

Pecuniary Liability for Loss, Damaged or Destroyed Government Property or a Question of Statutory Authority

By Chris Thompson, CPPM

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The world of property and asset management is always unfolding and revealing something new or old returning in a different form. This article focuses on the subject of liability for loss, damage or destruction of government property. However, this is not a discussion of liability for property in possession of contractors, rather a discussion of how federal

employees cannot be assessed pecuniary or financial liability for loss, damage or destruction of government property resulting from negligent conduct without specific statutory authority.

To begin, let's examine the question of *what is liability and how does it work?* Merriam-Webster dictionary defines liability as *the quality or state of being liable: something for which one is liable: pecuniary obligation: **DEBT***. A further examination reveals the definition of debt to be *something owed: a state of*

owing: the common-law action for the recovery of money held to be due.

Ethical Considerations

As a federal employee, liability generally begins with and is derived from Executive Order 12731 of 17 October 1990, which states, *Employees shall protect and conserve federal property and shall not use it for other than authorized activities.*

From that ethical principle, it seems clear that federal employees have a clear *liability* to account for and protect property in their custody.

It could be reasonably assumed that employees would take appropriate steps to shield property under their care from danger, injury, destruction or damage, including safe storage and other amplifying measures to protect from harm, decay or loss. It would also be crucial for employees to take the proper steps in order to meet the mandated ethical principle. So, with that said, there doesn't seem to be anything that would prevent these ethical principles from forming a concrete foundation for *liability*.

Statutory Considerations

Amongst the primary statutory authorities concerning property management, including the Federal Property and Administrative Services Act of 1949, as amended by PL 106-580 and codified by Public Law 107-217, there is no specific discussion of how agencies may assess pecuniary or financial liability against federal employees for loss, damage or destruction of government property, resulting from negligent conduct. So, as property and asset managers, statutory law provides the avenue for us to develop and implement policies to buy, manage, reutilize and dispose of property, but we are not given authority to establish policy to assess pecuniary liability against employees for loss, damage or destruction of property, resulting from negligent conduct.

Case Law

A recent decision by the Comptroller General (CG), *Department of Defense – Authority to Impose Pecuniary Liability by Regulation, B-280764 of May 4, 2000*, brought to light some serious considerations with respect to employee pecuniary or financial liability for negligent performance of their duties. The CG decision to not support administratively imposed pecuniary liability without statutory authority was primarily influenced by three United States Supreme Court

decisions regarding different aspects of potential employee liability, *United States v. Gilman*, *United States v. Standard Oil Co.* and *Bush v. Lucas* that were referred as policy issues to the United States Congress for consideration.

The CG stated, in part, *it is, we*

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think, an unassailable proposition that the federal employment relationship is primarily governed by statute, not by contract or by common law master-servant concepts. Certainly, where a federal employee holds his position by virtue of appointment, any claims of entitlement to pay and allowances derive from applicable statutes and regulations, not from a claimed contract of employment. This proposition is equally true where the United States seeks to discharge, discipline or penalize its employees. In Gilman, one court stated, a court should not interpret a statute relating to the federal employer-employee relations so as to imply regulation of an aspect of that relationship where Congress has been silent on the subject, and this is so because regulation of that relationship involves complex policy questions more properly the province of the Congress than the courts. (P 4) The CG acknowledged in its findings that Congress had not spoken to the issue of pecuniary liability of government employees, beyond the scope of funds certifying and disbursement officers and other specific statutes concerning pecuniary liability which apply to the military departments.

The CG concluded by writing, *Pecuniary liability for negligent conduct, administratively imposed, is no less a penalty than would be an employee's judicially created obligation to indemnify the government for losses resulting from his negligent conduct. As noted above, the Supreme Court counseled in Gilman, Standard Oil Co. and Bush v. Lucas that these issues are for Congress to resolve. We think the same holds true for administrative extensions of personal liability beyond the existing statutory parameters.* (P 6)

This case law decision has raised the government property interest level with some legal counsels. For some, this case law established a new precedent with respect to internal determinations that agencies cannot develop administrative policies to assess employee's pecuniary liability for loss, damage or destruction of government property, absent statutory authority. In addition, not only has this case disclosed complexities regarding common law master-servant and debt collection concepts, but also how the courts have determined that these are issues for the Congress to address. A very difficult and complex subject, indeed.

So what does all of this really conclude? The complex web of legal underpinnings with respect to pecuniary liability leaves two primary avenues to use and three factors to consider. First, the primary burden of proof lies on the shoulders of those in position as managers, who must develop, document and maintain employee performance files, especially as it relates to misuse or negligence in control of government property. This is the start of evidence gathering for any situation considering the assessment of financial penalties for loss, damage or destruction of government property. Secondly, there are also criminal charges for clear ethical violations under 18 USC. But, in order to get to a determination of ethical violations or misconduct, you must have

documented performance evidence.

The last factor refers to a Report of Survey, which is a document often used in the federal government to document, investigate and make decisions on adjustment of accountable records regarding lost, stolen or destroyed assets. So our last factor is that a federal employee cannot be assessed pecuniary liability after signature by an approving authority on a Report of Survey or other administrative means. There might be a conclusion by an investigating board that the employee is clearly liable due to negligent performance of duties for the asset loss, theft or destruction. Regardless of those findings, the employee cannot be assessed a financial penalty or required to pay an amount equal to intrinsic value

for the asset in question.

With that being the outcome, then the question becomes, what can be done? Historical documented evidence of employee performance by the supervisor reflecting repeat violations or trends in misconduct issues and appropriate notifications by the supervisor can support appropriate disciplinary actions. Although a financial penalty or pecuniary liability cannot be assessed against the employee without specific statutory authority, disciplinary action and employee plans of correction are proper and warranted by supervisors and managers to prevent recurring issues. We learned a long time ago in property and asset management that documentation is a must. There is no exception here. ■

References

Executive Order 12731 of October 17, 1990, *Principles of Ethical Conduct for Government Officers and Employees*, extracted from <http://www.usoge.gov/xeorders/eo12731.html> on 17 January 2006

Public Law 106-580, *Federal Property and Administrative Services Act of 1949*, extracted from <http://lepw.senate.gov> on 17 January 2006

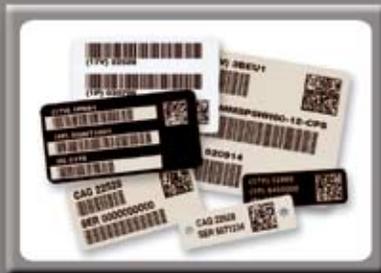
Government Accountability Office, Comptroller General (CG) Decision, *Department of Defense – Authority to Impose Pecuniary Liability by Regulation*, B-280764 of May 4, 2000

Biography

Chris Thompson works for the Department of Homeland Security. He is the Manager of Personal Property for US Customs and Border Protection, Department of Homeland Security. He has 31 years of experience working in and with property management, including 25 years in Contract Property Administration with the Department of Defense. His duties extend throughout different border protection infrastructures, including sea and land. He obtained his BSBA from the University of Phoenix and is considering the next stages of educational adventure. He is the Managing Editor and a frequent contributor to *The Property Professional*. He is a member of the NPMA Federal Center Chapter.



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