



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bernard E. Shea - Education Allowance -
Waiver of Overpayment

File: B-226143

Date: November 22, 1988

DIGEST

1. The education allowance authorized by 5 U.S.C. § 5924(4) is an overseas cost-of-living allowance payable to federal employees stationed in foreign areas to assist them in providing their children with educational services ordinarily provided without charge by public schools in the United States. There are two separate statutory provisions--5 U.S.C. §§ 5584 and 5922(b)--authorizing waiver of overpayments of this allowance when collection would be "against equity and good conscience." An employee may properly apply separately for waiver of an overpayment both to the head of the employing agency under 5 U.S.C. § 5922(b), and to the Comptroller General under 5 U.S.C. § 5584, in situations involving an overlapping of these separate waiver authorities.

2. An employee stationed in the Bahamas received education allowance monies in the amount of \$4,500 for his daughter's room and board at a high school near Miami, Florida, for the 1981-82 academic year. Under the applicable regulations this payment should have been limited to \$2,850 because the school did not provide the room and board. Waiver is granted under 5 U.S.C. § 5584 of the erroneous overpayment of \$1,650, since the record establishes that the employee acted in good faith and without knowledge of the error and that he spent the entire \$4,500 for his daughter's food and lodging in reliance on the erroneous authorization.

3. An employee stationed in the Bahamas received an education allowance in the summer of 1982 to provide for his daughter's education at a high school near Miami, Florida, for the 1982-83 school year. He became liable to refund most of the allowance when he was transferred to Miami at the beginning of that academic year in September 1982. Waiver of collection is denied under 5 U.S.C. § 5584 since the transaction did not involve expenses incurred by the employee in detrimental reliance on an erroneous authorization. Further, the Comptroller General has no basis to question the previous denial of waiver by the

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employing agency under 5 U.S.C. § 5922(b) with respect to those amounts.

DECISION

Mr. Bernard E. Shea, an Immigration Examiner with the United States Immigration and Naturalization Service (INS), requests reconsideration of our Claims Group's denial of his application for a waiver of claims against him in the amount of \$7,928.95 arising out of overpayments of education allowances he received for the academic years 1981-82 and 1982-83 for the education of his youngest child, Marybeth. In light of the facts presented, and the applicable provisions of statute and regulation, we grant waiver of an overpayment he received for the academic year 1981-82 in the amount of \$1,650, but we sustain the denial of waiver as to the remaining overpayments.

BACKGROUND

In 1975 the INS transferred Mr. Shea from Fort Fairfield, Maine, to Nassau, Bahamas. He then moved to the Bahamas with his wife and four of their six children. Their two oldest children remained in the United States. He received education allowances for the school expenses of his children from the time of his arrival in the Bahamas in 1975 until the time he was transferred to Miami, Florida, in September 1982.

The amounts at issue here relate to the education allowances Mr. Shea received for the academic years 1981-82 and 1982-83 to cover the expenses of his youngest child, Marybeth, for her junior and senior years of high school attendance at the Madonna Academy in the Miami suburb of Hollywood, Florida.

For the academic year 1981-82, a claim has been asserted against Mr. Shea in the amount of \$1,650 for a refund of an overpayment he received for Marybeth's room and board. He requested and received payment for the expenses of her room and board in the amount of \$4,500 in the summer of 1981. In October 1982 INS officials determined that his entitlement to reimbursement for her room and board under the applicable regulations had been limited to \$300 per month because her food and lodging had not been provided by her school. They allowed him credit for 9-1/2 months at the \$300 rate, or \$2,850, and determined that he was liable to refund the difference of \$1,650.

In October 1982 INS officials also asserted a further claim against Mr. Shea in the amount of \$6,100 for a partial

refund of the amount he had received for Marybeth's room and board for the academic year 1982-83. It appears that he requested and received \$6,400 for her room and board for that academic year in the summer of 1982, but he was only allowed a 1-month credit of \$300 because of his reassignment back to the United States in September 1982. In addition, the INS asserted a claim for a refund of \$178.95 for excess payments made for Marybeth's transportation expenses so that the claims against him here at issue relating to that academic year total \$6,278.95 in amount.

Beginning in 1982 Mr. Shea filed a series of grievances with INS under a labor-management agreement contending that he had been misled by State Department officials at the United States Embassy in Nassau concerning his entitlements, and suggesting that in the circumstances he felt the return of one-half of the excess allowances would be fair and equitable to himself and the government. His grievances were dismissed because they did not conform to the procedural requirements of the labor-management agreement.

Subsequently, in 1984, Mr. Shea requested a waiver of the claims against him. He again suggested that he had been misled in the matter, and he said that repayment would place a financial burden on his family.

In 1986 our Claims Group denied waiver on the basis of an administrative report with recommendations forwarded by the INS. Waiver was determined to be unwarranted because of Mr. Shea's fault in the matter, in that he was "apparently provided access to the necessary information concerning his allowance entitlements" but had not "questioned his entitlements."

In requesting reconsideration, Mr. Shea expresses disagreement with the conclusion reached that he was at fault in the matter. He states that the procedure followed by INS employees in Nassau in applying for education allowances was to obtain a form, and advice concerning the current regulations, from the administrative office of the United States Embassy. Employees then sent the form directly to the INS Regional Finance Center in Dallas, Texas, for further processing and payment. Mr. Shea states that prior to 1981 he had routinely followed this procedure without incident in obtaining education allowances for his children's schooling. Further, while he had not studied the regulations on file at the embassy each time he applied for education allowances and other overseas cost-of-living payments, he had regularly and routinely questioned the personnel at the embassy's administrative office about his entitlements. He had made no secret of

the fact that the Madonna Academy was not a boarding school, nor was there any way he could have hidden that fact. Furthermore, nothing contained in the application form, nor any of the advice provided by the embassy personnel, caused him to suspect that the room and board element of the education allowance would be limited to \$300 per month. Had he known of this limitation in advance, he says, he either would have made other arrangements for her living accommodations near the Madonna Academy or would have selected a different school.

ANALYSIS AND CONCLUSION

Statutes and Regulations - Education Allowance

Subsection 5924(4) of title 5, United States Code, authorizes payments to federal employees stationed in foreign areas to assist them in providing their children with educational services which are ordinarily provided without charge by public schools in the United States. The allowance is designed to assist them in paying for the cost of tuition and related expenses, room and board, and transportation. Congress established the education allowance more than 30 years ago to relieve employees stationed overseas of financial hardship in providing adequate schooling for their children. See, generally, GAO, Overseas Benefits at 8 and 23-25 (NSIAD-86-105FS, April 25, 1986).

Implementing regulations are contained in Part 270 of the Department of State's Standardized Regulations (Government Civilians, Foreign Areas) (SR). Those regulations provide that education allowances normally will be granted in advance of the school year, and that prior to the end of the grant period the employee must present satisfactory documentation of actual allowable costs. SR § 274.11. If the grant has exceeded documented expenses by more than \$100, a revision of the grant must be made together with repayment by the employee of any overpayment. SR § 274.11. As indicated, a grant for room and board is "limited to \$300 per month for up to 10 months when child does not reside in school dormitory but instead used private boarding facilities." SR § 277.2.b.

Statutes and Regulations - Waiver

Subsection 5922(b) of title 5, United States Code, provides that the head of the agency concerned may, under prescribed regulations, waive a right of recovery of overseas cost-of-living allowances paid under 5 U.S.C. § 5924, including the education allowance, if it is shown that the recovery "would be against equity and good conscience or against the public

interest." The implementing regulations limit waiver of the recovery of an education allowance to the situation in which an employee transfers to a new non-foreign post and the head of the employing agency determines, in that situation, that recovery of all or a part of the education allowances advanced would be against equity and good conscience or against the public interest. SR § 276.45. Circumstances meriting exercise of this waiver authority are stated to include those in which the educational institution would make no refund of tuition and other payments if the child were to be withdrawn from the school because of the employee's transfer to the United States. SR § 276.45.

In addition, section 5584 of title 5, United States Code, authorizes the Comptroller General to waive the claim of the United States against an employee or former employee of the government arising out of an "erroneous payment" of pay or allowances if collection "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a). That section further provides that the Comptroller General may not waive a claim if there exists, in connection with the claim, an indication of "fault" on the part of the employee. 5 U.S.C. § 5584(b)(1). "Fault" is considered to exist if in light of all the facts it is determined that the employee knew or should have known that an error existed and should have taken corrective action. See 4 C.F.R. Part 91; and National Treasury Employees Union, 58 Comp. Gen. 721, 723 (1979).

Thus, there are two separate and distinct bases under statute and regulation for the waiver of claims for the recovery of overseas cost-of-living allowances. We have expressed the view that an employee may properly apply separately for waiver of an overpayment both to the head of the employing agency under 5 U.S.C. § 5922(b), and to the Comptroller General under 5 U.S.C. § 5584, in situations involving an overlapping of these separate waiver authorities. Guy F. Windley, B-195322, Nov. 27, 1979.

Waiver of Overpayment Received for School Year 1981-82

Mr. Shea received advance payment in the summer of 1981 for his daughter's room and board for the next academic year in the amount of \$4,500. The records presented establish that the expenses he actually incurred for her food and lodgings exceeded this amount. Nevertheless, as indicated, the Madonna Academy at which his daughter had enrolled was not a boarding school, and the advance payment for her food and lodgings should thus have been limited to \$300 per month for the school's 9-1/2 month academic year, or \$2,850. Thus, the advance payment which was authorized exceeded

his entitlement in the amount of \$1,650. The INS did not consider this excess payment for waiver under 5 U.S.C. § 5922(b) and SR § 276.45 because the excess payment did not arise as the result of Mr. Shea's transfer from the Bahamas to the United States.

We consider an advance payment of an allowance to be erroneous and subject to waiver under 5 U.S.C. § 5584 to the extent it was made to cover expenses erroneously authorized and the employee actually spent the advance in good faith, and detrimentally relied on the erroneous authorization. See Rajindar N. Khanna, B-225263, June 28, 1988; and Major Kenneth M. Dieter, USAF, B-226284, June 28, 1988. We find that the documentary evidence now presented in Mr. Shea's case, including a summary of an official investigation conducted at the United States Embassy in the Bahamas, does not contradict but is instead consistent with his assertion that he received and spent the \$4,500 allowance payment in question in the good faith belief that he was fully entitled to it for his daughter's room and board. Hence, we now conclude that he was without "fault" in accepting and spending that payment, and that it would be inequitable to require a refund of the amount by which it exceeded his entitlement. We therefore waive the claim against him relating to that overpayment in the full amount of \$1,650.

Overpayments Received for School Year 1982-83

The record presented establishes that Mr. Shea had been notified of his selection for transfer in September 1982 from the Bahamas to Miami at the time in July 1982 that he applied for education allowances for his daughter's attendance at the Madonna Academy for the 1982-83 academic year. The record also establishes, however, that his transfer was subject to postponement or cancellation, and that it was therefore proper for him to proceed with his application for education allowances despite his pending transfer. Nevertheless, when he actually transferred to Miami in September 1982 he became liable to refund the unused portions of the education allowance he had received, unless his refund obligations could properly be waived.

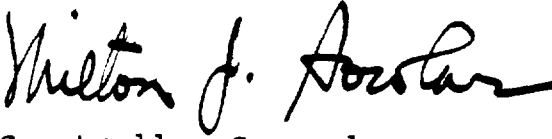
Concerning the \$6,400 payment Mr. Shea received for his daughter's room and board for the 1982-83 academic year, it appears that under the regulations the payment should have instead been limited to \$2,850, that is, to \$300 per month for the Madonna Academy's 9-1/2 month academic year. The record does not show, however, that Mr. Shea spent this erroneous overpayment for his daughter's room and board, or that he spent it in good faith reliance on official action in the belief that he was fully entitled to the

\$6,400 payment for his daughter's boarding expenses. Instead, it appears that he maintained a separate apartment for his daughter only until October 1982, and there is no indication that she either needed to reside or did reside outside the family home after he moved to the Miami area in September 1982. Further, he was notified of his debt arising out of this transaction in October 1982, and we find that he was at fault in the matter in not setting aside the unused funds at that time for repayment. That his repayment now might cause him financial hardship is not, of itself, a proper basis for a grant of waiver. In the circumstances, the INS determined that "equity and good conscience" did not require a waiver under 5 U.S.C. § 5922(b) of the \$6,100 claim against him resulting from this transaction. We concur and deny waiver under 5 U.S.C. § 5584. Compare Price v. United States, 621 F.2d 418 (Ct. Cl. 1980).

Mr. Shea has also requested a review of our Claims Group's denial of the \$178.95 claim against him for a refund of excess payments made for his daughter's transportation. This claim relates primarily to a payment he received in the summer of 1982 for her transportation expenses during the next school year, and which was only partly used for that purpose prior to his transfer to Miami in September 1982. The claim also relates, however, to an erroneous overpayment of transportation expenses received from the prior year. The INS declined to grant waiver of this claim under 5 U.S.C. § 5922(b). We also deny waiver under 5 U.S.C. § 5584 since it does not appear that any of the payments in question were spent in good faith for erroneously authorized transportation expenses. Compare Rajindar N. Khanna, B-225263, supra; and Major Kenneth M. Dieter, USAF, B-226284, supra.

We note further that in 1986 the INS declined to grant a waiver under 5 U.S.C. § 5922(b) of the claim against Mr. Shea for a refund of \$1,200 in education allowance monies received for his daughter's tuition expenses for the 1982-83 academic year. This matter was not considered by our Claims Group, and Mr. Shea has not specifically requested our review of that transaction. Hence, we have not considered that transaction.

Accordingly, we grant waiver of the claims against Mr. Shea in the partial amount of \$1,650, and we deny waiver of the balance of \$6,278.95.

for 
Comptroller General
of the United States