payment vouchers. *See* H.R. Rep. No. 107-436, at 340. It is somewhat anomalous that DOD would choose to hire potentially unaccountable individuals as Departmental Accountable Officials.

To clarify these responsibilities, DOD should draft a policy addressing the practice of employing local nationals as Departmental Accountable Officials. Such a policy should offer clear guidance regarding the advisability of hiring local nationals as Departmental Accountable Officials. The policy should include consideration of the law of the host nation before appointing a local national as a Departmental Accountable Official.

In making these suggestions, we remain cognizant that local national employees are important to DOD installations overseas and that they have occupied accountable positions for many years. Schoenstein Memo at 5, ¶ 11. We are also aware of the possibility that under section 2773a, individuals, including local nationals, could perform functions that the FMR identifies as functions of Departmental Accountable Officials, yet not be designated as Departmental Accountable Officials. We are confident that any policy put forth by DOD would adequately address these circumstances while minimizing the number of Departmental Accountable Officials who may not be held accountable.

CONCLUSION

While employing local nationals as Departmental Accountable Officials under section 2773a may undermine the policies behind placing pecuniary liability on Departmental Accountable Officials, we are aware of no legal authority prohibiting the practice. We recommend that DOD craft a policy regarding employment of local

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Hire Employees (June 21, 2005). Before hiring a local national as a disbursing officer (an accountable officer position under Title 31 of the United States Code), the State Department considers “[t]he recourses available to the United States in the event the [local national] misappropriates funds and the extent that host country laws and/or the courts aid in the prosecution of their citizens and the recovery of the misappropriated funds.” *Id.*

nationals as Departmental Accountable Officials, to address the consideration and circumstances under which foreign local nationals may serve as Departmental Accountable Officials.

A handwritten signature in black ink that reads "Anthony H. Gamboa". The signature is written in a cursive style with a large initial 'A'.

Anthony H. Gamboa
General Counsel