

DECISION

17146
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-193625

DATE: February 26, 1981

MATTER OF: Carl R. Petty - [Return of Retirement
Contributions]

DIGEST: When employee is terminated following a conviction for the theft of Government property, his liability for the Government's loss is joint and several with all other tortfeasors involved. However, the former employee's liability is limited to those losses that can be administratively established, based upon all of the available evidence, to be attributable to his fault. Therefore, where there is evidence to indicate that an employee was involved only in one of two thefts of Government property, his liability is limited to the Government's loss from the one theft.

The issue presented is whether a former employee may be held liable for more than his pro rata share of the loss suffered by the Government when that employee was one of several individuals involved in the theft and sale of Government property. For the reasons set out below, we hold that the liability of tortfeasors in this situation is joint and several and that the Government is entitled to recover as much of its loss as it can from any or all of the people that the evidence shows to have been involved in particular incidents.

The claim here has been submitted by Mr. Carl R. Petty, a former employee of the Naval Supply Center (NSC), Oakland, California. In October 1974, two trailer truckloads of sugar, packed in 10-pound bags, were stolen from the NSC. On October 29, 1974, one load, 43,200 pounds, was sold to a company in Oakland, California. On October 31, 1974, another load, 35,640 pounds, was sold to another company in Fremont, California. We have been provided with what appears to be a copy of the complete investigative report prepared by the Federal Bureau of Investigation (FBI).

Four individuals were indicted for the two incidents. Two were Government employees, Carl R. Petty and another and two were not. All but Mr. Petty pleaded guilty. After a plea of not guilty and a partial jury

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trial, Mr. Petty changed his plea to nolo contendere and a finding of guilty was entered on an information charging that he:

"* * * did willfully and knowingly receive, conceal and retain approximately Thirtyfive Thousand Six Hundred and Forty (35,640) pounds of sugar, with intent to convert it to his own use and gain, knowing it to have been embezzled, stolen, purloined and unlawfully converted, said sugar being the property of the United States (and its Defense Supply Agency) and having a retail market value."

According to the FBI report, when the sugar was delivered to one company on October 29, 1974, the truck was driven by the other Government employee. The two others involved were also reported to be present when that delivery was made. The report contains no information to indicate that Mr. Petty was present or involved in any way.

For the delivery to the other company on October 31, 1974, it was reported that Mr. Petty drove the truck. The other involved individuals were all identified as being present when the delivery was made.

The report contains vague allegations that other individuals at the Naval Supply Center may have been involved in the two incidents, but there are no names mentioned. Mr. Petty and the other Government employee are not alleged to have participated other than as truck drivers or witnesses at the actual delivery.

In summary, there is no evidence in the record to indicate any participation by Mr. Petty in the delivery made on October 29, 1974. He was implicated only in the delivery made on October 31, 1974.

We concur with the Defense Supply Agency that the liability of joint tortfeasors who commit torts against the Government is joint and several. This is so in cases of fraudulent claims against the Government, and

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we see no reason to depart from that rule in this case. See Continental Management, Inc., v. United States, 527 F.2d 613 (Ct. Cl. 1975).

However, in order to impose liability on a former employee there must be substantial evidence--either direct or circumstantial--to show that he was responsible for the loss involved. The amount to be recouped from the former employee must be administratively established based upon all of the available evidence. B-163064, January 12, 1968.

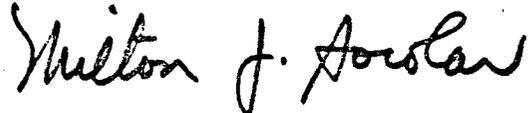
In this case there is no evidence of any kind to show that Mr. Petty was involved in any incident other than the delivery made on October 31, 1974. Therefore, since liability is joint and several, he may be charged only with all or any part of the loss suffered by the Government from that theft. The record before us shows that a total of 35,640 pounds of sugar packed in 10-pound bags was delivered on that date. The record, however, is not completely clear as to how much sugar was recovered from that delivery by the FBI. Therefore, we will use the amount contained in a letter from Mr. Petty's Probation Officer, to the then Civil Service Commission, requesting advice as to Mr. Petty's appeal rights from the seizure of his retirement contributions. That letter states that 21,690 pounds of sugar were recovered by the FBI. The loss to the Government for the October 31, 1974 theft was, therefore, 13,950 pounds of sugar, for which the Government paid \$.3664 per pound, for a total loss of \$5,111.28.

At the time of his separation, Mr. Petty's retirement account contained \$5,722.48. We have long held that amounts owed to the Government by an employee at the time of his separation may be set off against funds in his retirement account either when the employee requests return of his retirement contributions or when payment of an annuity begins. See 58 Comp. Gen. 501 (1979) and cases cited therein. The maximum amount of Mr. Petty's liability has been established at \$5,111.28, but all of the funds held in his retirement account have been turned over to the Defense Supply Agency, the owner of the stolen sugar. Therefore, \$611.20 should be returned to Mr. Petty.

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We note that, in the submission, counsel for Mr. Petty requests a hearing. The General Accounting Office does not hold hearings and considers claims on the written record only. 4 C.F.R. § 31.7 (1980). In the instant case, we required that all of the materials submitted to us by the agency also be supplied to claimant's attorney, who, when contacted after receiving the agency report, informally indicated that she had no further information for our consideration.

Accordingly, settlement will be made in the amount of \$611.20.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States