



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John Booth - Travel Expenses of Witness - Agency Responsible

File: B-235845

Date: March 12, 1990

DIGEST

1. The statutory provision in 5 U.S.C. § 5751, authorizing reimbursement of travel expenses of government employees called as witnesses and the implementing regulations in 28 C.F.R. Part 21 are applicable to discrimination hearings before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC). An employee who appears as a witness at such a hearing is in an official duty status and entitled to reimbursement for travel expenses.

2. A current employee of the Department of Veterans Affairs (VA) was summoned to testify at an EEOC hearing concerning the witness's official duties at his former agency, the Coast Guard. The VA must initially authorize and pay the employee's travel expenses so as not to disrupt the equal employment opportunity process. Then, the VA is entitled to reimbursement from the respondent agency (Coast Guard), which is ultimately responsible for the cost of the employee's travel to attend the hearing.

DECISION

This decision is in response to a request from the Secretary, Department of Veterans Affairs, concerning the issue of which agency, if any, is responsible for paying travel costs of a VA employee summoned to appear as a witness at a hearing on a discrimination complaint against the Coast Guard. We conclude that the VA is obligated to authorize and pay for the employee's travel and is then entitled to reimbursement from the Coast Guard, the respondent agency. The Coast Guard, and not the VA, is ultimately responsible for payment of the travel costs since the testimony concerns the witness's official duties at his former agency, the Coast Guard.

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BACKGROUND

In 1987, Ms. Carmen Hypolite filed a discrimination complaint against the United States Coast Guard in which she alleged that her nonselection for a grade GS-12 position was due to discrimination. The selecting official was Mr. John Booth, who was then employed by the Coast Guard in Alameda, California. In 1988, Ms. Hypolite disagreed with the agency's proposed disposition of her case and requested a hearing before the Equal Employment Opportunity Commission. Ms. Hypolite requested that Mr. Booth appear at the hearing as a witness. The EEOC Administrative Judge assigned to Ms. Hypolite's complaint ruled that Mr. Booth's testimony is relevant and necessary because he was the selecting official and there are issues of credibility to decide concerning the manner in which he made his selection.

Since Mr. Booth had transferred from the Coast Guard to a position with the VA in its Regional Office, Waco, Texas, the Administrative Judge sent a request to the VA to make Mr. Booth available as a witness at a hearing in Alameda, California, and to reimburse him for his travel expenses and per diem. The EEOC contends that the VA must make Mr. Booth available as a witness in view of EEOC's authority in 29 C.F.R. § 1613.218(f) (1988). That section provides that an EEOC Administrative Judge may request the appearance of an employee of any federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. Further, the agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge, unless it is administratively impracticable to comply with the request. The EEOC also says that 5 U.S.C. § 5751(a) (1982) provides, under regulations prescribed by the Attorney General, for payment of travel expenses of witnesses who work for the federal government and that the VA must pay such expenses under that authority.

The VA disagrees on the basis that none of the authorities cited by EEOC specifically address the factual situation here. The VA agrees that the EEOC provision (29 C.F.R. § 1613.218(f)) requires that all agencies make their employees available as witnesses and in a duty status, but contends that it does not address which agency pays the travel costs. In addition, the VA contends that the provisions of 5 U.S.C. § 5751(a), and the regulations issued by the Attorney General in 28 C.F.R. § 21.2 (1988) apply only to civil actions in court and to agency proceedings under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., and not to EEOC hearings. The VA

also contends that, if anyone is obligated to pay Mr. Booth's expenses, it should be the Coast Guard since Mr. Booth is being called to testify concerning matters related to his prior employment and not in his current official capacity.

The Coast Guard's position is that it is not responsible for Mr. Booth's travel expenses and that either the EEOC or Ms. Hypolite should pay for them. The Coast Guard also contends that Mr. Booth's personal attendance and the expenses involved are unnecessary since the witness can be examined "telephonically."

OPINION

Travel on Official Business

We believe the statutory language in 5 U.S.C. § 5751 and the implementing regulations in 28 C.F.R. Part 21 are sufficiently broad in scope and applicability to govern here, and, contrary to VA's contention, are applicable to EEOC hearings.

Although Mr. Booth has been summoned to appear in person at the request of the complainant, he is being summoned by the EEOC Administrative Judge to provide evidence on behalf of the government concerning his official duties while employed at the Coast Guard. Thus, 5 U.S.C. § 5751(a), which provides in pertinent part as follows, applies here.

"(a) Under such regulations as the Attorney General may prescribe, an employee . . . summoned, or assigned by his agency, to testify or produce official records on 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 Attorney General's regulations implementing 5 U.S.C. § 5751(a) provide that an employee is entitled to travel expenses in connection with any judicial or agency proceeding with respect to which the employee is summoned,

and is authorized by the employee's agency to respond to such summons, or is assigned by his or her agency to testify or produce official records on behalf of the United States. 28 C.F.R. § 21.2(b)(1) (1988). A "summons" is defined as an official request by the party responsible for the conduct of the proceeding. 28 C.F.R. § 21.1(f) (1988). An "agency proceeding" means an agency process as defined by 5 U.S.C. §§ 551(5), (7), and (9), the Administrative Procedure Act, which includes an adjudication by an agency through formulation of an order. 28 C.F.R. § 21.1(a); 5 U.S.C. § 551(7).

Contrary to VA's contention, we do not believe that the above-cited provisions limit the application of 5 U.S.C. § 5751 solely to proceedings held under the APA. Section 5751 and the implementing regulations in 28 C.F.R. make no such limitation.^{1/} An EEOC proceeding fits the definition in 5 U.S.C. § 551(7) since it is an agency process for the formulation of an order.

In this case Mr. Booth has been summoned by an Administrative Judge to appear as a witness at a discrimination hearing where the United States (Coast Guard) is a party, and to testify in his official capacity as a former employee of the Coast Guard. Accordingly, when Mr. Booth responds to the summons, he will be in an official duty status and entitled to reimbursement for travel expenses. See 28 C.F.R. §§ 21.2(b), and (e) (1988).

Agency Responsible For Payment Of Travel Expenses

In cases decided under predecessor language to the current 5 U.S.C. § 5751(a), we have held that if the facts or circumstances in the case that an employee is called to testify on arose from his prior employment with another agency, that agency and not the employee's current agency is responsible for payment of travel expenses. 46 Comp. Gen. 613 (1967); 22 Comp. Gen. 1074 (1943). This responsibility for payment is consistent with the language in 5 U.S.C. § 5751(a) quoted above, and the Attorney General's instructions on payment and reimbursement of travel expenses to government employees serving as witnesses. 28 C.F.R. § 21.2(d)(1) (1988).

Further, 29 C.F.R. § 1613.218(f) authorizes the Administrative Judge to request the appearance of an employee of any

^{1/} An official of the Department of Justice advised us that in his view section 5751 is broad enough to cover all administrative hearings, including those of the EEOC.

federal agency whose testimony is necessary to the proceeding and the agency must make the employee available unless it is impracticable to do so. If the employing agency objects, it shall provide an explanation to the Administrative Judge. If the Administrative Judge finds the explanation inadequate, the agency "shall make the employee available as a witness at the hearing." While that regulation does not specifically provide for travel expenses, it must be read together with 28 C.F.R. § 21.1 which clearly calls for payment by the employing agency and subsequent reimbursement by the agency whose activities are involved in the hearing.

Accordingly, since Mr. Booth has been ordered by the EEOC Administrative Judge to appear as a witness, we believe that it is incumbent on the VA to initially authorize and pay Mr. Booth's travel expenses in accordance with 5 U.S.C. § 5751(a) and the Justice Department's implementing regulations, since a failure to do so would be disruptive of the EEOC process. The VA is then entitled to be reimbursed the travel expenses by the Coast Guard.

While the Coast Guard may believe the personal appearance is unnecessary, the appropriate forum in which to challenge that determination is before the EEOC Administrative Judge. If the Administrative Judge rules that Mr. Booth must appear, the Coast Guard will be obligated to pay for his travel through reimbursement to the VA.

for Milton J. Jordan
Comptroller General
of the United States