

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

118707

FILE: B-205984

DATE: June 15, 1982

MATTER OF: Tehran American School - Reimbursement of Funds

- DIGEST: 1. The State Department cannot pay the Tehran American School \$13,333.94 due from the sale of School motor vehicles arranged by the United States Embassy in Tehran, Iran, since the Embassy as agent did not breach any duty owed to the School. The proceeds from the sale were lost as a result of seizure of the United States Embassy—an uncontrollable event. Moreover, the Embassy acted properly in commingling the proceeds of the sale with other receipts in the Embassy safe.
2. Claim is to be reported to the Congress under the Meritorious Claims Act, 31 U.S.C. § 236, since seizure and occupation of the United States Embassy and resulting loss of proceeds from the Embassy's sale of the School's vehicles, was an extraordinary circumstance calling for equitable consideration.

The Department of State has requested an advance decision on whether it can pay the Tehran American School \$13,333.94 as part of the proceeds from a sale of three School vehicles that was arranged by the United States Embassy in Tehran, Iran. Although we conclude that the State Department cannot make the payment, we think the equities warrant our reporting the claim to the United States Congress under the Meritorious Claims Act of April 10, 1928, 31 U.S.C. § 236.

The facts show that as a result of the political tensions in Iran in 1979, in anticipation of closing, the Tehran American School arranged that the United States Embassy in Tehran sell three of the School's motor vehicles. The State Department informs us that United States Embassies provide this kind of assistance to American institutions operating in foreign countries. Although State indicates that occasionally the proceeds from these sales are given directly to the seller, since the School had closed, the monies were placed in the Embassy cashier's safe with other receipts normally kept in the safe. These receipts regularly were deposited in an account at the Tehran bank used by the Embassy.

As payment, the Embassy intended to have the United States disbursing office in Paris issue a \$13,333.94 Treasury check drawn on funds deposited in the Tehran bank used by the Embassy. (\$18,194.74 from the sale minus amounts owed by the School to the Embassy for outstanding telephone bills and other payables.) As a result of the Embassy seizure, however, the safe was lost and never recovered and the Paris disbursing office was not notified to make the payment.

The State Department has concluded that the sale of the motor vehicles was made in accordance with Department regulations, that the funds were properly maintained in the safe, and that the loss was not due to negligence. Although a Departmental legal memorandum presents arguments for and against paying the claim, State has concluded that the United States is responsible for the funds and that payment to the School is warranted. 1/

The legal memorandum accompanying the State Department submission characterized the relationship between the Embassy and the School as that between agent and principal. In this regard, it stated that if a principal's property is lost or stolen through no fault of the agent, generally the principal must bear the loss. It also noted that where an agent is authorized to commingle the principal's funds with the agent's to carry out the purposes of the agency, the agent is not liable for the loss. In support of this argument the memo suggests that the Embassy "appears to have been at least impliedly authorized to collect the proceeds of the sale in Iranian rupees and to commingle these funds with others on deposit with the Embassy***". On the other hand, the memo points out that agents often are required to segregate a principal's funds from their own and that commingling will make the agent a debtor of the principal.

We agree with the State Department that the relationship between the School and the Embassy was that of principal and agent. As such, the question raised is whether the Embassy breached its agent's duty to the School so as to make the Embassy liable to the School for loss of the proceeds from the sale of the vehicles.

An agent entrusted with the care and custody of his principal's property is a bailee of the property. See, Preston v. Prather, 137 U.S. 604, 613-14 (1891). Where the property involved is the money

1/ The Department also has concluded that the Hostage Agreements between the United States and Iran precluded the United States from submitting the claim either to the Iranian Government or the Iran-United States Claims Tribunal.

of a principal, the agent is required to keep it in a safe place, Robbins v. Roumel, 138 A.2d 922, 923 (Min. Ct. App. D.C. 1958); however, the agent is not an insurer of its safety and absent negligence will not be liable if the money is lost or stolen. E.g., Cave v. Lougee, 67 S.E. 667 (Ga. 1910); New Mexico Department of Health and Social Services v. Secretary of Agriculture, 376 F. Supp. 953, 954-55 (D. Mex. 1973).

In this instance there is nothing in the record to suggest that the Embassy breached its duty to protect the School's monies. The funds in the safe were lost as a result of the seizure of the American Embassy, an event over which the United States had no control. Further, the State Department appears to have been acting appropriately in its placing the School's money in its safe.

Generally an agent entrusted with a principal's money must keep it separately from his own, and, upon commingling the funds he becomes a debtor to the principal. United States v. Marlenfeld, 116 F. Supp. 634, 638 (E.D. Mo. 1953), aff'd., 214 F.2d 632, cert. denied 348 U.S. 865. On the other hand, a principal may consent to the agent's commingling his funds with the agent's, and the risk of loss of the funds is shifted back from the agent to the principal. 116 F. Supp. at 638.

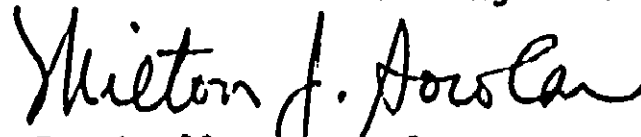
The facts show that the Embassy's commingling of the proceeds from the sale of the School's vehicles with other receipts in the safe was in the normal course of business and impliedly was undertaken with the School's consent. In this instance, the proceeds from the sale of the vehicles could not have been paid directly by the buyers to the School since the School had closed. The Embassy took the cash proceeds intending to deposit them in the bank with its normal weekly deposits and to order a Treasury check drawn against them. But for the seizure of the Embassy, the funds in the Embassy safe, including the receipts from the sale, would have been deposited in that bank. Since the school did not object to the Embassy following its regular procedures, we agree with the State Department memo that the School impliedly agreed to the commingling of the sale proceeds with other monies in the Embassy safe, and in accordance with the principles discussed above, the risk of loss was shifted to the School. It follows that since it was in no way negligent, the Embassy is not legally liable to the School for the loss of the \$13,333.94.

Although we must disallow the claim, we conclude that the equities in this case warrant our reporting the claim to the United States Congress under the Meritorious Claims Act of 1928, 31 U.S.C. § 236. The Meritorious Claims Act provides that when a claim is filed in this Office that may not be lawfully adjusted by use of an appropriation theretofore made, but

which claim, in our judgment, contains such elements of legal liability or equity as to be deserving of the consideration of Congress, it shall be submitted to the Congress with our recommendations. The remedy is an extraordinary one and its use is limited to extraordinary circumstances.

The cases we have reported for the consideration of the Congress generally have involved equitable circumstances of an unusual nature and which are unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances. 53 Comp. Gen. 157, 158 (1973).

We think the seizure and occupation of the United States Embassy, and the resulting loss of the proceeds from the Embassy's sale of the School's vehicles, was an extraordinary circumstance calling for equitable consideration. Although other individuals and institutions were damaged by the hostilities in Iran, the State Department has informed us that it is not aware of any similar claims in which the Government had the direct responsibility for safeguarding the private party's funds. Also, the other parties, though apparently not the School, could have presented their claims to the Iran-United States Claims Tribunal. Accordingly, our report and recommendation that payment of the claim be authorized will be forwarded to the Congress.



Acting Comptroller General
of the United States