

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

October 26, 2004

GSBCA 16434-TRAV, 16435-TRAV, 16436-TRAV

In the Matter of DENNIS J. FITZGERALD

Dennis J. Fitzgerald, Redlands, CA, Claimant.

Scott E. Schwartz, Office of Thrift Supervision, Department of the Treasury,
Washington, DC, appearing for Department of the Treasury

NEILL, Board Judge

These three cases, which we have consolidated at the request of agency counsel, involve travel claims which Dennis J. Fitzgerald, an examiner employed by the Office of Thrift Supervision (OTS) and assigned to OTS's west region, contends his agency refuses to pay. For the reasons stated below, we dismiss two of these claims as not yet ripe for review. The third claim is granted.

Background

Mr. Fitzgerald's first claim (GSBCA 16434-TRAV) is for \$23.02. This amount is said to represent mileage and toll expenses incurred on July 7, 2003, when claimant drove from his residence to his official duty station to attend a three-hour training session. On completing the training session, he left the office for a temporary duty (TDY) assignment. While en route to the local airport, he began to feel ill. He, therefore, canceled his departure and returned home. The OTS has reimbursed Mr. Fitzgerald for the portion of his travel from the time he left his office until his return home. He contends that his TDY travel began with his departure from home on July 7, and that he is, therefore, also entitled to the cost of traveling from home to his official duty station.

Mr. Fitzgerald's second claim (GSBCA 16435-TRAV) is for \$64.74. This amount is said to represent the cost of local travel to attend a two-day training session conducted on June 6 and 7, 2002, at a site near (approximately 4.5 miles from) but not actually at his official duty station. Claimant contends that he was told by his supervisor (the Assistant Regional Director) and by the Deputy Regional Director that he was not allowed to submit a claim for these travel expenses. He further states that he would have been accused of insubordination had he attempted to do so.

Mr. Fitzgerald's third claim (GSBCA 16436-TRAV) is for \$464.16. This amount is said to represent the cost of remaining at a TDY station for the weekend of May 3 and 4, 2003, rather than returning home. The agency contends that it was contrary to regulation for Mr. Fitzgerald to remain at his TDY station since the cost of travel to his home and subsequent return to the TDY site would have been less than the cost of remaining for the weekend at the TDY site. Accordingly, the agency has paid Mr. Fitzgerald for no more than what it would otherwise have paid if he had returned home for the weekend instead of remaining at the TDY site.

Discussion

The OTS is an office in the Department of the Treasury. 12 U.S.C. § 1462a(a) (2000). Agency counsel explains in the report filed for these cases that the majority of the OTS workforce is composed of examiners, like claimant, who travel to financial institutions throughout the geographic region to which they are assigned. As such, travel expenses are the second largest budget item of the agency after payroll.

By statute, the OTS Director is authorized to make assessments and charge fees to savings associations under the supervision of OTS. The Director is further authorized to use the combined resources retained through fees and assessments to pay all direct and indirect salary and administrative expenses of OTS, including contracts and purchases of property and services, and the direct and indirect expenses of the examinations and supervisory activities of OTS. 12 U.S.C. § 1467(a), (d), (k), (m). Statute also provides that any amounts received by the Director from assessments shall not be construed to be government or public funds or appropriated money. Id. § 1467(i)(2).

Given the Director's broad discretion in the collection and expenditure of funds, counsel for OTS contends that we lack jurisdiction to settle the claims which are the subject of these three cases. Counsel writes:

As such, without a specific statutory grant of jurisdiction over the OTS Director, [the General Services Board of Contract Appeals] cannot compel the OTS Director to expend agency funds in a manner inconsistent with the Director's statutorily unfettered discretion. No such grant of jurisdiction exists.

Our jurisdiction regarding claims settlement derives from statute and a delegation of authority. The statute provides in 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). The settlement authority granted to the Administrator has been delegated, in turn, to this Board. Delegation ADM P 5450.39C CHGE 78 (Mar. 21, 2002).

We find nothing in the exercise of the settlement authority granted by statute to the Administrator and delegated to us which would lead the OTS Director to expend agency funds in a manner inconsistent with the Director's statutory discretion. Our authority extends to (a) claims of or against the United States, (b) which involve expenses incurred by a Federal civilian employee, and (c) which were incurred for official travel and transportation, or for relocation incident to a transfer of official duty station. If, in reviewing a claim which meets these conditions, we should conclude that the claim has merit, we would expect the agency, in recognition of our settlement authority, to pay the claim as a legitimate administrative expense of the employee's travel or transfer. We find nothing in the statutes cited to us by agency counsel which preclude civilian employees of OTS from seeking relief on disputed claims falling within our jurisdiction or which would excuse the OTS Director from taking action in compliance with findings we make pursuant to the Administrator's statutory authority.

OTS counsel argues that because of the private nature of the funds the agency has at its disposal, we lack the authority to decide these cases. We have already addressed this challenge to our jurisdiction with regard to instrumentalities of the United States Government which rely on non-appropriated funds. In Kenneth A. Hack, GSBCA 15758-RELO, 02-2 BCA ¶ 31,926, we concluded that we did have the authority to rule on the employee's claim. We see no reason why the conclusion reached at that time would not apply equally to an agency such as OTS which is supported with non-public funds. At that time, we wrote:

[W]hen we settle claims, we either direct employing Government entities to pay (or not to pay) sums of money to their Federal civilian employees, or direct such employees to pay (or not to pay) sums to such entities. Unlike the Court of Federal Claims, whose judgments may only be "paid out of any general appropriation," 28 U.S.C. § 2517(a), we do not direct the payment of funds from or to any particular source. Whether the funds come from or go to an appropriation is not of concern to us.

Id. at 157,737.

Based on the above, we deny the agency's motion to dismiss these cases for lack of jurisdiction. Nevertheless, while we remain convinced that we have jurisdiction to settle disputed travel claims of OTS employees, we recognize that, in these cases, this must be done in accordance with travel regulations issued by the OTS Director. Statute provides that the OTS Director has the authority to issue regulations with respect to the collection and the use of funds derived from authorized assessments and fees. 12 U.S.C. § 1467(e)(2). Under this authority, the Director has issued a "Travel Policy" which establishes "responsibilities, authorities, policies and procedures concerning official travel."¹ Where an agency has the

¹ To avoid any confusion in the discussion which follows, we note here that the OTS travel regulation is entitled "Travel Policy." In the introduction to the regulation, however, it is referred to as the "OTS travel handbook."

authority to issue its own travel regulation independent of the Federal Travel Regulation, we will look to that agency's specific regulation as containing the primary criteria for settling a disputed travel claim of that agency's employees. E.g., Arjumand Wohra Khan, GSBCA 16356-TRAV (June 24, 2004); John L. Corrigan, GSBCA 16170-TRAV, 04-1 BCA ¶ 32,461 (2003); Hack; Tracy Jones, GSBCA 15659-TRAV, 02-1 BCA ¶ 31,687 (2001).

Agency counsel argues, in the alternative, that, even if we should conclude that we have jurisdiction to hear Mr. Fitzgerald's appeals, we should decline to do so since the claimant and OTS have already achieved a mediated resolution of the claims in question. Counsel writes:

Appellant not only had every opportunity to discuss any matters he believed were at issue, but he was also encouraged to raise any disagreements he then had over travel policy. Indeed, given the broad range of issues and policy disagreements raised in his Grievance, he clearly did so. Despite this, and the fact that his specific request for relief was satisfied, Mr. Fitzgerald seeks to rehash issues he either did, could have, or should have raised in mediation.

The mediation to which counsel refers is one which Mr. Fitzgerald requested in July 2003, but, for reasons unexplained in the record, was not actually scheduled by the agency until April 26 of the following year. We have carefully read the text of Mr. Fitzgerald's original request as well as the text of an agreement signed by him and the other individuals who participated in the mediation session. We are not persuaded that the purpose of this mediation was to settle specific claims. Rather, the problem appears to have stemmed from a continuing disagreement between Mr. Fitzgerald and two OTS officials, the Deputy Regional Director and the Assistant Regional Director, over Mr. Fitzgerald's alleged non-compliance with and misunderstanding of the agency's Travel Policy. The scope of the mediation eventually provided by the agency is apparent from a message sent to Mr. Fitzgerald by the appointed mediator shortly before the start of the mediation. At that time, the mediator advised him that she understood his grievance to be focused on two issues: namely, "[Y]ou believe you are treated unfairly when filing travel claims and (2) management expects more from you than other examiners when submitting travel plans." The mediator went on to write these were the only approved issues for mediation and "the only two issues I am permitted to address as part of the mediation."

The brief agreement entered into by the participants at the close of the mediation likewise reflects its limited scope. The agreement provided that the requirement that Mr. Fitzgerald submit all travel plans for prior approval was eliminated "except as required by regional or national policy of all west region employees." Mr. Fitzgerald, as traveler, agreed to adhere to national and regional travel policies and guidance -- as did the Deputy Regional Director and her staff, as reviewers of travel practices and expense statements. It was also agreed that, in reviewing Mr. Fitzgerald's travel practices and expense statements, the Deputy Regional Director and her staff would apply the same standards they apply to other west region examiners. Mr. Fitzgerald, in turn, agreed to acknowledge the authority of the Deputy Regional Director to interpret travel policy for the west region and to make final determinations as to how it will be applied (although Mr. Fitzgerald reserved the right to appeal these determinations).

On its face, the mediation agreement reflects not settlement of any specific preexisting claims, but rather, a consensus on the standards to be applied in the approval of Mr. Fitzgerald's travel plans and expense statements. We find nothing in the agreement that suggests that it represented a full and final settlement of any and all claims Mr. Fitzgerald might have, based on events prior to the mediation. Indeed, the agreement also includes an additional commitment on Mr. Fitzgerald's part to submit by a specific date a voucher for travel expenses incurred in July of the previous year. Presumably the purpose of the mediated agreement was not to settle this and similar preexisting claims, but to agree on the standards the agency would follow in processing them. We do not view, therefore, this mediation agreement as a bar to the processing of the claims which are the subject of these three appeals.²

We turn now to the individual claims and consider first that which is the subject of GSBCA 16434-TRAV, namely, Mr. Fitzgerald's claim for mileage from his residence to his duty station on July 7, 2003. Counsel for OTS contends that, prior to this appeal, the agency had never had the opportunity to review this claim. In support, the Deputy Regional Director for OTS's west region states in a declaration given under penalty of perjury that, for the day in question, Mr. Fitzgerald did submit a claim for reimbursement for travel costs, from the time of his departure from the OTS office until his return home after becoming ill on the way to the airport, but did not submit a claim for the cost of travel from his home to the OTS office to attend a training session. Mr. Fitzgerald explains that he did not file a claim for the cost of his commute to the OTS office on July 7, 2003, until April 28, 2004 -- two days after the mediation session on April 26. In support of this statement, he has provided what purports to be a copy of the voucher submitted, but it is neither signed nor dated.

Given these statements, it is difficult to determine with certainty whether the claim has actually been submitted to OTS or whether the problem is simply that OTS has not yet been able to complete its review of the claim. What is clear, however, is that, for whatever the reason may be, the agency has yet to adjudicate the claim. Rule 401(c) of the Board's

² Counsel calls our attention to one request for relief included in Mr. Fitzgerald's original request for mediation which claimant, after the mediation concluded, freely admitted had been met in the mediation. In his request for mediation, claimant had asked that the agency "effect reimbursement for any reimbursement for actual or cost comparable expenses that were less than the allowable cost or did not fully reimburse me for comparable costs up to the costs I should have been allowed to claim that would have resulted inequitable reimbursement for the travel in question." Admittedly, the request is less than artfully worded. Nevertheless, we understand it to reflect Mr. Fitzgerald's concern, expressed elsewhere in the same request for mediation, that constructive costs used for cost comparisons were often lower than they should have been and thus resulted in limitations on reimbursements of actual costs to which Mr. Fitzgerald considered he was entitled under OTS Travel Policy. Given the nature of the agreement reached, we do not view Mr. Fitzgerald's satisfaction with the outcome of the mediation as meaning that any such requests for reimbursement were actually settled or waived. Rather, we believe the satisfaction he voiced was with the agreement reached on the standards to be applied in calculating constructive costs which would serve as a cap for claimed actual costs.

Rules of Procedure provides that any claim for entitlement to travel or relocation expenses must first be filed with the claimant's own agency and the agency must initially adjudicate the claim. 48 CFR 6104.1 (2003). Although not conceding that we have jurisdiction over these cases, counsel, nonetheless, has argued that, even if we conclude that we do have jurisdiction, the appeal is premature in view of the absence of an agency adjudication of the claim. We agree with the latter part of this statement. We are, therefore, dismissing this case and remanding it to the agency for initial adjudication. George Oliver, GSBCA 14550-TRAV, 98-2 BCA ¶ 29,800.

We are confronted with a similar objection to the claim which is the subject of GSBCA 16435-TRAV. In this case, Mr. Fitzgerald seeks reimbursement for the cost of travel to a training site which is located approximately 4.5 miles from his official duty station. Claimant freely admits that he never submitted this claim to his agency because he was allegedly forbidden to do so and feared that he would be accused of insubordination if he did submit the claim. Accordingly, Mr. Fitzgerald submitted to the Board an unsigned and undated voucher seeking the amount in question. The agency raises the same objection to our proceeding with this case as it does with regard to GSBCA 16434-TRAV. The point is well taken. We, therefore, dismiss this case as well, with the admonition that claimant must first submit his claim in proper format for adjudication by the agency before this Board will review the correctness of that determination.

The claim which is the subject of GSBCA 16436-TRAV has been the subject of an agency adjudication. On the weekend of May 3 and 4, 2003, Mr. Fitzgerald elected to remain at his extended TDY station rather than return home. His claim for lodging and per diem was denied. In rejecting the claim, the Deputy Regional Director observed that Mr. Fitzgerald had violated OTS Travel Policy by remaining at his TDY station for that weekend. Specifically, he was told that he had violated the requirement that an employee "exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business." The Deputy Regional Director also pointed out that, in failing to return home on that weekend, Mr. Fitzgerald also violated specific instructions sent to him and other senior examiners by the examiner in charge (EIC) of the project on which they were working at the time. In an e-mail message dated April 15, the EIC had advised the examiners that they should return home every weekend if this is found to be cheaper than staying at the TDY station.

Mr. Fitzgerald defended his action on the ground that it was entirely in keeping with OTS Travel Policy. In particular, he relied upon a provision contained in chapter six of this OTS travel handbook, "Examiners Travel." This provision reads:

WEEKEND TRAVEL

Employees on temporary assignments of two weeks or longer may return home on flex³ weekends with full reimbursement, including travel time. Employees may elect to return home on the intervening, nonflex weekend during an assignment, provided no work time is lost to travel. If an employee chooses to return home on a nonflex weekend, travel expenses will be limited to the lesser of the cost to return home or to stay at the temporary duty station.

It is the contention of Mr. Fitzgerald that this provision leaves to the discretion of an examiner whether he or she should remain at the TDY site on non-flex weekends. Only when and if the examiner elects to return home on a nonflex weekend is there a requirement for a cost comparison. Notwithstanding this provision, management for the OTS's west region insists an examiner cannot elect to remain at his or her TDY station on nonflex weekends but must return home on his or her own time unless, through a cost comparison, the examiner can demonstrate that it will cost less to remain on site.

The agency argues that this position regarding return home travel on nonflex weekends is nothing new, but rather, a longstanding policy for the region. Documentation submitted by both the agency and claimant, however, convinces us instead that this was not a longstanding policy at the time, but rather, the result of a decision made by regional management in the first half of 2003. Up until that time, examiners on extended assignments were apparently encouraged to return home even on nonflex weekends by being granted travel time on such weekends. Although not strictly in accordance with the OTS travel handbook provision quoted above, the practice of granting some work time for travel may have made economic sense when the cost of the time granted was considerably less than the cost of an employee remaining on location for an entire weekend.

For reasons unexplained in the record, however, the decision was eventually made by regional management during the first half of 2003 to stop granting examiners travel time on nonflex weekends and to require them instead to travel home on these weekends on their own time. This change was particularly troublesome because regional management, at the same time, apparently suspended the option provided in the travel handbook of remaining on site rather than going home on nonflex weekends. Examiners were told not only that they must return home on nonflex weekends on their own time, but also that they could not remain at their TDY station on nonflex weekends, unless it could be demonstrated by a cost comparison that doing so would be less expensive.

The Assistant Regional Director is correct in stating that Mr. Fitzgerald and other senior examiners were formally advised of this policy in mid-April of 2003. On April 15, 2003, the EIC of an ongoing exam (the Washington Mutual Exam) sent an e-mail message

³ A "flex" weekend is one resulting from the employee working according to an authorized alternative work schedule (AWS) or "flex-i-time" schedule. Employees working according to an AWS work the usual eighty hours of a two-week pay period just as do those on a normal work schedule. Employees on AWS, however, work for more than eight hours on most days, thus enjoying one free day in addition to the two weekends in each pay period. This free day is usually taken on a Friday or Monday, thus creating the "flex" weekend.

to Mr. Fitzgerald and other participating senior examiners. The subject of the e-mail was "Travel Policy." The message read, in part, as follows:

[P]lease make sure traveling examiners reporting to you are aware that the policy is as follows. Official travel time is not authorized for non-flex weekends, and **no travel time should be reflected on TARS [Time and Attendance Reporting System] for the Friday and following Monday of non-flex weekends (i.e. for Western Region standard flex schedule, the MIDDLE Friday and Monday on TARS should have "0" for travel)**. This is probably a change to what we've done in the past, but it has been confirmed by appropriate parties as correct. . . . Examiners may travel home every weekend (and should travel home if it is less expensive than staying over). When traveling home and back to work on non-flex weekends, examiners can either 1) travel on your own time, outside of your normal work hours or 2) make up any work hours lost in travel.

The record contains e-mail correspondence which shows that Mr. Fitzgerald consistently opposed this change in policy, both when it was informally made known to the examiners before the EIC's April 15 message and after that date as well. In responding to Mr. Fitzgerald's concerns, regional management virtually ignored his continual reference to the above quoted provision in chapter six of the agency's travel handbook and, instead, repeatedly told him that he misunderstood the agency's Travel Policy.

We have no quarrel with the decision on the part of regional management to enforce the provision in the agency's Travel Policy stating that no work time is to be lost if examiners choose to return home on nonflex weekends. We do, however, object to management's concomitant decision to deprive examiners of their right under the same agency-wide policy to remain at the TDY site on nonflex weekends. Mr. Fitzgerald's interpretation of the applicable provision is entirely correct. It clearly gives the employee the option of not returning home on nonflex weekends. The effect of the provision cannot be annulled by invoking the prudent person rule. Normally, one does not act imprudently when acting in accordance with applicable regulation. In the past we have observed: "Only in egregious cases should an agency substitute its judgment for that of an employee when the regulatory scheme under which the employee is operating leaves matters to the employee's own judgment." Arjumand Wohra Khan. This is not such a case. Furthermore, regional management erred if it believed that it had the authority to issue a policy at variance with this provision. The introduction to the travel handbook states:

Regional Directors have the authority to interpret or establish specific guidelines within the intent of National Policy not to supersede or replace OTS National Travel Policy.

Decision

We dismiss GSBCA 16434-TRAV and 16435-TRAV as involving claims which are not yet ripe for review. As to GSBCA 16436-TRAV, we find that Mr. Fitzgerald's decision to remain at his TDY station on the weekend of May 3 and 4 was in accordance with applicable regulation. The agency has acted contrary to its own Travel Policy in limiting his

reimbursement to the constructive cost of his returning home on that weekend. His claim, therefore, if otherwise acceptable, should be paid.

EDWIN B. NEILL
Board Judge