

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

AGENCY MOTION TO DISMISS DENIED: December 7, 2000

GSBCA 15320-RELO

In the Matter of MS. ROBERTA B.

Robert H. Hunter of Fort Lauderdale, FL, appearing for Claimant.

Arthur Larry Passar, Office of General Counsel, Central Intelligence Agency, Washington, DC, appearing for Central Intelligence Agency.

BORWICK, Board Judge.

The Central Intelligence Agency (CIA) moves to dismiss the claim of Ms. Roberta B.¹ for lack of jurisdiction. We deny the agency's motion. We conclude that nothing in Sections 4 and 8 of the Central Intelligence Agency Act of 1949, 50 U.S.C. §§ 403e, 403j (1994), deprives this Board of settlement authority over CIA employees' claims for travel and relocation expenses formerly handled by the General Accounting Office and transferred to the Administrator of General Services by the General Accounting Office Act of 1996, Pub. L. No. 104-316, § 202(n), 110 Stat. 3826, 3843 amending 31 U.S.C. § 3702).

Background

Claimant, Ms. Roberta B., entered into a service abroad agreement with the CIA and transferred to an overseas duty post. Under the terms of that agreement, the CIA paid certain expenses related to claimant's transfer, and claimant committed to remain in that post for a minimum of twelve months. Claimant returned to the United States prior to the expiration of the minimum period, however, and the agency now seeks to recover approximately \$41,000, which it asserts is "owed as a result of the breach" of the agreement. Claimant seeks review by the Board of the CIA's denial of her request that the debt be waived. In dispute at this juncture is the jurisdiction of the Board to consider this claim. The CIA argues that, "[b]ecause of its unique statutory expenditure authorities, [the] CIA is the final arbiter of any disputes . . . relating to overseas relocation expenses." Alternatively, the CIA asks that the Board, if it determines it has jurisdiction, "as a matter of comity, defer to the judgment of the Agency and decline to hear this petition, which would require second-guessing the exercise of the special authorities of the Director of Central Intelligence (DCI)."

¹ For security reasons, the agency has disguised claimant's actual name.

Discussion

The Comptroller General's jurisdiction to review travel and relocation claims of federal civilian employees was transferred to the Administrator of General Services by the General Accounting Office Act of 1996. The affected statute now provides in pertinent part:

Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:

. . .

(3) The Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station.

31 U.S.C. § 3702(a)(3). Before the enactment of the General Accounting Office Act of 1996, this authority was vested in the Director of the Office of Management and Budget but delegated to the Administration of General Services, and before that general claims settlement authority was vested in the Comptroller General. Pub. L. No. 104-53 § 211, 109 Stat. 514, 535 (1995); 31 U.S.C. § 3702(a)(1994).

The CIA bases its jurisdictional argument on its reading of sections 4 and 8 of the Central Intelligence Agency Act of 1949, 50 U.S.C. §§ 403e, 403j (1994). Section 4 of the Act provides authority for the payment of travel and relocation expenses for CIA employees assigned to duty stations outside the United States. 50 U.S.C. § 403e. Section 8 allows the Director of the CIA to expend funds in certain circumstances that would otherwise be prohibited, with subsection (b) providing: "for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified." *Id.* § 403j.

The CIA argues that, because of the expenditure authority in section 8 of the Act, its decisions concerning employee travel and relocation expense claims pursuant to section 4 are exempt from review by any forum outside the agency. Under subsection 8(b), however, only the Director's certification of expenditures "of a confidential, extraordinary, or emergency nature" are explicitly exempt from outside review. The CIA notes, "Of especial significance, expenditures of a confidential nature are accounted for solely by the Director's certificate, which is deemed a sufficient voucher." Certification of a voucher is a term of art, however, with the certifying officer held responsible for the legality and correctness of the voucher and supporting records, and liable for any illegal or improper payments made. *See* 31 U.S.C. § 3528 (1994 & Supp. 1998) (detailing responsibilities of a certifying official and noting, *inter alia*, that the official is liable for "repaying a payment [that is] . . . illegal, improper, or incorrect because of an inaccurate or misleading certificate; . . . prohibited by law; or . . . that does not represent a legal obligation under the appropriation or fund involved . . ."). The apparent intent of subsection 8(b), therefore, is to shield the Director, and the agency, from liability for what might otherwise be illegal or improper expenditures.

Moreover, rather than supporting the CIA argument, the legislative history of the CIA Act indicates this more limited intent:

Subsection [8](a) establishes a point of reference to which the administrative and fiscal officers of the Agency and other appropriate officers of the Government may look to determine what expenditures are authorized for the activities of the Agency. It permits sums made available to the Agency to be expended for the purposes set forth in the section. This section is necessary in view of the requirements of existing law or Comptroller General's decisions, which specify that such expenditures are not permissible unless otherwise authorized by law.

Subsection [8](b) permits the Agency to expend sums made available to it without regard to provisions of law. It also permits the expenditure of funds for confidential purposes, to be accounted for solely by certification of the Director.

S. Rep. No. 81-106, reprinted in 1949 U.S.C.C.A.N. 1395, 1399.

As we stated in Charles G. Bakaly, III, GSBCA 14750-RELO, 99-1 BCA ¶ 30,367, "the purpose of the statute is served 'not only by what it sets out to change, but also what it resolves to leave alone.'" 99-1 BCA at 150,136 (quoting West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991)). Nothing in sections 4 or 8 of the CIA Act purported to limit the claims settlement authority of the Comptroller General concerning travel and relocation expenses, and nothing in those sections would limit the authority that was subsequently transferred to the Administrator of General Services by the General Accounting Office Act of 1996 and subsequently delegated to this Board. The Administrator of General Services's claims settlement authority applies to "claims involving expenses incurred by Federal civilian employees." It is not disputed that CIA employees are Federal civilian employees.

Significantly, under his claims settlement authority, the Comptroller General had reviewed several claims concerning travel and relocation expenses of CIA employees and their dependents. See In re: Fly America Act Penalty for Involuntary Rerouting, 62 Comp. Gen. 496 (1983); James L. Hooper, B-152708 (Nov. 29, 1963); 40 Comp. Gen. 53 (1960); Margaret J. Bilek, B-142252 (Apr. 1, 1960); Bessie N. Abbott, 36 Comp. Gen. 116 (1956); E. Kushlis, 29 Comp. Gen. 317 (1950). In James L. Hooper, for example, the Comptroller General considered the claim of a temporary employee of the CIA who sought reimbursement of his costs for dependent travel and transportation of household goods. The Comptroller General sustained the CIA's denial of the claim following a review of the administrative record and those laws and regulations governing "[t]he travel of employees and their dependents and the transportation of their household effects." Nothing in the decision indicates that the CIA or the Comptroller General ever questioned the Comptroller General's jurisdiction over the claim.

In In re: Fly America Act Penalty for Involuntary Rerouting, 62 Comp. Gen. 496 (1983), the CIA requested a decision from the Comptroller General on whether an employee returning from temporary duty overseas "must be assessed a penalty under the Fly America

Act . . . when the U.S. air carrier flight on which he had scheduled his return to the United States . . . was discontinued and the U.S. air carrier rescheduled the employee's transoceanic travel on a foreign air carrier." Id. at 496. The relevant statute, cases, and provisions in the Comptroller General's "Guidelines for Implementation of the Fly America Act" were reviewed, along with the specific facts of the case, and the Comptroller General issued his decision. The Comptroller General's authority to decide the matter, however, was never questioned.

Similarly, in 40 Comp. Gen. 53, the CIA requested a decision from the Comptroller General on "whether [the CIA] may promulgate certain regulations under the authority granted . . . by section 4(a)(4) of the Central Intelligence Agency Act of 1949." The proposed regulations concerned the transportation of privately owned vehicles by employees who are transferred between Washington, D.C., and an overseas post. The Comptroller General reviewed the agency's proposed regulation and reasons for it, rejected the first part as "not authorized under existing law," and required restrictions on the second. Id. at 55. The agency never argued, and apparently never considered, that the Comptroller General may have lacked authority to consider the matter. See also Bessie N. Abbott, 36 Comp. Gen. 116 (1956).

Nothing in those decisions indicates a reluctance to decide them or any doubt that the Comptroller General had the authority to do so.

Although the CIA argues that nothing in the GAO Act or its legislative history indicates an intent "to override . . . [section 8 of the CIA Act] by providing for the external administrative review" of travel and relocation claims, that review authority had already been established when jurisdiction lay with the Comptroller General. If Congress had intended the CIA to be now exempt from review, it would have clearly provided an exemption in the GAO Act. The CIA, as support for its position, points to several other statutes that specifically exempt the agency from review concerning a variety of matters. In each case, however, the exemption is clearly stated in the statute. There was no similar intent stated in the CIA Act to exclude the Comptroller General's review of travel and relocation claims involving the CIA, and none stated in the GAO Act to bar review of those claims when jurisdiction was passed to the Administrator of General Services.

In addition, the legislative history addressing section 4 of the CIA Act indicates no intention to distinguish the treatment of CIA personnel from other federal employees concerning their right to reimbursement of travel and relocation expenses. Congress intended, in section 4, to "provide[] authorities similar to those granted in the Foreign Service Act of 1946 necessary to the development of an intelligence career staff. The language of section [4] corresponds substantially to corresponding sections of the Foreign Service Act of 1946." S. Rep. No. 81-106, reprinted in 1949 U.S.C.C.A.N. 1395-96; see Abbott, 36 Comp. Gen. at 117-18. In Abbott, the Comptroller General acknowledged this intent when construing the home leave transportation provision of the Central Intelligence Agency Act, and looked to the Foreign Service Act and related State Department travel regulations in determining the propriety of costs for dependent travel. 36 Comp. Gen. at 117-18. Cases in which the Comptroller General considered the travel and relocation claims of foreign service employees are too numerous to list.

In the several years since jurisdiction over these claims was transferred to this Board, it too has reviewed numerous claims concerning travel and relocation claims under the Foreign Service Act. See, e.g., Katherine Brucker, GSBCA 15216-TRAV (July 31, 2000); Carlos L. Edwards, GSBCA 15192-RELO, 00-1 BCA ¶ 30,877; Desiree Fray, GSBCA 15012-TRAV, 99-2 BCA ¶ 30,485; Gordon D. Giffin, GSBCA 14425-RELO, 98-2 BCA ¶ 30,100.

The CIA also cites to a 1977 memorandum of understanding between the CIA and GAO to support its argument that CIA expenditure decisions are exempt from review. That memorandum, however, distinguishes between two categories of funds expended by the agency: "Confidential funds," which are "expended pursuant to section 8(b) of the CIA Act of 1949, [50 U.S.C. § 403j(b)]" and "are accounted for outside the Agency solely on the certificate of the Director"; and "[v]ouchered funds, [which] . . . are expended pursuant to the general laws and regulations applicable to other Government agencies." GAO agreed that it would not review requests for waiver of overpayments from confidential funds; the CIA would be the final arbiter. For requests for waiver of overpayments from vouchered funds, however, the memorandum established a procedure to protect against the disclosure of classified information, noting that "where payments have been made out of vouchered funds to covert employees -- those serving in sensitive cover positions -- . . . the identity of the individual as [a CIA] employee is a classified fact which must be protected." The memorandum allowed the CIA to "use a John Doe numbering system and generalize the fact situation" when necessary to protect the employee or intelligence sources and methods. All this memorandum proves, however, is that GAO agreed, when reviewing a particular class of cases involving "vouchered funds," to protect confidential information. The Board routinely reviews cases involving confidential information, and has agreed to take any necessary steps to ensure confidentiality here.

The CIA further notes that it "has adopted internal regulations" governing authorized expenses and service abroad agreements. The agency also notes that it has established internal review procedures to consider related claims. Neither fact is of jurisdictional significance. Rather, in both regards, the CIA is like virtually every other agency whose actions concerning travel and relocation claims are subject to Board review.

Finally, the CIA has requested that, if the Board should find jurisdiction, it "as a matter of comity, defer to the judgment of the Agency and decline to hear this petition." The CIA offers no compelling reason for the Board to abdicate its responsibility to provide an independent forum for consideration of claimant's case. The argument that Board review "would require second-guessing the exercise of the special authorities of the Director of Central Intelligence (DCI)" is essentially an argument that could be made against the review of any agency action. We have every respect for the special role played by the agency and its DCI, but the agency has not demonstrated that the special authority of the agency or the DCI extends to routine and day-to-day travel and relocation matters.

The agency's motion to dismiss is therefore **DENIED**. Within ten working days from the date of this decision, the parties shall propose a schedule of proceedings to the Board.

ANTHONY S. BORWICK
Board Judge