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DECISION

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

FILE: B-201542 **DATE:** September 18, 1981

MATTER OF: Air Traffic Control Trainees - POV Travel to FAA Academy

DIGEST:

1. Federal Aviation Administration (FAA) issued Notice stating that under certain conditions employees who travel to FAA Academy for training may have travel by privately owned vehicle (POV) authorized as advantageous to the Government. One condition requires that class must be attended by trainees who are airway facilities technicians subject to frequent assignment to recurring training. Whether training session is attended by certain class of employees has no bearing on whether travel by POV is advantageous to Government. Accordingly, that condition should be stricken from Notice.

2. Federal Aviation Administration (FAA) entered into agreement with FASTA/NAGE which authorized travel by privately owned vehicle (POV) for members of bargaining unit attending training at FAA Academy. In Ard T. Johnson, B-194372, January 8, 1980, GAO held that employees in identical situations must be authorized POV as advantageous to Government, notwithstanding that they are not covered by FASTA/NAGE agreement. Air traffic control trainees seek same benefit under Johnson decision. However, situation of air traffic control trainees is not identical to that of members of FASTA/NAGE bargaining unit since former do not perform training on a recurring basis. Accordingly, we will not disturb FAA determination that travel by air traffic control trainees is not advantageous to Government.

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Mr. David E. Siegel, Regional Vice President of the Professional Air Traffic Controllers Organization (PATCO) requests our decision on whether air traffic control trainees are entitled to utilize privately owned vehicles (POV) as advantageous to the Government while attending training at the Federal Aviation Administration (FAA) Academy in Oklahoma City, Oklahoma. The decision is rendered under the provisions of 4 C.F.R. § 22.2 (1981). (Originally published as 4 C.F.R. § 21.2 at 45 Fed. Reg. 55691, August 21, 1980.)

Mr. Siegel is appealing the decision of the FAA which denied a PATCO request that air traffic control trainees be authorized travel by privately owned vehicle as advantageous to the Government while attending training at the FAA Academy. The PATCO relies on our decision Ard T. Johnson, B-194372, January 8, 1980. That decision involved the same collective-bargaining agreement provision contained in the contract between the Federal Aviation Science and Technological Association, National Association of Government Employees (FASTA/NAGE), and the FAA as is involved in the present case, namely:

"ARTICLE 19 - FAA ACADEMY TRAINING TRAVEL

"Section 1. The Parties recognize that the frequent assignment of airway facilities technicians to recurring training at the FAA Academy, leading to qualification and/or maintenance of qualification on certifiable systems and supporting sub-systems, creates an unusual situation not experienced by other travelers. It is further recognized that adequate Government owned quarters and adequate off-hours local transportation are not provided. The Employer therefore agrees that, when such personnel (if employed in the contiguous 48 states) are issued a travel order to attend the FAA Academy for more than three consecutive weeks, such personnel shall be authorized the use of a privately owned vehicle. Such travel shall be deemed to be advantageous to the Government and per diem and mileage shall be paid at the rate applicable to such travel."

Mr. Johnson was an employee who was not covered by that agreement. He sought to be allowed travel by privately

owned vehicle as advantageous to the Government on the basis that he satisfied all of the conditions in Article 19. In holding that Mr. Johnson would be entitled to travel by privately owned vehicle as advantageous to the Government if he met all the criteria set out in Article 19, we stated:

> "* * * [I]f an employee covered by the FASTA/NAGE - FAA agreement, who travels in a POV to the FAA Academy, is considered to be using the POV for the advantage of the Government, then an identically situated employee who is not covered by the agreement should also be considered to be using his POV for the advantage of the Government. The reason for this is that, although the FAA has the discretion to determine when POV use is advantageous to the Government, the FAA cannot exercise its discretion in an arbitrary or capricious manner."

The key to the Johnson decision was our holding that identically situated employees could not be treated differently for travel expense purposes. We remanded the matter to FAA for a determination as to Mr. Johnson on the basis of our holding.

Following our decision, the FAA Southern Region issued a Notice concerning travel to the FAA Academy by POV (SO N 1500.78, May 29, 1980), implementing our decision. Paragraph 6 of the Notice provides, in part:

> "ACTION. Officials who issue travel orders for travel to the FAA Academy may authorize POV as advantageous to the government for travelers when ALL of the following conditions exist:
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> "a. The class begins on or after January 22, 1979, and exceeds three consecutive weeks in length.
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> "b. The class is normally attended by one or more trainees who are Airway Facilities Technicians subject to frequent assignment to recurring training leading to qualification and/or maintenance of qualification on certifiable systems and supporting subsystems.

"c. The trainee is employed within the 48 contiguous states."

Mr. Siegel sought to obtain a determination from the FAA that air traffic control trainees who attend the FAA Academy for training in excess of 3 weeks if employed in the contiguous 48 states would be authorized travel by privately owned vehicles as advantageous to the Government. The FAA refused on the basis that employees outside the FASTA/NAGE bargaining unit are so entitled only if they meet the criteria set forth in Article 19 and if the class is attended by one or more employees specifically covered by Article 19. Mr. Siegel requests that this Office overturn the FAA determination, citing the Johnson case.

In deciding this matter, the first issue that must be addressed is the effect of the May 29, 1980, FAA Notice implementing the Johnson decision. Paragraph 6.b of that Notice provides, as a condition of entitlement, that:

"The class is normally attended by one or more trainees who are Airway Facilities Technicians subject to frequent assignment to recurring training leading to qualification and/or maintenance of qualification on certifiable systems and supporting subsystems."

We believe that this provision is overly restrictive and represents an erroneous interpretation of our holding in the Johnson case. Article 19 of the FASTA/NAGE agreement lists certain factors that led to the determination by the FAA that such travel would be advantageous to the Government. Those factors include frequent assignment to recurring training at the FAA Academy and the lack of adequate Government-owned quarters and adequate off-hours local transportation. In addition, the personnel must be employed in the contiguous 48 states and also must be issued travel orders to attend training at the FAA Academy for more than 3 consecutive weeks. While it is implicit in Article 19 that the personnel will also be members of the FASTA/NAGE bargaining unit, that may not serve as a proper basis to exclude nonmembers who travel to the FAA Academy in identical situations. To make determinations regarding travel entitlements on the basis of nontravel related items such as the

employees' membership in a collective-bargaining unit is clearly an arbitrary exercise of discretion. See Ard T. Johnson, supra. Likewise we believe that it is improper to make such a determination on the basis of the attendance at a training class of such a member. Therefore, we hold that paragraph 6.b of FAA Notice SO N 1500.78, May 29, 1980, is unduly restrictive and must be modified to exclude nontravel related restrictions. It may continue to include a requirement that, in order to qualify for a finding of use of a POV as advantageous to the Government, an employee is subject to "frequent assignment to recurring training," but it may not include a requirement that any member of a specific group must also be in attendance at the class.

The remaining issue is whether air traffic control trainees satisfy the conditions set forth in Article 19 and, therefore, are entitled to travel to the FAA Academy by privately owned vehicle as advantageous to the Government. The conditions contained in Article 19 are set forth above and will not be repeated here.

By letter dated March 2, 1981, the FAA has submitted comments on the PATCO request. The FAA states that air traffic control trainees are not similarly situated to the category of employees involved in Johnson. The FAA notes that the employees covered by Article 19 "are proven FAA employees who travel to the Academy for recurring training during their career." The FAA contrasts those employees to the air traffic control trainees who are "almost exclusively new hires attending initial training which will probably be the only time they will attend the FAA Academy in their career." For these reasons the FAA believes that "[t]he large expenditure of funds required by extension to air traffic controller trainees of the determination of POV as advantageous to the Government cannot be justified using the same rationale as that for the * * * [airway facilities] electronic technicians."

The determination of whether the use of a privately owned vehicle is of advantage to the Government is primarily the responsibility of the agency concerned and will not generally be questioned by this Office. 56 Comp. Gen. 865 (1977). The burden of proving that the agency's determination is faulty lies with the claimant.

Applying this rule in the Johnson case, we held that when the agency had exercised its discretion by determining that travel under certain circumstance was advantageous to the Government, it was arbitrary or capricious for the agency to subsequently make a different determination in an identical situation, save for membership in a collective-bargaining unit. However, in the present case, the situations of the airway facility technicians and the air traffic control trainees are not identical. As noted by the FAA, the air traffic control trainees are almost exclusively new hires who do not perform training at the FAA Academy on a recurring basis, whereas the technicians do perform such training on a recurring basis during their careers.

In summary, the air traffic control trainees are not in the same situation as the airway facilities technicians described in Article 19, and the FAA has retained its discretion to determine that travel by the air traffic control trainees to the FAA Academy by privately owned vehicle is not advantageous to the Government.

In a letter dated July 14, 1981, PATCO responded to the FAA position. It does not challenge the FAA's contention that air traffic control trainees are not subject to recurring training assignments at the FAA Academy as are the airway facilities technicians. It does not offer any additional evidence requiring a finding by this Office that the FAA position is arbitrary or capricious. Accordingly, we will not disturb the FAA's determination in this matter.

Milton J. Socolar

Acting Comptroller General
of the United States