UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 14, 2019

CBCA 5861-TRAV

In the Matter of WILLIAM V. KINNEY

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LESTER, Board Judge.

By decision dated October 31, 2018, the Board granted in part and denied in part a claim from William V. Kinney, a federal air marshal employed by the Federal Air Marshal Services (FAMS) within the Transportation Security Administration (TSA), Department of Homeland Security. Mr. Kinney requested that he be reimbursed for the costs of traveling between his residence and his office in his privately-owned vehicle (POV) on days when he departed for and returned from international temporary duty travel (TDY). We divided his claim into three time periods that mirrored those in which FAMS was subject to different policies, and we remanded a portion of his claim to TSA for reevaluation.

Both TSA and Mr. Kinney have requested that we reconsider portions of our decision. For the reasons explained below, we deny both requests.

TSA's Reconsideration Request

In our prior decision, we held that, from July to September 2016 (the first period covered by Mr. Kinney's claim), a version of TSA Management Directive 1000.6 (TSA M 1000.6) dated March 27, 2015, was in effect and applied to Mr. Kinney's travel claim during

that period. *William V. Kinney*, CBCA 5861-TRAV, 18-1 BCA ¶ 37,184, at 180,992. Section 6.A of that directive provided that "TSA generally follows the [Federal Aviation Administration Travel Policy (FAATP)] Chapter 301" and that "[i]nstances where TSA policy deviates from the FAATP are clearly identified" in TSA MD 1000.6 itself. Under the FAATP in effect during that period, if an employee commenced travel from his or her permanent duty station (PDS) rather than from his or her residence, the employee, as part of his travel costs, would be reimbursed the costs of round-trip travel by POV from the employee's residence to his or her office, and back, if the employee needed to work at the office immediately prior to or after return from travel. Reimbursement was provided, though, only to the extent that the employee was "not able to perform [his or her] commute by [his or her] normal mode of transportation" and "use of the alternate mode of transportation result[ed] in an increase in [the employee's] commuting costs." FAATP 301-10.24(c).

Because TSA MD 1000.6 did not clearly identify any deviations to the FAATP rules regarding day-of-travel local transportation expenses between the employee's residence and PDS as they apply to FAMS, we applied the FAATP rules to Mr. Kinney's travel. In doing so, we rejected TSA's argument that Office of Law Enforcement (OLE) 3401, a policy letter from the Assistant Administrator for Law Enforcement/Director of FAMS (FAMS Director) containing a different reimbursement rule, overrode the FAATP provision. *William V. Kinney*, 18-1 BCA at 180,993-94. For the policy in OLE 3401 to be effective, we held, the Assistant Administrator and Chief Financial Officer (OFACFO) for TSA's Office of Finance and Administration would have to have approved it. Because that had not happened, the OLE 3401 policy was not effective. We remanded this matter to FAMS to determine whether Mr. Kinney could show that, because of his international TDY travel, his commuting costs exceeded what they normally would have been.

On reconsideration, TSA has provided us with new documents not originally submitted to the Board that, according to TSA, show that there was a different policy in place from July to September 2016 (as well as from October 2016 to January 2017) and that the FAATP rules did not apply then.[1] Through those new documents, TSA argues, we should

[1] We note the agency's failure to provide these documents and some of this information during the original briefing. Although the agency has asserted that it was previously unaware that the Board would question what policies were in place during the periods of Mr. Kinney's travel and the FAMS Director's authority to issue policies, those arguments were clearly raised in Mr. Kinney's briefing and were implicit in orders that the Board issued requesting additional documentation. We are not obligated to accept new evidence and information on reconsideration that was previously available to the agency. *Stephen T. Classick*, GSBCA 15882-RELO, 03-1 BCA ¶ 32,060, at 158,466 (2002). We

see a history of OFACFO approvals, waivers, and rescissions of earlier versions of TSA MD 1000.6 and FAMS policy letters that resulted in the OFACFO's implicit approval of the policy in OLE 3401. Specifically, TSA begins by telling us that the language from section 6.A of the March 27, 2015, version of TSA MD 1000.6 upon which we relied in our prior decision was in place by 2010 (much earlier than the 2015 date identified in our prior decision). Similarly, the FAATP in effect in 2010 contained the same provisions regarding day-of-travel residence-to-office/office-to-residence expense reimbursement as discussed in our prior decision.

It was in 2010, TSA tells us, that FAMS started a new practice of requiring federal air marshals to report to their PDSs in advance of all international TDY overnight missions. On September 10, 2010, after FAMS' request, the OFACFO for TSA's Office of Finance and Administration approved a policy change allowing federal air marshals "who are required to stop at a field office while en route to, or returning from, international mission TDY travel to receive full (round-trip) travel reimbursement from and to their residence," and that language was added to Policy FLT 6001, a predecessor of OLE 3401. But that new reimbursement policy was short-lived. On October 12, 2012, because of budgetary issues, the OFACFO rescinded his September 10, 2010, policy change by approving the following request:

> [W]e request your approval to rescind the September 10th, 2010 policy exception that allowed us to pay OLE/FAMS personnel full round trip reimbursement when required to make a stop at a field office while en route to, or returning from, international mission TDY travel.

In June 2013, the FAMS Director then issued a revision to Policy FLT 6001 (later renamed OLE 3401), replacing language permitting residence-to-PDS-to-residence transportation cost reimbursements with language precluding such reimbursements.

TSA argues that, by agreeing on October 12, 2012, to rescind the September 10, 2010, policy change, the OFACFO effectively authorized FAMS to create a new policy barring reimbursements of all transportation costs between a federal air marshal's residence and his or her PDS. Yet, all the OFACFO did was rescind the September 10, 2010, policy change, taking FAMS back to the policy that was in place before September 10, 2010. The OFACFO did not add new language to TSA MD 1000.6 barring reimbursement of costs between an employee residence and a PDS on days of international TDY, and it did not add language eliminating the applicability of FAATP 301-10.24(c) to federal air marshals.

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exercise our discretion to accept it, despite its untimeliness, as it does not change the result.

Because the October 12, 2012, rescission of the September 10, 2010, policy change did not eliminate the applicability of FAATP 301-10.24(c) to FAMS or allow the FAMS Director to create a reimbursement policy that conflicted with FAATP 301-10.24(c), we deny TSA's request for reconsideration. The portion of OLE 3401 purporting to bar all residence-to-PDS transportation cost reimbursements was not effective from July to September 2016.[2]

Mr. Kinney's Reconsideration Request

In our October 31, 2018, decision, we held that, for the eleven international TDY trips that Mr. Kinney took from July to September 2016, Mr. Kinney would be entitled to reimbursement of his round-trip travel expenses between his residence and his PDS if, and only to the extent to which, he can show that, because of his international TDY travel, his commuting costs exceeded what they normally would have been. *William V. Kinney*, 18-1 BCA at 180,993 (citing FAATP 301-10.24(c)). On reconsideration, Mr. Kinney asks us to find that, even if his return day-of-travel POV expenses are the same as his normal commuting costs, he should still be entitled to recover all of his one-way day-of-return POV expenses, citing to precedent from this Board applying the provisions of the Federal Travel Regulation (FTR).

As Mr. Kinney recognizes, and we acknowledged in our prior decision, we have sometimes found when applying the FTR that, if an employee merely stops by his PDS office building on the way to or from the airport without going inside or performing any work, he may still be entitled to travel expenses starting from the time he departed his residence or until his return there if the stop was merely for convenience as a continuous part of the travel process–for example, where the employee drove to his office site to get on an airport shuttle or to pick up a government vehicle to be used for continuing the travel process. *See, e.g.*, *Jennifer A. Miller*, CBCA 3240-TRAV, 13 BCA ¶ 35,360, at 173,537; *Orlando Sutton*, CBCA 2823-TRAV, 12-2 BCA ¶ 35,120, at 172,447; *Issy Cheskes*, CBCA 689-TRAV, 07-2 BCA ¶ 33,624, at 166,536. Those cases typically involve a situation where the employee, for whatever reason, had to depart on TDY from the office and needed to pick up the POV on his or her way back home at the end of the TDY. Here, Mr. Kinney performs work at his PDS before departing on international TDY, so he cannot recover the costs of day-of-travel commuting from his residence to his PDS, except to the extent permitted by FAATP 301-10.24(c). Upon his return from TDY travel, though, he performs no work at the office,

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[2] For the same reasons that we deny TSA's request to find that the October 12, 2012, rescission created a new policy that overrode FAATP 301-10.24(c), we deny TSA's request to find that the October 12, 2012, rescission overrode the policy that we previously found controlled the period from October 2016 to January 2017.

but stops there merely to get his POV on his way home. Were the FTR applicable in such circumstances, he might be entitled to the costs of his day-of-return POV expenses.

The FAATP, however, is written differently than the FTR. Unlike the FTR, the FAATP creates a comprehensive reimbursement scheme for those employees who drive to their PDSs for work before departing on and when returning from TDY travel. If the employee has to use his or her POV to get to or from the office on either the departure leg or the return leg of TDY travel, he or she is entitled under FAATP 301-10.24(c) to reimbursement of *round-trip* expenses incurred in traveling from the residence to the PDS and from the PDS back to the residence, but only to the extent that such costs, by necessity, exceed normal commuting costs. Agencies typically expect employees to pay their own expenses for commuting, *Orlando Sutton*, CBCA 2781-TRAV, 12-2 BCA ¶ 35,072, at 172,268 (citing cases), and the FAA's regulation limiting reimbursement for expenses that an employee incurs traveling between a residence and a PDS to those that exceed normal commuting costs is inherently reasonable. Were we to allow an employee to recover *all* of his or her return-day PDS-to-residence costs, without reference to normal commuting costs, it would essentially eliminate the FAATP's clear intent to limit reimbursement of day-of-travel local transportation costs to those that exceed normal commuting costs.

Because the FAATP reasonably limits reimbursement of return-day PDS-to-residence transportation expenses to those that exceed normal commuting costs, we deny Mr. Kinney's reconsideration request.[3]

Decision

For the foregoing reasons, we deny the parties' reconsideration requests.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

[3] To the extent that Mr. Kinney has raised other grounds for reconsideration, they are denied because they merely repeat previously raised arguments that the Board denied, which is not a proper basis for reconsideration. *Jerome K. Adams*, CBCA 4861-RELO, 15-1 BCA ¶ 36,136, at 176,383.