

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 25, 2002

GSBCA 15790-DBT

In the Matter of KENNETH ■ H ■■■■■■■■■■

Kenneth ■ H ■■■■■■■■■■, ■■■■■■■■■■, Employee.

Telo M. Braswell, Senior Assistant General Counsel, Office of General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

DeGRAFF, Board Judge.

The General Services Administration (GSA) notified one of its employees, Kenneth ■ H ■■■■■■■■■■, that he had been overpaid \$43,061.06 for a living quarters allowance. GSA asked Mr. H ■■■■■■■■■■ to repay this amount and said that if he did not, it would make deductions from his pay in order to collect the amount of the overpayment. Mr. H ■■■■■■■■■■ submitted a petition to GSA and asked for a hearing regarding GSA's determination before the payroll deductions began, as allowed by 5 U.S.C. § 5514(a)(2)(D)(2000), and GSA asked the General Services Board of Contract Appeals to select one of its judges to serve as the hearing official.

After the case was assigned to the undersigned judge, GSA and the employee each submitted written statements of their positions. GSA's regulations provide that the hearing official is to issue a written decision which sets forth the facts supporting the nature and origin of the debt, as well as the hearing official's analysis, findings, and conclusions as to the employee's or agency's grounds, the amount and validity of the debt, and the repayment schedule. 41 CFR 105-56.009 (2001). The decision follows.

Findings of Fact

Two GSA payroll center computer printouts show that between February 28, 1998, and June 30, 2001, when Mr. H [REDACTED] was stationed in Germany, GSA paid him a total living quarters allowance of \$89,112.¹ Mr. H [REDACTED]'s year end pay and leave statements for 1998, 1999, and 2000, plus the statement for the pay period ended June 16, 2001, show that GSA paid him a total living quarters allowance of \$88,652. The pay and leave statements show \$460 less than the printouts show, because the pay and leave statements do not take into account a subsequent payment and an adjustment made in August 2001. Taking the payment and the adjustment into account, the amounts shown on the printouts are consistent with the amounts shown on the pay and leave statements.

In June 2001, GSA issued a memorandum that asked its employees in Europe to provide evidence of their actual living quarters expenses. In August 2001, Mr. H [REDACTED] submitted documentation to GSA claiming that he had incurred living quarters expenses of \$8290.68 in 1998; 16,020 Deutsche marks (DM) plus \$5701.40 in 1999; 33,406.16DM plus \$1718.69 in 2000; and 15,968DM plus \$1170.22 in 2001. GSA determined that his actual living quarters expenditures for the period at issue were \$46,741.34. GSA arrived at this amount by converting to United States dollars those of Mr. H [REDACTED]'s expenses that he claimed in Deutsche marks, using a conversion rate of 2.19DM to \$1, and then adding to that figure the living quarters expenses that he claimed in United States dollars.

On December 28, 2001, GSA notified Mr. H [REDACTED] that an audit of his payroll account showed that he had been overpaid \$43,061.06 for his living quarters allowance, and asked him to repay this amount. GSA said that if it did not hear from him within thirty days, it would begin making deductions from his pay in the amount of fifteen percent of his net disposable pay until the debt was satisfied. GSA told Mr. H [REDACTED] that he could ask GSA to reconsider its determination regarding the existence or amount of the debt and the proposed repayment schedule. If he chose to ask GSA to reconsider the proposed repayment schedule, GSA asked that within twenty days after receipt of its December 28 letter, he provide an alternative repayment schedule with a detailed statement showing the financial hardship that would result from GSA's proposed schedule. GSA also told Mr. H [REDACTED] that he could petition GSA for a pre-offset hearing, and that his petition should state why he believed GSA's decision regarding the existence or amount of the debt was in error and why he objected to GSA's proposed repayment schedule.

¹ GSA also paid Mr. H [REDACTED] a post allowance, which he believes should be at issue in this hearing. The only issue before the Board, however, concerns the living quarters allowance.

Mr. H [REDACTED] asked for reconsideration and also submitted a petition requesting a hearing before the payroll deductions began. In the request for reconsideration and the petition for hearing, Mr. H [REDACTED] asked what GSA meant when it said that it would deduct fifteen percent from his "net disposable pay" and what GSA calculated that amount to be. He said that after he received that information, he would be able to assess his situation and tell GSA how the repayment schedule would affect his family. In a letter dated January 24, 2002, GSA told Mr. H [REDACTED] what it calculated to be fifteen percent of his net disposable pay. In making that calculation, GSA included allowances as part of gross pay.

In its March 27, 2002 response to Mr. H [REDACTED]'s petition for a pre-offset hearing, GSA said that allowances are not included as part of gross pay. GSA also said that it reviewed its records and determined that the difference between the amount it paid Mr. H [REDACTED] and the amount it calculated to be his claimed actual expenses is \$42,366.66, not \$43,061.06 as stated in its December 28, 2001 letter. Thus, as of March 27, the amount that GSA sought to collect by deductions from Mr. H [REDACTED]'s pay was \$42,366.66.²

Discussion

When Government quarters are not available without charge for an employee in a foreign area, statute provides that the employing agency may grant the employee a living quarters allowance (LQA) for rent, heat, light, fuel, gas, electricity, and water, in accordance with regulations prescribed by the President. 5 U.S.C. §§ 5922(c), 5923. The President's authority to prescribe regulations was delegated to the Secretary of State by section 1(b) of Executive Order 10903, 26 Fed. Reg. 217 (Jan. 11, 1961), and the Secretary implemented the statutory provision in the Department of State Standardized Regulations (DSSR). DSSR §§ 130-38.³

According to the DSSR, in order to receive LQA payments, an employee is supposed to submit to the agency a written application that contains an estimate of costs, or actual costs if they are known.⁴ DSSR § 132.5. The employee's allowance will be the lesser of allowable

² Actually, the difference between the amount GSA paid Mr. H [REDACTED] and the amount GSA calculated to be his claimed actual living expenses is \$42,370.66, which is \$4 more than GSA now demands that Mr. H [REDACTED] repay. GSA says that it has decided not to ask Mr. H [REDACTED] to repay the \$4 difference.

³ The relevant DSSR provisions have been in effect since 1992.

⁴ Our record does not show that Mr. H [REDACTED] ever completed an application for LQA. In April 1998, he provided GSA with evidence of the amount he was paying for rent.

costs or the maximum rate of payment for the post. DSSR § 134. The maximum rate of payment depends upon factors such as the location of the employee's post, the employee's personnel classification, and the size of the employee's family. DSSR § 135. The employee is required to show the actual annual expenses of rent and utilities, supported by documentation, whenever requested by the agency. DSSR § 132.5. In areas where it is difficult to estimate quarters costs, the agency will pay the employee the maximum rate of payment allowed by the DSSR in even installments throughout one year. At the end of that year, or at any other time, the employee's actual quarters expenses are supposed to be reconciled with the amount that was paid to the employee, and any payment in excess of the employee's actual expenses is supposed to be recovered. DSSR § 134.16. The DSSR makes clear that an employee can retain only the lesser of the maximum rate of payment or the amount of actual, allowable expenses that the employee incurs for living quarters. DSSR §§ 134, 134.16, 135.1.

Validity and amount of the debt

If Mr. H [REDACTED] received LQA payments that exceeded the amount of his actual, allowable living expenses, then he owes GSA a valid debt. According to the DSSR, Mr. H [REDACTED] cannot retain anything more than his actual, allowable living quarters expenses, and GSA is supposed to recover any overpayment. Because the DSSR are prescribed by the Secretary of State pursuant to a delegation of authority from the President, the regulations may not be waived or modified by GSA. Joseph P. Carrigan, 60 Comp. Gen. 243 (1981). The DSSR obligate Mr. H [REDACTED] to repay an LQA overpayment and, therefore, a valid debt exists if Mr. H [REDACTED] received an overpayment.

Mr. H [REDACTED] says he did not know that he was receiving LQA overpayments that he would later be required to repay. He also says that the overpayments resulted from GSA's actions. Unfortunately for Mr. H [REDACTED], however, he has no right to retain anything more than amount of LQA allowed by the DSSR, regardless of whether he knew that he was being overpaid or whether GSA's actions are responsible for the overpayments.⁵ The rule that governs Mr. H [REDACTED]'s arguments is not new. More than one hundred years ago, the United States Supreme Court considered the case of Jabez Burchard. Mr. Burchard retired from federal service in October 1874, and received retirement benefits at the rate of three-quarters of his sea pay. In March 1878, the Government determined that Mr. Burchard should have

GSA completed an application for LQA and printed in the signature block, "Employee not available to sign."

⁵ His knowledge and GSA's actions would be relevant, however, if GSA considers whether to waive the debt.

been receiving retirement benefits at the rate of one-half of his sea pay, and began paying him at that rate. The Supreme Court decided that the Government could recover the amount that it paid to Mr. Burchard in excess of one-half of his sea pay between October 1874 and March 1878. The Court explained:

Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law; and he has no right to keep what he thus obtained This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly, under such circumstances, the mistake may be corrected.

United States v. Burchard, 125 U.S. 176, 180-81 (1888). In a similar case, the Court explained that because a military officer was not entitled to the amount that he received for longevity pay for a certain period of time, the excess amount he received would have to be deducted from other amounts due to him. United States v. Stahl, 151 U.S. 366 (1894). Neither Mr. Burchard nor Mr. Stahl realized that he was receiving more money than he was eligible to receive. Yet, the Supreme Court decided that they had to return the amounts they received that exceeded the amounts they were actually entitled to receive. See also DiSilvestro v. United States, 405 F.2d 150, 155 (2nd Cir. 1968), cert. denied, 396 U.S. 964 (1969) ("It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them"⁶). Thus, it is clear that if GSA overpaid Mr. H [REDACTED], he owes GSA a valid debt.

In order to establish that it overpaid Mr. H [REDACTED], GSA must first establish the amount of LQA payments that Mr. H [REDACTED] received. GSA's computer printouts show that Mr. H [REDACTED] received \$89,112 in LQA payments. We reviewed the printouts carefully and determined that they are internally consistent and appear to be accurate. They are also consistent with the amounts shown on Mr. H [REDACTED]'s pay and leave statements. Thus, we conclude that GSA correctly determined that the amount paid to Mr. H [REDACTED] was \$89,112.

Next, in order to establish that it overpaid Mr. H [REDACTED], GSA must establish the amount of his actual, allowable expenses. According to GSA's December 28, 2001 letter to Mr. H [REDACTED] and its March 27, 2002 response to his petition for a pre-offset hearing,

⁶ "Ex aequo et bono" is a Latin term that means "according to what is equitable and good." Black's Law Dictionary 581 (7th ed. 1999).

Mr. H [REDACTED]'s actual living quarters expenditures for the period at issue were \$46,741.34. GSA did not disallow any of Mr. H [REDACTED]'s claimed expenses. It did, however, convert to United States dollars the expenses that Mr. H [REDACTED] claimed in Deutsche marks, and then it added that amount to the living expenses that he claimed in United States dollars. GSA used a conversion rate of 2.19DM to \$1. In his petition requesting a hearing, Mr. H [REDACTED] said that this conversion rate is not accurate. If the conversion rate is not accurate, then GSA has not established the amount of Mr. H [REDACTED]'s actual expenses and, consequently, has not established the amount of the debt that resulted from an overpayment.

We asked GSA to explain the basis for the conversion rate that it used and the basis for its decision to apply the conversion rate as it did. In its March 27 response, GSA said that it had contacted the State Department to obtain the correct rate, and that the rate it used was based upon information provided by the State Department's Office of Allowances. The record as of March 27, contained a table that appears to show conversion rates in effect in January, July, and December 1999. No rates were shown for any other months or years, and only the December 1999 conversion rate was 2.19. Although we asked GSA to tell us who prepared the table and to explain how to read the table to determine that the 2.19 conversion rate was appropriate to use for Mr. H [REDACTED], GSA's March 27 response did not answer those questions. GSA did not put forward any theory or identify any regulation or other authority that supported its decision to utilize a conversion rate of 2.19DM to \$1 and to use that one rate for the three years and four months that Mr. H [REDACTED] received LQA payments.

On April 22, GSA informed the Board and Mr. H [REDACTED] that the 2.19DM to \$1 conversion rate that it received from the State Department was not correct, and that it recently received from the State Department's Office of Allowances the correct rates to use in order to calculate Mr. H [REDACTED]'s actual, allowable expenses. GSA now says that conversion rates of 1.79DM, 2.06DM and 2.12DM to \$1 should be used in order to determine the amount of his expenses, and that using these rates decreases the amount of the debt to \$39,528.63.⁷ GSA has not explained why using conversion rates of 1.79DM, 2.06DM and 2.12DM to \$1 to calculate the amount of Mr. H [REDACTED]'s debt is any more reliable than using a rate of

⁷ This information was not contained in the agency's records relating to the debt at the time GSA decided to utilize its salary offset procedures. According to statute and regulation, before GSA initiates any proceedings to collect a debt by salary offset, it is required to make the records relating to the debt available to the employee. 5 U.S.C. § 5514(a)(2)(B); 41 CFR 105-56.004(e). One purpose of this procedural requirement is to safeguard the due process rights of debtors. S. Rep. No. 97-378, at 12 (1982). The requirement fails to serve this purpose and is rendered meaningless if GSA adds documents to the record after a hearing begins.

2.19DM to \$1, or whether any of these rates is correct. We have no more confidence in GSA's current position than we had in its original position, because the rates it now says are correct were obtained from the same source as was the original rate, which GSA previously represented was correct.

In December 2001, GSA represented that Mr. H [REDACTED] owed \$43,061.06. In March 2002, GSA represented that Mr. H [REDACTED] owed \$42,366.66. In April 2002, GSA represented that Mr. H [REDACTED] owed \$39,528.63. Also in April, GSA said that it recently discovered that it has already collected by salary offset \$182.40 of the LQA overpayment from Mr. H [REDACTED], so his debt should be further reduced by this amount. GSA made this discovery based upon a question raised by Mr. H [REDACTED] in his response to GSA's March 27 response, which does not inspire confidence that GSA has made a sufficiently careful examination of its records regarding Mr. H [REDACTED]'s debt. Even though this proceeding is not one to which formal rules of evidence standards apply, we need to be presented with information that persuades us to reach the right result. The mercurial information we have been given is insufficient to persuade us that GSA has reached its final position, much less the right position, regarding the amount of Mr. H [REDACTED]'s actual expenses or the amount of his debt.

Because GSA has not established that it correctly determined the amount of Mr. H [REDACTED]'s debt, it is not entitled at this time to offset from his salary any amount due for an LQA overpayment.

Repayment schedule

In its December 28, 2001 letter, GSA told Mr. H [REDACTED] that it intended to take fifteen percent of his net disposable pay until the debt was satisfied. The fifteen percent figure is the maximum deduction allowed by GSA's regulations. 41 CFR 105-56.010(d). In its March 27 response to Mr. H [REDACTED]'s petition, GSA acknowledged that these regulations say that the period during which deductions are made can never exceed three years. GSA said that it would collect as much as it could during three years and then evaluate other options for collecting any remaining debt. On April 22, GSA informed the Board and Mr. H [REDACTED] that it now believes it can pursue salary offsets for as long as it takes to collect a debt, because its regulations conflict with 5 U.S.C. § 5514 and are therefore invalid. We reject GSA's argument, primarily because the regulations do not conflict with the statute, which does not preclude an agency from limiting the duration of salary offsets. According to 5 CFR 550.1104 and 550.1105 (2001), GSA's salary offset regulations were required to be approved by the Office of Personnel Management (OPM). In 5 CFR 550.1104(j), OPM requires that an agency's regulations prescribe the duration of salary offset deductions, and OPM sets an outside limit upon the time within which deductions can be made. OPM does not, however,

preclude an agency from setting a shorter duration for making deductions. It appears that OPM allows an agency to do what GSA has done in its regulations. GSA's March 27 position was correct. Its ability to collect by salary offset is limited to three years.

GSA has not established that its proposed repayment schedule is consistent with the requirement contained in the regulations that the size and the frequency of salary offset deductions bear a reasonable relation to the employee's ability to pay. 41 CFR 105-56.010(d). There is nothing in our record to show that before GSA sent its December 28, 2001 letter to Mr. H [REDACTED], it considered whether the size and frequency of its proposed deductions bear a reasonable relation to his ability to pay. After he received that letter, Mr. H [REDACTED] asked GSA to explain what amounts would be deducted from his pay, so that he could assess how the deductions would affect his family and then provide that assessment to GSA. By the time GSA responded to his request, it was too late for him to meet GSA's deadline for providing an alternative repayment schedule and a detailed explanation of the hardship that would result from GSA's repayment schedule. In addition, the information that GSA provided was based upon including allowances in gross pay, which is inconsistent with how GSA now says gross pay is calculated. By not giving Mr. H [REDACTED] timely, accurate information regarding the size of its proposed deductions, GSA deprived him of a meaningful opportunity to provide any information regarding the effect of the proposed deductions and deprived itself of the opportunity to consider whether the size and frequency of its proposed deductions bear any relation to Mr. H [REDACTED]'s ability to pay. Because GSA cannot demonstrate that its proposed repayment schedule bears a reasonable relation to Mr. H [REDACTED]'s ability to pay, it is not entitled at this time to offset from his salary any amount due for an LQA overpayment. See Arnold v. United States, 404 F.2d 953, 958 (Ct. Cl. 1968) (agency could not collect debt by salary offset because it did not exercise its discretion and determine that deductions were in reasonable amounts and commensurate with debtor's financial ability to pay).

Decision

At this time, GSA cannot implement a salary offset in order to collect the amount that it claims is due because it has not established the amount of the debt and it has not established that its proposed repayment schedule complies with its regulatory requirements regarding such schedules.

MARTHA H. DeGRAFF
Board Judge