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DECISION



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

FILE: B-212292

DATE: October 12, 1984

MATTER OF: Gracie Mittelsted - Expenses of Travel
to Attend Merit Systems Protection Board
Hearing

DIGEST:

An individual who was separated through a reduction-in-force prior to the expiration of her term appointment in March 1982, appealed the separation in hearings before the Merit Systems Protection Board in May 1982. The appellant prevailed, was awarded backpay for the unexpired period of her appointment, and now claims travel expenses for her attendance at the hearings. The appellant may not be allowed travel expenses authorized for a Government employee under 5 U.S.C. §§ 5702 and 5704, since she traveled to the hearings after the expiration of her term appointment. Furthermore, she is not eligible for travel expenses payable to non-employee witnesses under 5 U.S.C. § 5703, since she was a party to the proceeding.

The American Federation of Government Employees, Local No. 644, requests our decision as to whether Ms. Gracie Mittelsted may be reimbursed for the travel expenses she incurred when she attended a Merit Systems Protection Board (MSPB) hearing to appeal a reduction-in-force which resulted in her separation from temporary employment with the Department of Labor. For the reasons explained below, we find no basis for allowing Ms. Mittelsted's travel expenses.

The union's request for a decision has been handled as a labor-management relations matter under our procedures in 4 C.F.R. Part 22 (1984). The Department of Labor was served with a copy of the union's request and supporting documents, but has not furnished responsive comments.

BACKGROUND

In 1978, the Department of Labor appointed Ms. Mittelsted to the position of Claims Examiner, grade

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GS-11 for a term not to exceed March 31, 1982. On January 29, 1982, prior to the expiration of her term appointment, Ms. Mittelsted was separated from her position through a reduction-in-force (RIF).

Ms. Mittelsted and 14 similarly situated employees appealed the RIF to the MSPB. During hearings held by the Philadelphia Regional Office of MSPB on May 6 and 7, 1982, Ms. Mittelsted testified on behalf of herself and the other appellants. By decision dated June 22, 1982, the MSPB determined that the RIF was procedurally defective, and Ms. Mittelsted was awarded backpay for the period January 30 to March 30, 1982.

Ms. Mittelsted requested that the Department of Labor reimburse her for travel costs in the amount of \$346.34, representing the mileage and subsistence expenses she incurred in traveling from her residence in Charleston, West Virginia, to the Philadelphia Regional Office of MSPB during the period May 5 through May 8, 1982. The Department of Labor denied Ms. Mittelsted's claim on the basis that she was not a Government employee at the time she attended the MSPB hearings.

DISCUSSION

Different standards govern the payment of travel allowances to participants in administrative proceedings, depending upon whether the participant is a Government employee or a private individual. Accordingly, we will examine Ms. Mittelsted's entitlement to travel expenses under these separate standards.

Travel Expense Entitlement of Government Employees

The provisions of 5 U.S.C. §§ 5702 and 5704 (1982), authorize subsistence and transportation expenses for a Government employee who travels on "official business" away from his designated post of duty. We have held that an employee who attends administrative proceedings to appeal an unjustified or unwarranted personnel action is performing "official business" and is entitled to travel expenses under 5 U.S.C. §§ 5702 and 5704. See 33 Comp. Gen. 582 (1954); and B-180469, February 28, 1974.

Where the party to an administrative proceeding is not a Government employee at the time of the hearing, there is only limited authority under 5 U.S.C. §§ 5702 and 5704 to reimburse his travel expenses. If the party prevails, and if he is retroactively reinstated to Federal employment for the period inclusive of the time devoted to the hearing, his travel expenses may be paid as if he had been a Government employee at the time of the hearing. See Lawrence D. Morderosian, B-156482, June 23, 1975; reconsidered in B-156482, June 14, 1977. See also N. Victor Bonilla-Sosa, B-187989, August 18, 1977. In this regard, the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596(b)(1)(B)/(1982), provides that an employee who is found by an appropriate authority to have undergone an unjustified or unwarranted personnel action and is reinstated with backpay shall, "for all purposes," be deemed to have performed service for the agency during the period of wrongful separation.

However, if the party to an administrative proceeding does not prevail, or prevails but is afforded a remedy other than reinstatement, there is no basis for regarding him as a Government employee at the time he performed travel to attend the proceedings. See generally 61 Comp. Gen. 654 (1982). Under these circumstances, the party is not entitled to the travel and transportation expenses authorized by 5 U.S.C. §§ 5702 and 5704.

Since Ms. Mittelsted had been separated from employment with the Department of Labor on January 29, 1982, the effective date of the RIF, she was not a Government employee when she attended the MSPB hearings on May 6 and 7, 1982. Although she successfully appealed the RIF, Ms. Mittelsted's remedy was limited to backpay for the unexpired period of her term appointment, ending March 30, 1982. Accordingly, there is no basis for regarding Ms. Mittelsted as a Government employee at the time she attended the MSPB hearings in May 1982, and she may not be reimbursed for travel expenses under 5 U.S.C. §§ 5702 and 5704.

Travel Expense Entitlement of Non-Government Employees

Under 5 U.S.C. § 5703 (1982), an agency may authorize the invitational travel of an individual serving without pay and reimburse him for the travel and transportation expenses

he incurs while away from his home or regular place of business. In 48 Comp. Gen. 110 (1968), we construed this statute as authorizing the payment of travel expenses to non-Government employees who are invited to testify on behalf of the Government in administrative proceedings. Further, in 48 Comp. Gen. 644 (1969), we held that section 5703 authorizes the payment of travel expenses incurred by a non-employee witness who testifies in adverse action proceedings either on behalf of the Government or the petitioning employee, provided the hearing officer determines that the testimony of the witness is substantial, material, and necessary for a proper disposition of the case.

However, in 61 Comp. Gen. 654, cited previously, we held that an outside applicant/complainant could not be reimbursed for the travel expenses he incurred when he attended an equal employment opportunity hearing on his discrimination complaint. Specifically, we determined that a complainant is not eligible for invitational travel under 5 U.S.C. § 5703 on the same basis as a witness, since, unlike a witness, he has a direct interest in the outcome of the proceedings. Further, we noted that the courts have drawn a distinction between witnesses and parties for purposes of 28 U.S.C. § 1821, which authorizes the payment of travel allowances to witnesses testifying in the Federal courts. Generally, the courts have held that a party is not entitled to recover travel expenses associated with his own appearance as a witness. See Picking v. Pennsylvania R. Co., 11 F.R.D. 71 (M.D. Penn. 1951), appeal dismissed, 201 F.2d 672, cert. denied, 345 U.S. 1000, rehearing denied, 346 U.S. 843. See also Morrison v. Alleluia Cushion Co., 73 F.R.D. 70 (N.D. Miss. 1976).

Ms. Mittelsted attended the MSPB hearings in order to testify on her own behalf, and she had a direct interest in the outcome of the proceedings. While Ms. Mittelsted also may have testified on behalf of the other appellants, there is nothing in the record to show that she testified on matters unrelated to her own appeal, or that she incurred additional travel expenses because of such testimony. Accordingly, for the reasons stated in our decision in 61 Comp. Gen. 654, Ms. Mittelsted may not be reimbursed for travel expenses under the provisions of 5 U.S.C. § 5703.

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In view of the above, Ms. Mittelsted's claim for travel expenses in the amount of \$346.34 may not be allowed.

for Milton J. Fowler
Comptroller General
of the United States