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DECISION



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

FILE: B-202845

DATE: September 29, 1982

MATTER OF: Expenses of Outside Applicant/
Complainant to Travel to Agency
EEO Hearing

DIGEST:

In the absence of specific authority therefor, the National Aeronautics and Space Administration, may not pay in advance the travel expenses of an outside applicant/complainant to attend an equal employment opportunity hearing requested by the complainant.

This action is in response to a request by the then Acting Administrator of the National Aeronautics and Space Administration (Administration) as to whether the Administration may properly pay in advance the travel expenses of an outside applicant/complainant to attend an equal employment opportunity hearing which has been requested by the complainant. For the reasons set forth below, we find no basis upon which the Administration may authorize the complainant's travel to the hearing at Government expense.

The Administration has advised that it has been charged with discrimination under Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. §§ 2000e et seq. by an applicant for a position with the Administration's headquarters office in Washington, D.C. The unsuccessful applicant, an employee with the Los Angeles Regional Office of the Equal Employment Opportunity Commission (Commission) has requested an administrative hearing on her complaint which has been appropriately scheduled for Washington, D.C. The Administration informs us that it has been advised by the Commission that the Administration would be responsible for the payment of the complainant's travel expenses to the hearing on the discrimination complaint. The Administration states that neither its enabling legislation nor its appropriation act authorizes such use of appropriated funds and that the Federal Travel Regulations (FPMR 101-7) do not provide for agencies to assume such costs. The Administration

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further states that it is not aware of any court case or Comptroller General decision which has held that Federal agencies are responsible for paying the travel expenses for an "outside applicant/complainant" to attend an equal employment opportunity hearing. Lastly, the Administration notes that the regulations promulgated by the Commission to implement Title VII of the Civil Rights Act, set forth at 29 C.F.R. Part 1613 (1981), do not require that an agency assume such travel expenses. Thus, the Administration has requested our determination on the propriety of such an expenditure for which it finds no authority.

In considering this matter we requested the views of the Commission which has responsibility for administering and enforcing Title VII and other non-discrimination and affirmative action requirements for Federal employment. See 42 U.S.C. § 2000e-16 (Supp. IV 1980), Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, and Executive Order 12106, December 28, 1978.

Our review indicates that there is not any provision in Title VII which would require or authorize the Administration to pay in advance the complainant's travel expenses and the Commission does not contend that Title VII contains such an authorization. As indicated above, although the complainant is a Government employee, her action was filed not as an employee of the Administration but as an applicant for employment. Thus, for purposes of travel costs she is neither an employee of the Administration nor is the travel official business of her current employer. In its response, the Commission has advised us that the primary authority for the payment of travel expenses by the Administration in this case is 5 U.S.C. § 5703. This statute provides authority for agencies to authorize in appropriate circumstances the invitational travel of an individual serving without pay, and to pay the individual's travel or transportation expenses while away from his home or regular place of business. The Commission relies upon our decisions in 48 Comp. Gen. 110 (1968) and 48 Comp. Gen. 644 (1969) in support of its view

that the complainant's travel expenses to the hearing would come within the scope of invitational travel to non-Government employees pursuant to 5 U.S.C. § 5703. In 48 Comp. Gen. 110 we held that non-Government employees invited as witnesses to an administrative hearing to testify for the Government could be allowed payment of travel expenses under 5 U.S.C. § 5703, as persons serving without compensation. In the latter case, 48 Comp. Gen. 644, we held that the invitational travel of non-Government employees pursuant to 5 U.S.C. § 5703 is also proper with regard to the travel of private individuals called as witnesses in adverse action proceedings on behalf of either the Government or the employee provided that the presiding hearing officer determined that such testimony is necessary for a proper disposition of the case. We stated therein that it was in the interest of the Government to reach a sound decision since adverse actions directed against competent employees could result in impairment of the work of the activity concerned. Thus, we determined that where the presiding hearing officer determined that an employee had reasonably shown that the testimony of a witness is substantial, material and necessary for a proper disposition of the case, the witness may be considered within the scope of 5 U.S.C. § 5703, even though the witness is, in effect, to testify on behalf of the employee. The Commission states that, thus, the Comptroller General has examined 5 U.S.C. § 5703, and has concluded that it is in the best interest of the Government for the agency conducting the proceeding to pay for the travel expenses of relevant witnesses regardless of for whom that witness is testifying. The Commission contends that this same rationale should be applicable to a complainant who is also a witness on his or her own behalf.

We do not agree with the Commission's view that outside applicant/complainants are entitled to the payment of travel expenses on the same basis as non-Government employees who are summoned as witnesses. The role of a complainant is clearly distinguishable from that of a witness. Unlike a witness, a complainant has a direct interest in the proceeding. For example, a complainant who prevails on a

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title VII complaint may be entitled to such remedies as employment or reemployment in a desired position, backpay, reimbursement of certain costs, as well as other appropriate relief. See 42 U.S.C. § 2000e-16 and 29 C.F.R. 1613.271 (1981). Since a complainant and a witness each have a distinctly different relationship to the outcome of the administrative proceeding we do not view a complainant as being entitled to reimbursement of travel expenses on the same basis as a witness. We note that with regard to the payment of mileage for witnesses in the Federal courts under 28 U.S.C. § 1821, the courts have long recognized a distinction between witnesses and parties to the action. Parties generally are not entitled to witness fees and mileage for their attendance. See Picking v. Pennsylvania R., Co., 11 F.R.D. 71 (M.D. Pennsylvania 1951), appeal dismissed 201 F.2d 672, cert. denied 73 S. Ct. 1144. 345 U.S. 1000, rehearing denied 74 S. Ct. 18, 346 U.S. 843. See also Morrison v. Alleluia Cushion Co. Inc., 73 F.R.D. 70 (N.D. Mississippi, E.D. 1976). In view of the relationship of the complainant to the Government and the various remedies available to the successful complainant we do not find it appropriate to view complainants as eligible for invitational travel under 5 U.S.C. § 5703.

The Commission also contends that 5 U.S.C. § 5751(a), which governs the travel expenses of Federal employees, summoned as witnesses provides authority for the payment of the complainant's travel expenses. This statute provides in pertinent part as follows:

"(a) Under such regulations as the Attorney General may prescribe, an employee as defined by section 2105 of this title * * * summoned, or assigned by his agency, to testify or produce official records or behalf of the United States is entitled to travel expenses under subchapter I of this chapter. If the case involves the activity in connection with which he is employed, the travel expenses are paid

from the appropriation otherwise available for travel expenses of the employee under proper certification by a certifying official of the agency concerned. If the case does not involve its activity, the employing agency may advance or pay the travel expenses of the employee, and later obtain reimbursement from the agency properly chargeable with the travel expenses."

The Commission states that in view of the above provision it may authorize payment of the complainant's travel expenses and then seek reimbursement from the Administration. However, by its express language 5 U.S.C. § 5751(a) applies to witnesses. In addition, subsection 5751(a) only applies where the employee has been summoned or assigned by his agency to testify or produce official records "on behalf of the United States." The Commission has stated its belief that the complainant's testimony in the context of an equal employment opportunity proceeding would be on behalf of the United States within the meaning of 5 U.S.C. § 5751(a) in view of the intent of Congress that Federal employment be free of discrimination. Although we agree with the Commission that equal employment opportunity in Federal employment is certainly in the interest of the United States, we do not believe that either the language of subsection 5751(a) or its legislative history supports a construction of the phrase "on behalf of the United States" beyond its plain and customary meaning. Thus, we do not view a complainant's testimony on her behalf on a discrimination complaint as being testimony on behalf of the United States as contemplated by 5 U.S.C. § 5751(a). Accordingly, we find no authority under 5 U.S.C. § 5751(a) for the Commission to pay the complainant's travel expenses and to then seek reimbursement from the Administration.

In view of the above, the Administration may not pay in advance the travel expenses of the outside applicant/complainant to attend the hearing on her complaint.

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We emphasize, however, that we are not deciding here the question of an agency's paying travel expenses of an outside applicant/complainant who has prevailed on his or her discrimination complaint. That is a different question which, if necessary, we would address in an appropriate case.

for *Harvey W. Van Cleave*
Comptroller General
of the United States