The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mark J. Worst - Travel and Backpay Claims

File: B-223026

Date: November 3, 1987

DIGEST

1. Submission of fraudulent travel vouchers for a temporary duty (TDY) assignment taints each day covered by the vouchers and disqualifies the employee from any expense reimbursement for each such day. An employee cannot avoid this result by submitting corrected vouchers after it has been determined that the original vouchers were fraudulent.

2. An employee on a long-term TDY assignment may be paid lodging expenses at other TDY worksites that he occasionally visited. However, the employee may not be paid lodging expenses for occasional return trips to his permanent duty station.

3. Agencies have discretion over the authorization of mileage reimbursement for an employee's local travel within a TDY area. In the exercise of this discretion an agency may properly limit TDY local area mileage to travel between the employee's lodgings and worksite.

4. No authority exists to reimburse an employee who purchases a residence at a long-term TDY location for the cost of installing a dryer at that residence.

5. An employee who was wrongfully separated and seeks overtime as part of a backpay award must establish either that he earned overtime prior to the unjustified separation or that similarly situated employees earned overtime during the period of unjustified separation. Documentation that a similarly situated employee earned overtime several months after the end of the separation period is not sufficient to establish an entitlement to overtime as part of the backpay award.

6. A former GS-11 employee who was wrongfully separated and who seeks a retroactive promotion to GS-12 as part of his backpay award has established prima facie entitlement to promotion where (1) his former position was advertised at

the GS-12 level on the day after his separation and (2) he was the only applicant rated highly qualified for the position. Since the agency has not offered any evidence to rebut the employee's prima facie showing that he would have been promoted but for his unjustified separation, backpay should be calculated at the GS-12 level.

7. A wrongfully separated employee who is later ordered reinstated by the Merit Systems Protection Board (MSPB) is not entitled to reimbursement of expenses for travel to consult with his attorney in connection with the MSPB appeal. However, the employee may be reimbursed for travel to attend the MSPB hearing.

8. The Civil Service Reform Act, enacted in 1978, amended the Back Pay Act to authorize the award of attorney fees to prevailing employees. However, by operation of section 902(b) of the Civil Service Reform Act, an award of attorney fees cannot be made to an employee whose appeal of an adverse action was pending at the time of enactment of that Act.

DECISION

This decision resolves a number of claims by Mr. Mark J. Worst, a former employee of the Department of the Navy, which are now pending before our Office. Mr. Worst was accused by the Navy of submitting a fraudulent travel voucher during a long-term temporary duty (TDY) assignment. This led the Navy to terminate his TDY assignment and remove him from government service. The Merit Systems Protection Board (MSPB) later reversed Mr. Worst's removal on procedural grounds, but he declined reinstatement. Mr. Worst's claims fall into two categories--those relating to his travel allowances during his TDY assignment and those relating to his backpay entitlements as a result of the MSPB decision.

For the reasons discussed hereafter, we conclude as follows with respect to the TDY travel claims. The Navy properly determined that Mr. Worst submitted a fraudulent travel voucher, thereby disqualifying him from any per diem or other allowances for the period covered by the fraudulent voucher (November 2, 1977, through February 2, 1978). As to Mr. Worst's remaining travel claims, which are not within the period tainted by fraud, he is entitled to lodging expenses that he incurred on two occasions on trips away from his long-term TDY location. He is not entitled to lodging expenses for the third such occasion since this trip was back to his permanent duty station. The Navy properly limited Mr. Worst's mileage reimbursement within the local

long-term TDY area to travel between his residence and worksite. Finally, Mr. Worst is not entitled to reimbursement for a dryer hookup charge at his TDY residence.

With respect to the backpay claims, we conclude as follows. Mr. Worst has not provided adequate documentation to support an entitlement to overtime pay he allegedly would have earned during the period of his separation. The record before us supports Mr. Worst's contention that he would have been promoted from GS-11 to GS-12 during the period of his separation. Therefore, he is entitled to backpay at the GS-12 level unless the Navy can clearly establish that he would not have been promoted. Mr. Worst is not entitled to per diem during the period of his improper separation. Mr. Worst is not entitled to travel expenses to confer with his attorney in connection with his appeal, but he can be reimbursed for travel to attend the MSPB hearing. Finally, Mr. Worst is not entitled to attorney fees in connection with the MSPB appeal.

BACKGROUND

Mr. Worst, formerly a Navy Department employee with the Naval Ordnance Station, Louisville, Kentucky (NOSL), received a TDY assignment to the Northern Ordnance Division of FMC Corporation at Fridley, Minnesota, which lasted from May 31, 1977, to August 1, 1978. Since his assignment was scheduled to be lengthy, Mr. Worst purchased a home in the TDY area. He subsequently was informed by an NOSL official that he was not permitted to claim as lodging expenses any of the costs associated with his residence purchase. On February 28, 1978, in an attempt to recover some of these costs, Mr. Worst submitted false rental receipts that corresponded with inaccurate statements he made in a travel voucher claiming reimbursement of alleged rental expenses at his TDY location for the period November 2, 1977, through February 1, 1978. As a result of Mr. Worst's false submissions, the Navy initiated an investigation into his living arrangements in Minnesota. The agency determined that Mr. Worst attempted to defraud the government by submitting false claims for rental expenses and it instituted a removal action against him. Evidently Mr. Worst's TDY assignment was terminated on or about August 1, 1978, and he was returned to his permanent duty station at Louisville. Mr. Worst was separated from federal service effective September 26, 1978.

Mr. Worst appealed his separation to the Merit Systems Protection Board (MSPB). In its decision of January 22, 1979, the MSPB reversed the separation action on procedural grounds, instructing the Navy to reinstate Mr. Worst to

his former position at NOSL.1/ Mr. Worst declined reinstatement, choosing instead to resign from his employment with the Navy as of February 26, 1979.

After his resignation, Mr. Worst submitted amended travel vouchers to the Navy in which he claimed reimbursement for various expenses incurred during his TDY assignment from May 31, 1977, to August 1, 1978, including reimbursement for lodging costs based on his actual real estate expenses incurred in connection with his purchase of a residence at the TDY location in Minnesota. The NOSL denied payment and eventually his claims were submitted for review by our Claims Group. On November 17, 1980, the Claims Group determined that, in accordance with Robert E. Larrabee, 57 Comp. Gen. 147 (1977), Mr. Worst was entitled to lodging expenses in connection with his occupancy of the residence he purchased in Minnesota, determined by prorating the monthly interest, property tax, and utility costs actually incurred. The Claims Group determination did not address Mr. Worst's claims for items other than lodging expenses, nor did it address the effect of the original false travel voucher that Mr. Worst had submitted.

The Navy Finance and Accounting Center (NFAC) then returned Mr. Worst's claims to NOSL for settlement in accordance with the Claims Group's determination. However, NFAC instructed NOSL not to pay per diem or lodging expenses for the period from November 2, 1977, through February 28, 1978, because of the false travel voucher Mr. Worst had submitted.

Mr. Worst now asks whether NFAC's instructions to deny him any TDY expense reimbursement for the period covered by the false voucher were legal and appropriate under the circumstances of his case. Also, Mr. Worst asks whether the agency may rightly deny payment to him for other expenses he incurred while on TDY, namely dual lodging costs that arose when Mr. Worst was assigned away from the TDY site to perform official duties at other locations, miscellaneous mileage expenses, and the cost of installing a clothes dryer in the home he purchased at the TDY site. As discussed hereafter, Mr. Worst also raises several issues concerning his backpay entitlements in connection with MSPB's reversal of his separation.

1/ The MSPB concluded that Mr. Worst's separation was fatally defective because the same individual was the proposing and deciding official. In view of this conclusion, the MSPB did not consider the underlying merits of the separation action.

ANALYSIS

I. TDY CLAIMS

Fraudulent Travel Vouchers

Concerning allegations of fraud in claims against the government, we have held that:

> "* * * the burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than suspicion or conjecture. However, if, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn." B-212354, August 31, 1983 (quoting from B-187975, July 28, 1977).

Where an agency investigation clearly reveals that an employee included fraudulent statements in a travel voucher in order to obtain funds from the government, the agency has met its burden of proving that claims for subsistence expenses for those days are tainted by fraud. In this case, it is clear from the investigative report submitted by the Naval Investigative Service, which we have reviewed, that Mr. Worst purposely submitted false statements to the agency concerning his lodging arrangements in Minnesota.

Our Office repeatedly has held that fraudulent claims for any subsistence expenses on a given day taint all claims for subsistence for that entire day. See, e.g., Fraudulent Travel Claim, B-217689, August 22, 1985; 57 Comp. Gen. 664 (1978). This rule applies to Mr. Worst's case despite the fact that he subsequently submitted revised travel vouchers to replace the original false voucher. To permit an employee to resubmit accurate travel vouchers after he attempts to defraud the government without success would defeat the purpose of the rule. While we are aware that Mr. Worst was misinformed while on TDY about his entitlement to lodging expenses, we cannot condone falsifying documents in order to obtain payments he believed were due him.

Accordingly, the Navy was correct in denying Mr. Worst reimbursement of any TDY expenses for days covered by his fraudulent travel voucher. We note, however, that the Navy's original description of the period covered by the fraudulent travel voucher--November 2, 1977, through February 28, 1978--was incorrect. The voucher was submitted

on February 28, 1978, but only covered claims through February 1 of that year. It appears from the record before us that the Navy later corrected this error and honored Mr. Worst's claims for the balance of February 1978.

The remaining dispute between Mr. Worst and the Navy as to his entitlements during his TDY assignment concerns the allowability of three expense items, amounting to $428.25 in the aggregate, which he incurred during the period of his assignment not covered by the fraudulent travel voucher.

Dual Lodging Expenses

Mr. Worst states that while he was on TDY, he was assigned to different locations--Louisville, Washington, D.C., and Sturbridge, Missouri--where he remained overnight. On these days he incurred the cost of securing quarters away from the regular TDY site in addition to the expense of maintaining the house he purchased. He has submitted claims of $15, $16.25 and $17.45 for such trips.

Employees may receive lodging expenses for two TDY locations on the same day if there is a need, beyond mere personal convenience, for retaining lodgings at both places. With respect to claims arising during the period of Mr. Worst's TDY assignment, we held that if an employee had no alternative but to retain his lodgings at his regular TDY post where lodgings were also required, expense items for the dual lodgings may be allowed subject to the actual expense limitation set forth in the travel order. 55 Comp. Gen. 690 (1976).2/ Since under Volume 2 of the Joint Travel Regulations, para. C4552, employees are authorized to receive lodging expenses for homes purchased at TDY locations, it seems reasonable for agencies to reimburse employees for dual lodging expenses when employees are requested to perform official duties away from the TDY location and are required to stay overnight. Therefore, on those occasions where Mr. Worst was unable to return to his regular TDY location on the same day that he was detailed away from it, the Navy should reimburse him for dual lodging costs up to the monetary maximum specified in the travel order. However, reimbursement may be allowed only when Mr. Worst stayed at another TDY location. He could not receive

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2/ Since the 1976 decision, we have modified the rule with respect to the calculation of reimbursement for dual lodging expenses. See 60 Comp. Gen. 630 (1981). This change also has been incorporated into the Joint Travel Regulations, Volume 2, para. C4552.

reimbursement for staying at his permanent duty station, Louisville. See, e.g., 60 Comp. Gen. 630, 631 (1981) and decisions cited.

Travel Within the Local TDY Area

Mr. Worst's travel authorization provided for use of his privately owned vehicle for travel between Louisville and Minneapolis and "for official use in [the] TDY area." The Navy authorized payment for only 20 miles per day, the round-trip distance between his residence and worksite. Mr. Worst claims $350.25 for additional mileage costs incurred while on TDY as travel expenses associated with meals, laundry and the like at the TDY location.

Under 2 JTR, para. C2154, an agency may authorize a mileage allowance to an employee on TDY within the immediate vicinity of a TDY station. This provision confers discretion upon the agency as to the allowance of local TDY mileage; ordinarily we will not interfere with an agency's exercise of such discretion. See, e.g., Porter Billingsley, B-226463, May 14, 1987; Leighton E. Johnson, B-190711, August 14, 1978, and decisions cited. We have no basis to question the Navy's determination here to limit Mr. Worst's mileage reimbursement in the TDY area to travel between his residence and worksite.

Dryer Installation Charge

Finally, Mr. Worst claims as a reimbursable lodging expense the cost ($30) of installing a clothes dryer in the home he purchased at the TDY location. The Navy denied payment on the basis that such a cost was not authorized by the applicable travel regulations. Reimbursable lodging expenses under 2 JTR, para. C4552 include monthly interest, monthly property tax and monthly utility costs actually incurred when an employee purchases a home to use as quarters at a TDY location. The regulations do not authorize payment for the cost of installing a clothes dryer in that home. Accordingly, we conclude that the Navy was correct in denying this claim.

II. CLAIMS UNDER THE BACK PAY ACT

In addition to his TDY claims, Mr. Worst has presented us with several issues as to his backpay entitlements resulting from the MSPB's reversal of his separation by the Navy. The Navy has made a backpay award to him; the issues before us

are those pertaining to the backpay award on which Mr. Worst and the Navy could not agree. We will now address these issues.3/

The Back Pay Act, codified as amended in 5 U.S.C. § 5596 (1982), provides in pertinent part that:

> "(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
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> "(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
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> "(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred * * * and
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> * * * * *
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> "(B) for all purposes, is deemed to have performed service for the agency during that period * * *."

The regulations implementing the Back Pay Act are set forth in 5 C.F.R. §§ 550.801 et seq. Further guidance is contained in the provisions of the Federal Personnel Manual (FPM) discussed hereafter.

Overtime Pay

Under the Back Pay Act, Mr. Worst claims overtime pay as part of his award. Our Office has held that overtime pay may be included in a backpay award, computed based on an

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3/ Our Claims Group originally had determined that Mr. Worst's backpay claims were barred by the statute of limitations, 31 U.S.C. § 3702, since they were not received by our Office within 6 years after they accrued (February 1979). However, upon further review of the record, we have established that the claims were in fact received here in November 1980.

individual's overtime experience prior to separation or the amount of overtime performed by similar employees during the separation period. Ronald J. Ranieri, B-207997.2, August 23, 1983. In support of his claim, Mr. Worst submitted to our Office documentation evidencing the overtime performed by the successor to his former position. The overtime documented by his submission was performed during April and May of 1979, several months following Mr. Worst's resignation in February 1979 and thus the ending period of his backpay entitlement. The record does not contain any documentation indicating that Mr. Worst performed overtime duties before he was separated or that he likely would have performed overtime duties had the separation not occurred. Also, there is no documentary evidence showing that similarly situated employees performed overtime during the period of his separation. Therefore, we must conclude, based on the record before us, that Mr. Worst is not entitled to receive overtime pay as part of his backpay award.

Retroactive Promotion

The second aspect of Mr. Worst's claim under the Back Pay Act is for a retroactive promotion to GS-12. Under the Back Pay Act, an individual may receive a retroactive promotion upon a showing that he would have been promoted during the period of his separation but for the unjustified personnel action. See, e.g., Ciambelli v. United States, 203 Ct. Cl. 680 (1974); Janet L. Apple, B-214659, February 12, 1985.

On September 27, 1978, one day after Mr. Worst's removal, the Navy posted a vacancy announcement advertising the position he had held at the GS-12 level rather than GS-11, the grade at which Mr. Worst held the position. Mr. Worst applied for the position and was determined to be highly qualified for the job. According to Mr. Worst, he was the only highly qualified candidate for the position and, consequently, the Navy did not immediately fill the vacancy. There is no indication in the record as to why the position was advertised as a GS-12 position.

A promotion during the backpay period should be based on clear evidence that the employee would have been promoted but for the unjustified personnel action. See George F. Ackley, B-214828, October 11, 1984. Given the lack of any explanation in this case of why the position was advertised as a GS-12, it is difficult to view the record before us as clearly establishing that Mr. Worst would have been promoted but for the unjustified personnel action. On the other hand, a claimant cannot be required to assume "the well-neigh insuperable burden of negating" any alternative to his

promotion. Ciambelli v. United States, supra, 203 Ct. Cl. at 687. Here Mr. Worst asserts that "his" position was announced at the GS-12 level as soon as he was removed and that the position was not filled at this time since he was found to be the only highly qualified applicant. The Navy did not contest these assertions, nor did it attempt to explain the circumstances surrounding the GS-12 position announcement (which, presumably, only the Navy could explain). The Navy's only response to the promotion claim is its conclusory observation that "[t]here is no evidence of record that Mr. Worst would have been selected for the GS-12 position."

While the record is not entirely clear on the point, we believe that Mr. Worst has made at least a prima facie showing that he would have been promoted to GS-12 but for his unjustified separation and that the Navy has not rebutted this showing. Accordingly, we hold that Mr. Worst is entitled to have his backpay award calculated at the GS-12 level.

Per Diem

Mr. Worst next claims as part of his backpay award the amount of per diem he would have received on TDY had he not been removed from his position. This claim is foreclosed by the express terms of FPM Chapter 550-34 (Inst. 262, May 7, 1981), which provides in section 8-5(a):

> "* * * In making its [backpay] computation, an agency shall not include as allowances any amount which represents reimbursement for expenses which would have been incurred by an employee in the performance of his/her job if the unjustified or unwarranted personnel action had not occurred but which were not incurred because of the unjustified or unwarranted personnel action. For example, an agency should not include a per diem allowance or a mileage allowance for travel or use of a privately owned vehicle which would have occurred except for the improper personnel action * * *."4/

Travel Expenses

According to the record, Mr. Worst's TDY assignment was terminated and he was directed by his supervisor to return to his permanent duty station at Louisville in August 1978.

4/ This same language was contained in the provision in effect at all times applicable to Mr. Worst's case. See FPM Chapter 550-24, § 8-5(a) (Inst. 187, February 28, 1973).

After his separation Mr. Worst returned to his former TDY area in Minnesota and remained there. Mr. Worst claims payment for travel costs incurred in order that he could consult with an attorney in the Louisville area concerning his appeal of the adverse action. In addition, Mr. Worst claims travel expenses incurred in connection with travel to attend the MSPB hearing on his appeal, which was held in Louisville.

Our Office has held that there is no entitlement to travel expenses incurred in travel to confer with an attorney over an adverse action. Colegera L. Mariscalo, 64 Comp. Gen. 631, 636 (1985). Therefore, Mr. Worst's travel to Louisville from Minnesota to consult with his attorney regarding his appeal cannot be reimbursed. The Back Pay Act does not authorize consequential travel expenses incurred as a result of an adverse personnel action. See 61 Comp. Gen. 578 (1982). We also have held, however, that an employee who has been reinstated may be reimbursed for travel expenses incurred in attending an MSPB hearing. Colegera L. Mariscalo, supra; Lawrence D. Morderosian, B-156482, June 14, 1977. The basis for such payment is that the individual's attendance at the hearing constitutes official business and, therefore, would have been reimbursed if the individual had been a federal employee at the time of the hearing. In this case, Mr. Worst was residing in Minnesota, his former TDY location, at the time of his hearing. Mr. Worst's election to return to his TDY location rather than remain in Louisville following his separation from duty should not preclude him from receiving payment for travel costs incurred in attending his hearing.

Attorney Fees

Finally, Mr. Worst claims attorney fees in connection with his appeal of the adverse personnel action taken against him. Prior to the enactment of the Civil Service Reform Act, there was no authority under the Back Pay Act or other laws to pay attorney fees in connection with employee appeals of adverse actions. With the enactment of the Civil Service Reform Act in 1978, authority was vested in the MSPB under 5 U.S.C. § 7701 to award reasonable attorney fees to employees who prevail on appeal under certain conditions. The Civil Service Reform Act, however, precludes the application of its provisions to administrative proceedings pending on its effective date, January 11, 1979. Section 902(b) of the Act, 5 U.S.C. § 1101 note (1982), provides that:

> "No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be

issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted."

Although there is separate authority for the payment of attorney fees contained in the Back Pay Act, as amended by the Civil Service Reform Act, 5 U.S.C. § 5596(b)(1)(A)(ii), that authority also is limited by § 902(b) of the Civil Service Reform Act. Carl V. Cox and Emil F. Hawes, B-202849, March 9, 1982; Leslie H. Graham, Jr., B-197737, January 8, 1982. The courts likewise have held that, by virtue of section 902(b), attorney fee awards cannot be made with respect to proceedings pending on the enactment date of the Civil Service Reform Act. See Crowley v. Shultz, 704 F.2d 1269 (D.C. Cir. 1983); Nibali v. United States, 634 F.2d 494 (Ct. Cl. 1980).

Mr. Worst's appeal was pending before the MSPB at the time of enactment of the Civil Service Reform Act. Thus, the attorney fee authorization is not applicable to his case.

CONCLUSION

The Navy should process Mr. Worst's case in accordance with the foregoing decision.

for Milton J. Socolar
Comptroller General
of the United States