

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

August 8, 2006

GSBCA 16935-DBT

In the Matter of STANLEY [REDACTED] McM [REDACTED]

James Yorke and Sharon Papp, American Foreign Service Association, Washington, DC, appearing for Petitioner.

James H. Anderson, Office of the Legal Adviser, Department of State, Charleston, SC, appearing for Department of State.

DANIELS, Board Judge (Chairman).

“When the head of a government agency or his designee determines that an employee . . . is indebted to the United States for debts to which the United States is entitled to be repaid, . . . the amount of indebtedness may be collected . . . by deduction from the current pay account of the individual.” 5 U.S.C. § 5514(a)(1) (2000). Before making such a collection, however, an agency must give the employee an opportunity for a hearing concerning the existence or amount of the debt or the terms of a repayment schedule. *Id.* § 5514(a)(2)(D). The hearing “may not be conducted by an individual under the supervision or control of the head of the agency.” *Id.*

The Department of State has determined that one of its employees, Foreign Service Officer Stanley [REDACTED] McM [REDACTED], is indebted to the United States in the amount of \$7478.25. Mr. McM [REDACTED] has exercised his right to a hearing as to the existence of the debt, and the Department has asked the General Services Board of Contract Appeals to designate one of its judges to conduct the hearing. The parties have agreed that the “hearing” shall be on paper, and that the record shall consist of documents submitted by them. The Board designated the undersigned to conduct the hearing. This is the decision on the matter.

Background

Shortly after joining the Foreign Service in 2002, Stanley [REDACTED] McM [REDACTED] was given his first post-training assignment – to Algiers, Algeria. Mr. McM [REDACTED] asked a post management officer of the Office of Executive Director of the State Department's Bureau of Near Eastern Affairs whether, because Algiers was considered a location to which family members could not accompany him, he would be eligible to receive a Separate Management Allowance (SMA) for his wife while he was there. He informed the post management officer that his wife was also a Foreign Service Officer. The officer responded in the affirmative and suggested that Mr. McM [REDACTED] complete an application for the SMA. He followed her suggestion, and the application was approved. Mr. McM [REDACTED] received the SMA throughout his one-year tour of duty in Algiers.

In September 2003, Mr. McM [REDACTED] completed his duty in Algiers and was reassigned to Washington, D.C. The Department continued to pay him a SMA.

In December 2003, an auditor of the Department's Office of Inspector General informed Mr. McM [REDACTED] that because his wife was a Foreign Service Officer, he should not have been receiving the SMA. The Department asked him to repay the entire amount of SMA he had received -- \$10,078.38.

Mr. McM [REDACTED] readily agreed to repay the SMA he had received while posted to Washington, \$2600.13. As to the remainder of the amount – \$7478.25 – he maintained, “I do not feel it would be fair for the burden of repayment to be on me for the SMA I received while I was in Algiers. . . . Repayment of SMA for this long time period in Algiers would be a heavy financial burden for my family, even on a repayment schedule. I believe I should not be required to repay SMA accrued during time in Algiers, but rather the administrative officials who are responsible for this error should be held accountable.”

Mr. McM [REDACTED] asked the Department to waive repayment of the amount on the ground that “collection of [the claim] would be against equity and good conscience and not in the best interests of the United States.” (A government claim may be waived in these circumstances, according to 5 U.S.C. § 5584.) In asking for the waiver, he cited a provision of the Foreign Affairs Handbook (FAH), in effect at the time, which stated, “Generally, these criteria will be met by a finding that the erroneous payment occurred through administrative error and that there is no indication of misrepresentation, fraud, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.” 4 FAH-3H-497.2-2b. He referenced the Office of Inspector General report which concluded that he had “acted in good faith, and did not intend to defraud the U.S. government, when he applied for and received SMA. The post management officer for the

Bureau of Near Eastern Affairs, Office of Executive Director (NEA/EX) confirmed that when McManis sought her guidance, she mistakenly told him that he was eligible to receive SMA.”

An authorized officer of the Department declined to waive the Government’s claim. He determined that Mr. McM [REDACTED] was not eligible for a waiver, per 5 U.S.C. § 5584, because he was at fault in receiving the SMA. The officer wrote, “Although the overpayment was caused by an administrative error, that does not relieve you from fault. You knew or should have known through review of Department regulations that you were not entitled to SMA. Since you knew or should have known that you received an erroneous payment it would not be against equity and good conscience to collect.”

In issuing his decision as to waiver, the Department officer informed Mr. McM [REDACTED] of his right to petition for a hearing with respect to the existence or amount of the debt or a repayment schedule. Mr. McM [REDACTED] exercised this right, maintaining that he “do[es] not believe that [he] should be compelled to reimburse a debt caused by errors of authorizing offices.”

Discussion

The Department of State Standardized Regulations (DSSR) authorize the payment of a Separate Maintenance Allowance under certain circumstances. An SMA is “an allowance to assist an employee who is compelled by reason of dangerous, notably unhealthful, or excessively adverse living conditions at the post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining family members elsewhere than at such post.” DSSR 261.1(a). The regulations address “Circumstances Not Warranting SMA.” *Id.* 263. Among these circumstances are “When the spouse of an employee is either a member of the military services or is a U. S. Government civilian employee subject to worldwide assignment availability.” *Id.* 263.2. The Department says, and Mr. McM [REDACTED] does not contest, that as a Foreign Service Officer, Mr. McM [REDACTED]’s wife is subject to worldwide assignment availability. Thus, the regulations clearly provide that even if a Foreign Service Officer assigned to Algiers is generally entitled to an SMA, because Mr. McM [REDACTED]’s wife is also a Foreign Service Officer, he was not entitled to the allowance while he was posted there.


Our job in deciding this case is to determine, under the law, whether Mr. McM [REDACTED] may keep the money which he improperly received. Unlike the Department, we do not have the power to waive the debt for equitable reasons. The law here is clear. As we have summarized it previously:

It is a venerable principle that after the Government pays money by mistake to someone having no right to keep the funds, the Government may recover that money. *United States v. Wurts*, 303 U.S. 414, 415-16 (1938) (citing *Wisconsin Central Railroad v. United States*, 164 U.S. 190, 212 (1896); *United States v. Burchard*, 125 U.S. 176, 180, 181 (1888)). The Court of Claims has explained that “no officer or agent of the Government is clothed with authority to disburse money belonging in the public treasury without authority so to do,” and that “when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution.” *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) “Under these circumstances it is not only lawful but the duty of the Government to sue for a refund.” *Id.*; see also *USI Security Systems*, GSBCA 9990-COM (Nov. 1, 1989); *Drain-A-Way Systems*, GSBCA 7022, 84-1 BCA ¶ 16,929, at 84,217 (1983).

Advanced Injection Molding, Inc. v. General Services Administration, GSBCA 16504, et al., 05-2 BCA ¶ 33,037.

Decision

Clearly, Mr. McM [REDACTED] must repay to the Department the amount of SMA he received but has not yet repaid. We do not subscribe to the Department’s belief that Mr. McM [REDACTED] was at fault in receiving the SMA payments; the auditor’s report confirms that Mr. McM [REDACTED] fully disclosed all facts pertinent to his eligibility for the allowance and that he was misled by an officer who should have known the rules. Nevertheless, the regulations preclude his retaining the money in question.



STEPHEN M. DANIELS
Board Judge