



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Central Intelligence Agency--Use of Government Vehicle to Attend Funeral of Employee's Child

File: B-275365

Date: December 17, 1996

DIGEST

1. Although there may be instances in which attending the funeral of the child of a coworker may be official business, the determination that it is official may only be made by the head of an agency or someone to whom the authority to make the determination has been delegated. Therefore, a Central Intelligence Agency official who made the decision to attend a funeral without seeking official approval had no authority to use a government vehicle to attend the funeral.
2. The Central Intelligence Agency, rather than this Office, must determine whether an official's unauthorized use of a government vehicle was "willful," and thus carries a minimum 30-day suspension from duty under 31 U.S.C. § 1349. To be willful, the official's use must either be with actual knowledge that the use would be considered unauthorized or made in reckless disregard as to whether or not it was authorized.

DECISION

The Inspector General of the Central Intelligence Agency (CIA) has asked several questions that arose when a CIA officer used a government vehicle to attend the funeral of the child of a coworker. The Inspector General's specific questions, and our answers, are set forth below.

BACKGROUND

An official of the CIA, assigned to another government component, used a government vehicle to transport himself, his deputy, and two secretaries to the funeral of the son of a colleague. The purpose of attending the funeral was to provide support to the coworker. The official used the vehicle to provide round-trip transportation from Washington, D.C., to a city one hundred miles distant. The group departed the office about 10:00 a.m. and returned about 5:00 p.m.

The CIA official stated that he believed that his attendance at the funeral constituted official business, and that therefore use of the vehicle was authorized. He said that he viewed attendance as a "quality of life" issue and that he wanted to send a message that he cared for his people. The official sought no prior authorization or guidance concerning the use of the government vehicle to attend the funeral. Further, since the CIA official believed that attending the funeral was official business, he decided that it was not necessary for members of the group to take annual leave to attend the funeral.

The head of the federal component to which the CIA official is assigned is reported to have indicated subsequently that, had he been asked, he would have authorized the official to attend the funeral and to use the government vehicle. On the other hand, the head of the official's home component at CIA subsequently counseled the official in writing that this use of a government vehicle was improper.

The CIA official is the immediate successor to an individual who was removed from the same position in the summer of 1995, 3 months before the use in question, and suspended without pay for 30 days, for having misused a government vehicle for home-to-work transportation. The CIA official was aware of his predecessor's vehicle misuse and the disciplinary proceedings brought against the predecessor.

Further, about 11 months prior to the use in question another CIA employee was disciplined for misuse of a government vehicle. CIA publicized the misuse throughout the agency, warning CIA employees that use of a government vehicle for personal use was prohibited and that there were severe penalties for the violation of the prohibition.

The CIA has internal regulations and notices dealing with the use of government vehicles. One specifies that use of a government vehicle for official purposes is the sole justification for its use, and warns that severe penalties may be imposed for willful misuse of a government vehicle. The definition of official purposes under the regulation includes use of the vehicle to carry out the authorized mission of CIA, to render assistance in emergency situations, and for home-to-work transportation under narrowly defined conditions. Also, every 6 months each CIA employee receives a compilation of internal agency rules and must certify in writing that she or he has read it. The compilation specifically states that severe penalties can be imposed against employees who willfully misuse a government vehicle.

The Inspector General asks whether the CIA official's use of a government vehicle to attend the funeral in question may be viewed as proper. Further, if we decide that the use was not official, the Inspector General asks whether the use constituted "willful" misuse that requires a minimum 30-day suspension under 31 U.S.C. § 1349(b).

DISCUSSION

Attendance at the funeral. Traditionally, attendance at the funeral of a fellow employee was not considered official business and therefore an agency could not spend its appropriation to reimburse its employees for expenses incurred in attending such funerals. See, e.g., B-236110, Jan. 26, 1990; B-166141, Feb. 27, 1969; B-129612, July 1, 1957. In B-199526, February 23, 1981, we held that attendance at the funeral of the child of an employee could not be official business, and an agency employee could not be reimbursed for the costs of attending the funeral, even if the agency designated the employee as its "official representative" at the funeral.

More recently, however, we recognized that in some cases the expenditure of appropriated funds for attending a funeral would be justified:

"There are situations where the attendance by an official agency representative at a funeral may be considered important to the mission of the agency and where an appropriate representative would be unable to attend without the travel being authorized at government expense. The agency head or delegatee, in his or her discretion, may consider that an agency representative at a funeral would serve the governmental purposes of sustaining employee morale and reinforcing to the agency's employees and others the significance of the deceased to the agency."

70 Comp. Gen. 200, 201 (1991). Although our decision involved attendance at the funeral of a law enforcement officer killed in the line of duty, we modified earlier decisions "to the extent that these decisions conflict with today's holding." Id. One of the decisions we modified was B-199526, above, involving the funeral of the child of an employee, thereby acknowledging that attendance of an agency representative at the funeral of an employee's child could be important to the agency's mission so that it might be considered official business.

As we noted in 70 Comp. Gen. 200, the determination that attendance at a funeral constitutes official business must be made by the agency head or a delegatee authorized to make that determination. Specifically, we said:

"We would expect, however, that before an employee is authorized to travel to a funeral as the official agency representative, the matter would be reviewed and the authorization made at an appropriate level of the agency."

70 Comp. Gen. at 201.

The Inspector General's letter indicates that the CIA official here was not designated as the official agency representative at the funeral either by the Director of Central Intelligence (or his delegate) or by a comparably high official in the government component to which he was assigned. He made the decision himself, without consulting or seeking approval at "an appropriate level" of the agency. Therefore, his attendance at the funeral did not constitute official business under the guidelines set forth in 70 Comp. Gen. 200.

Use of the government vehicle. Section 1344(a)(1) of title 31, United States Code, provides that:

"Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes.

In other words, government vehicles may only be used for official purposes. Section 1349(b) of title 31 provides for disciplining employees who violate section 1344. It provides:

"An officer or employee who willfully uses or authorizes the use of a passenger vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office."

(Emphasis added). The penalty imposed by section 1349(b) is mandatory. There is no authority to impose a lesser penalty. See Fields v. Veterans Administration, 21 M.S.P.R. 176, 177 (Merit Systems Protection Board 1984); Himmel v. Department of Justice, 21 M.S.P.R. 149, 152 (Merit Systems Protection Board 1984).

Not every misuse of a government owned or leased vehicle carries with it a minimum month-long suspension from duty, only "willful" misuse. The question of whether the misuse of a government vehicle is "willful" is one of fact, to be determined in each instance. It is a determination that must be made by the employee's agency, not this Office. Based on the statute and court and administrative interpretations, we believe that for an agency to conclude that a violation is willful there must be more than a showing that the employee intended to use the vehicle for the purpose that is later found to be unauthorized.

"Rather, in order for the action to constitute willful use for a nonofficial purpose within the meaning of the act, the employee must

have had actual knowledge that the use would be characterized as 'nonofficial' or have acted in reckless disregard as to whether the use was for nonofficial purposes."

Kimm v. Department of the Treasury, 61 F.3d 888, 891-92 (Fed. Cir. 1995) (emphasis added). See also, Felton v. Equal Employment Opportunity Commission, 820 F.2d 391, 394 (Fed. Cir. 1987).

In this instance, we think that actual knowledge that the use would be characterized as not official would require a showing either that an internal agency regulation specifically stated that attendance at a funeral was not official business, or that the CIA official had been informed that attending the funeral was not official. In our opinion, the Inspector General's letter contains nothing that would support a finding of actual knowledge.

The question whether the CIA official acted with "reckless disregard" as to whether the use of a government vehicle to attend the funeral was for official or nonofficial purposes is more difficult. There are two decisions of the United States Court of Appeals for the Federal Circuit that provide guidance on this issue.

In Felton v. Equal Employment Opportunity Commission, above, Felton was suspended for 30 days under 31 U.S.C. § 1349 for willfully authorizing a subordinate to use a government vehicle to help her secure her personal vehicle that had broken down during the commute to work. The subordinate, Mitchell, was a secretary in Felton's office. At her hearing, Felton had indicated her rationale in approving the use of the government vehicle, as follows:

"(1) Mitchell was the only typist in the office, (2) the caseload was very heavy due to a large backlog, (3) it would be better for the office if Mitchell secured her personal vehicle as quickly as possible and returned to the office to do her work, and (4) thus, if Mitchell was going to be out of the office anyway to take care of her vehicle, she should be assisted so as to get it accomplished as expeditiously as possible"

820 F.2d at 393. In overturning Felton's suspension, the court indicated that in order to be willful, under 31 U.S.C. § 1349, approval of the use of a government vehicle must either be with knowledge that the use is unauthorized or in reckless disregard of whether the use was for an official purpose.¹ After quoting from an

¹In approving the knowledge or reckless disregard standard for determining "willful" under 31 U.S.C. § 1349, the court relied on Trans World Airlines, Inc. v. Thurston,
(continued...)

agency policy which indicated that determining what constitutes an "official purpose" is a matter of administrative discretion, the court stated:

"Viewing official use as a matter of administrative discretion, we think it clear that an administrator in Felton's position could reasonably have determined that the use authorized in this case would promote the successful operation of the agency.

"Felton's testimony makes clear that she acted in good faith in attempting to solve an office emergency. Poor management judgment in selecting an alternative to solve an office emergency does not rise to the level of 'reckless disregard.'"

820 F.2d at 395.

In the second case, Kimm v. Department of the Treasury, above, Kimm was suspended for 30 days for using his government car to transport his child to day care when his wife was disabled due to complications arising from her pregnancy. Kimm had a specially equipped government vehicle assigned to him and was on call at all times, round the clock. In justifying his action, Kimm indicated that he only deviated from his normal route by 2.6 miles in delivering his son to day care. His only alternative would have been to drive his son to day care in his personal vehicle and then drive back to his home to get his official vehicle. This alternative would have been a round trip of over 20 miles and would have taken 40 minutes, during which time he would not have had access to the equipment in his government vehicle. Kimm stated that due to his heavy workload and his wife's medical situation he believed "he was making the most efficient use of his and the agency's time" by transporting his son in the government vehicle. He further stated that he believed that the agency's rules governing the use of government vehicles allowed him the discretion to make this "minor deviation."

In reversing the decision of the Merit Systems Protection Board that Kimm's use constituted a willful violation under 31 U.S.C. § 1349, the court stated:

¹(...continued)

469 U.S. 111 (1985). In that case, the Supreme Court was reviewing the imposition of liquidated damages against the airline for "willful" violation of an age-discrimination statute. The Court held that knowledge or reckless disregard was an acceptable standard for measuring whether conduct was willful under the statute. The Court concluded that the airlines' good-faith, albeit unsuccessful, attempt to comply with the statute indicated that its violation was neither knowing nor in reckless disregard of whether it was complying with the law.

"[T]he agency policy does not specify that the conduct at issue here is permitted. However, the policy does not set forth specific types of conduct and characterize the official nature of each; the policy calls only for good faith judgment by an employee. Kimm does not dispute that he was aware of the agency policy and of the impropriety of using a [government vehicle] for other than official purposes; however, whether a use constitutes a nonofficial purpose leaves room for the exercise of judgment, which, under the circumstances, Kimm did not improperly exercise."

"In particular, Kimm was involved in an around-the-clock, dangerous investigation, which required him to be on call at all times. He was authorized to commute to work in his [government vehicle], which contained special equipment necessary to remain in contact with the agency. . . . Given the circumstances, Kimm could reasonably have concluded that bringing his son to and from day care on his way to and from work during a limited medical emergency, saving time and maintaining contact with his agency, was essential to successful completion of his mission. Even if Kimm could have first secured permission to transport his son, his failure to do so given the circumstances does not amount to 'reckless disregard' for the regulations."

61 F.3d at 893.

In each of these cases, the involved agency had rules that provided that government vehicles could only be used for official purposes, but did not specify what was official. Therefore, it was left to the discretion of an employee to decide in each instance whether a use was official. In each case the employee was faced with a temporary, unusual occurrence, which the court characterized as an "emergency." In each case the court found that the employee made a good-faith determination that using a government vehicle in the circumstances was in the interest of the government and was important to carrying out the agency's mission. Further, in each case the employee did not seek guidance or approval before deciding to use or authorize the use of the government vehicle.

As we stated above, CIA, rather than this Office, must determine whether the official's use of the government vehicle was undertaken in reckless disregard of whether or not it was official use, and therefore willful, under 31 U.S.C. § 1349. In making this determination, CIA must decide whether its internal rules governing the use of government vehicles are comparable to those of the agencies involved in Felton and Kimm, and thus allow some administrative discretion to determine in each instance what is official. It should consider whether the situation faced by the CIA official in this case was similar to the situations the court characterized as

emergencies in Felton and Kimm. In the end, it must determine whether the CIA official here made a good faith determination that using a government vehicle (rather than some alternative) to attend the funeral was in the government's interest and was important to carrying out the agency's mission.

Good faith. The Inspector General specifically asked that the guidance we supply him specifically address the evaluation and effect under applicable standards and precedent of asserted good-faith claims to a belief that the use of a government vehicle in any given situation is for an official purpose. In our opinion, the mere assertion by an employee that he or she was acting in the good-faith belief that use of a government vehicle was authorized in a given situation is insufficient to avoid a finding of reckless disregard. Faced with the possibility of 30 days suspension without pay, we assume that any employee would claim that he or she acted in good faith. We think that in addition to a finding of good faith, an agency must conclude that the employee's decision to use a government vehicle was reasonable under the circumstances. In both Felton and Kimm the court concluded that the employees' determinations that using a government vehicle in the circumstances they faced was in the government's interest and was needed to efficiently carry out their mission was reasonable.

To avoid future misunderstandings within the agency concerning when the use of a government vehicle is authorized, we recommend that CIA amend its internal guidance consistent with this decision.

/s/Robert P. Murphy
for Comptroller General
of the United States