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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Charles F. Baines

File: B-252000

Date: August 30, 1993

DIGEST

The travel orders of a Navy employee transferred overseas authorized delayed travel of his dependents and did not authorize a separate maintenance allowance (SMA) for them. Upon arrival at his overseas post, the employee attempted to elect an SMA for his dependents until their arrival 2-1/2 months later. The SMA should not be paid since section 264.2(2) of the Standardized Regulations (Government Civilians, Foreign Areas) provides that an election by an employee to include his dependents on his travel orders to his post of duty overseas and not request an SMA may not be changed for the employee's first 90 days at post. Also, the DOD Civilian Personnel Manual states that a voluntary SMA for personal convenience, such as in this case, is in lieu of any travel and transportation entitlements for family members for whom an SMA is paid. In this case the dependents were authorized and received the dependents travel and transportation allowances. Accordingly, the SMA is not payable.

DECISION

The question in this case is whether a separate maintenance allowance (SMA) may be paid during an employee's first 90 days at his overseas post when he attempted to change his initial election not requesting an SMA.[1] We conclude that the SMA may not be paid.

BACKGROUND

Mr. Charles F. Baines transferred from Puget Sound Naval Shipyard, Washington, to the Naval Ship Repair Facility, Yokosuka, Japan, reporting for duty on September 30, 1991. His travel orders authorized delayed travel of his dependents but did not authorize an SMA.

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[1]The matter was submitted by the Director, Office of Civilian Personnel Management, Department of the Navy, Arlington, Virginia.

An SMA is authorized when, because of specified conditions, an employee is compelled to maintain family members elsewhere than at his post of duty in a foreign area. Mr. Baines states that he was not made aware by Puget Sound personnel that he could apply for SMA before he departed. In any case, after his arrival at Yokosuka, Japan, Mr. Baines completed an application, Form SF-1190, dated October 1, 1991, for various overseas allowances, including, for the first time, an SMA. He provided the necessary supporting medical certificate justifying leaving his dependents in Puget Sound in a separate memorandum request on October 8, indicating that his wife could not travel pending her recovery from surgery. However, because of administrative error in the mail system, these requests for an SMA did not reach the approving authority of the Navy until December 5, 1991, at which time the SMA was granted. SMA of $473.42 was paid for the period from December 5, 1991, until December 29, 1991, when the SMA was terminated due to Mr. Baines's dependents' arrival in Yokosuka.

ANALYSIS AND CONCLUSION

The payment of an SMA is authorized under 5 U.S.C. § 5924(3), which provides in pertinent part that such allowance "may be granted" to an employee in a foreign area "who requests such an allowance because of special needs or hardship involving . . . the employee's spouse or dependents," to meet the additional expenses of maintaining them elsewhere than at the employee's post. The implementing regulations for an SMA appear in the Department of State's Standardized Regulations (Government Civilians, Foreign Areas) (DSSR).[2] Section 264.2 of the DSSR requires that for the SMA based upon the special needs of the employee (as was the situation in this case),

> "(2) At the time of assignment an employee must elect (1) to have a dependent included on the employee's travel orders or (2) not placed on the travel orders and instead be placed on SMA (voluntary). After this initial election, the employee may request that SMA (voluntary) either commence/terminate, depending on the initial election, only once for each member of family during a tour. However, this change can not occur during the employee's first or last 90 days at post."

Although Mr. Baines may not have been properly informed at Puget Sound about his options in applying for an SMA, his

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[2]Prescribed pursuant to 5 U.S.C. § 5922(c) under authority delegated by the President. Executive Order No. 10903, Jan. 11, 1961, 26 Fed. Reg. 217.

initial "election" was to have his dependents included on the travel order and not request an SMA. Thus, as the Navy concluded, when M aines became more aware of his options in Yokosuka and ied for an SMA, he was in effect requesting a chan in his initial election. As the Navy also concluded, when the Navy approved the grant of the SMA, it commenced under section 265.2, DSSR, "during" Mr. Baines's assignment to post, rather than under section 265.1, DSSR, "upon" Mr. Baines's assignment to post. However, the Navy did not apply the last sentence quoted from section 264.2(2) above, which prohibits a change from occurring during the employee's first 90 days at post. Under the latter provision, the earliest a change could have occurred for Mr. Baines would have been December 30--91 days after reporting for duty. Since his dependents had joined him at post by then, there would have been no basis for a change to allow payment of the SMA. Thus, the Navy's grant of an SMA on December 5, 1991, was erroneous.[3]

In addition we note that paragraph 6-5(a)(2) of chapter 592 of the Department of Defense Civilian Personnel Manual (CPM), DOD 1400.25-M, which further implements the DSSR for DOD employees, states that a voluntary CMA for personal convenience, such as in this case, is in lieu of any travel and transportation entitlements for family members. Thus, in considering an initial election for SMA at the time of assignment, or a change of election, the employee must determine which benefit he prefers--the SMA or the dependents travel and transportation allowances--because he

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[3]Instead of applying the 90-day provision in section 264.2(2) of the DSSR, the Navy applied paragraph 6-3b of chapter 592 of the Department of Defense Civilian Personnel Manual (CPM), DOD 1400.25-M, which further implements the DSSR for DOD employees. This provision establishes a beginning date of SMA after a change in election during assignment to post, as of the date of approval of SMA [December 5, 1991, in this case]. Mr. Baines, however, argues that the applicable provision should be section 265.2 of the DSSR, which states that when SMA is granted to an employee during his assignment to post, the SMA begins as of the later of (1) separation from the family member, or (2) application for SMA [October 1991 in this case]. The dispute over beginning dates of SMA in this case is moot because of the specific provision of section 264.2(2) regarding the 90-day period in which an SMA election may not be changed. While an agency may issue internal regulations to implement the DSSR provisions for its employees, it does not appear that such a regulation may be contrary to section 264.2(2). Also, the general provision as to effective dates to which Mr. Baines refers would not apply during the 90-day period specifically addressed in section 264.2(2).

is only entitled to one. While apparently Mr. Baines was not aware of these options prior to his departure from Puget Sound, as noted his orders provided for his dependents' delayed travel to Japan which later they received at government expense. In view of the limited period for which the SMA would have been payable in this case and the substantial benefit Mr. Baines received in the form of the dependents travel at government expense, it does not appear that he suffered any substantial detriment due to not being informed of this option.

Thus, under the facts here, Mr. Baines was not entitled to receive any SMA payment, and the partial payment he received was erroneous. He may request waiver of the Navy's collection back of that payment pursuant to 5 U.S.C. § 5584 and 4 C.F.R. Parts 91-92 (1993).

James F. Hinchman
General Counsel