UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 13, 2018

CBCA 5901-TRAV

In the Matter of MONIKA M. DERRIEN

Monika M. Derrien, Burlington, VT, Claimant.

Polly Wheeler, Chief, Pacific SW National Wildlife Refuge System, Fish and Wildlife Service, appearing for Department of the Interior.

SHERIDAN, Board Judge.

Monika Derrien (claimant) was a graduate student who performed a directorate fellowship with the Fish and Wildlife Service (FWS or agency) from June to September 2015. As a directorate fellow for a federal agency, claimant was entitled to the travel reimbursement amounts available to ordinary invitational travelers. She now disputes the disallowance of $2111.89 in costs related to the use of her personal vehicle (POV), lodgings, and meals and incidental expenses (M&IE) while traveling to and from her temporary duty (TDY) stations.

Background

Claimant's travel required her to drive from her residence in Burlington, Vermont, to the National Conservation Training Center (NCTC) in Shepherdstown, West Virginia, for orientation, and then to her extended TDY station at Ash Meadows National Wildlife Refuge (Ash Meadows) in Amargosa Valley, Nevada. Ash Meadows is located in Death Valley, in the Mojave Desert, approximately ninety miles northwest of Las Vegas, Nevada.

Throughout May and June 2015, in preparation for and prior to travel, claimant communicated by e-mail with the refuge manager at Ash Meadows, Annjanette Bagozzi, and

FWS regional workforce recruiter, Bill Johnson. These emails show that Ms. Bagozzi and Mr. Johnson expected claimant to incur travel expenses to the NCTC and Ash Meadows, and then back to Burlington after the fellowship was completed, and that FWS would reimburse Ms. Derrien for those expenses. Claimant states that during her communications with Ms. Bagozzi she was told she would need to use her POV for the fellowship. As claimant is not an FWS employee, she relied on Ms. Bagozzi and Mr. Johnson to provide her information about what FWS required. As she was not an FWS employee, and did not have access to FWS systems, Ms. Derrien also relied on FWS employees to input her information into appropriate FWS systems on her behalf.

On or about May 15, 2015, claimant submitted requested information to Mr. Johnson for input into two software systems: Concur, the agency's E-Gov Travel Service (ETS), and the Automated Clearing House (ACH) for direct deposit.[1] Claimant emailed Mr. Johnson on June 10, 2015, to ask if her information was correctly entered into Concur and ACH. Mr. Johnson assured her by reply email, "I took care of everything on my end by getting your traveler profile established in our system." Claimant followed-up by forwarding the email to Ms. Bagozzi who responded on that same day that she had not yet received the information from Mr. Johnson. In pertinent part, Ms. Bagozzi wrote on June 10:

> Wow. I didn't get any of that from anyone. We'll get it sorted out. Because you're not flying it will be a matter of reimbursement rather than trying to pay for a flight up front.
>
> You will be paid mileage for your drive and be given meals and incidental expenses cash [MI&E]. I would keep your hotel receipts for any overnights on your drive and we will be able to figure it out from there.

On June 11, 2015, Ms. Bagozzi and Molly Sweat, a FWS management analyst, signed a form titled "Invitational Travel: Travel Authorization." The form contained preprinted language stating that the use of a POV was subject to being:

> (a) Administratively determined to be [for] the advantage of the Government

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1 In its reply, FWS asserts that claimant did not enroll in Concur prior to travel. However, email correspondence with Mr. Johnson indicates that claimant provided him the required information for input into Concur.

(b) A showing of advantage to the Government

(c) Not to exceed cost by common carrier, including consideration of Per Diem allowances.

Claimant denies receiving a copy of the June 11, 2015, travel authorization form.[2] The record also contains a cost comparison form (first cost comparison) apparently signed by claimant and Ms. Bagozzi that reflects the costs shown in the June 11, 2015, authorization form. Ms. Derrien denies receiving or signing the first cost comparison form.[3]

Claimant began her travel on June 14, 2015, when she drove her POV approximately 535 miles from Burlington to the NCTC in Shepherdstown. She stayed at the NCTC for orientation until June 19, when she began her seven-day drive to Nevada. While driving to Nevada, she stayed at various hotels. She arrived in Nevada on June 25, and began her fellowship at Ash Meadows.

FWS officials did not submit the June 11, 2015, authorization form or the first cost comparison to reviewing officials until July 27, 2015, forty-three days after claimant began travel and was already in Nevada with her POV. On July 28, 2015, Kathleen Brennan, a FWS fellowship analyst, received the first authorization form and wrote to Ms. Bagozzi and Ms. Sweat instructing them to update the comment field with a reason why the agency authorized POV and to sign a cost comparison form for mileage reimbursement. That same day, FWS then completed another cost comparison (second cost comparison) that repeated the calculations from the first. In its first and second cost comparisons, FWS again showed that the estimated cost of using a POV was approximately $1745.41, whereas travel by air would cost approximately $2253.49. Ms. Brennan requested a more detailed explanation as to why FWS authorized the use of POV, but a response was not forthcoming at that time.

Ms. Brennan began some email correspondence with claimant on December 2, 2015, well after the fellowship and its associated travel had concluded. In that correspondence, Ms. Brennan wrote that claimant would be reimbursed for the constructive costs of travel by commercial carrier and car rental at the TDY. Ms. Brennan also asserted that the use of air

[2] The form did not address lodgings or MI&E, expenses that Ms. Bagozzi confirmed in her email the day prior would be reimbursed.

[3] The identical form, except showing the date of July 28, 2015, is also in the record.

travel would have been "the most cost-effective method" when compared to claimant's actual costs of $2981.57 for the one-way trip to her TDY. She also directed claimant to the Federal Travel Regulation (FTR) provisions regarding the mode of travel that may be authorized by the Government.

Claimant asserts that sometime in July 2015, FWS provided her with a voucher that did not include all of her travel expenses. She subsequently received another voucher with the costs of one-way travel totaling $2852.72 of reimbursable fees that she, along with Ms. Bagozzi, signed on August 31, 2015. This amount constituted the total cost of her travel to the TDY location in Nevada, including lodging and M&IE.

There is little evidence of further contact between claimant and FWS officials over the year. Between January and May 2016, Ms. Derrien was in contact with an official at Ash Meadows regarding various vouchers that did not fully reimburse her expenses and which claimant declined to sign. In September 2016, claimant was contacted by a travel arranger from NCTC, and on September 22, 2016, another authorization was signed that contained a detailed rationale for why FWS authorized the POV. That authorization offered the following explanation:

> Due to the nature of her work, and the location of her accommodations, it was necessary for Monika Derrien to drive her privately owned vehicle [in] Burlington, VT to and from her Directorate Fellows Program (DFP) duty station in Nevada, and the DFP Orientation at the National Conservation Training Center, Shepherdstown, WV. Since Ms. Derrien was working at several field sites in the greater Las Vegas area for her outreach position and a government vehicle was not available for her use, it was critical that she had her own transportation.

Nonetheless, reviewing officials at FWS insisted that the POV was originally authorized due to an erroneous initial cost comparison.[4] Over the two years Ms. Derrien's

[4] In addition to the first and second cost comparison forms, there are three other cost comparisons in the file. A September 22, 2016 cost comparison shows $2846.81 in actual costs to claimant and constructive costs of $2200 by common carrier (airfare and associated costs). The first of two undated cost comparisons reflects total claimant travel and lodging costs of $4432.69 and total constructive costs of $3342.68 (this is the cost comparison on which the agency based its reimbursement amount of $3342.68. The other undated cost comparison shows $2831.80 in actual costs to claimant and $971.49 in constructive costs by common carrier.

travel was being considered by FWS officials, FWS amended or rejected, multiple vouchers for different amounts indicating different mileage rates. On October 6, 2016, in order to initiate the appeals process, claimant signed a voucher for $3342.10 in reimbursable costs, and on October 17, 2017, the agency reimbursed claimant that amount. Claimant asserts she is due an additional $2111.89.[5] The agency argues that claimant is barred from recovery, as the first authorization of POV was erroneous due to the agency's own failure to develop an accurate cost comparison.

Discussion

FWS argues that this case falls within our holdings that there can be no equitable recovery for relying on the bad advice of a government employee, when the advice is unauthorized by statute or regulation. For the reasons set forth below, we conclude that the facts of this matter do not limit claimant's ability to recover the actual expenses that she was authorized and relied on receiving when traveling in the interest of the Government. Those expenses include POV mileage at $.56 per mile, lodging, and M&IE.

When she began her travel on June 13, 2015, Ms. Derrien was instructed by FWS employees with whom she was told to interact to use her POV and that she would receive appropriate reimbursement for her mileage, lodging, and M&IE. As claimant was not an FWS employee, she did not have access to the FWS systems and was dependant on the information and authorizations she was given by those FWS employees. Claimant knew of no reason why she should not rely on the email authorization given by FWS employees, and without receiving any verbal or written communication that she should not, began her travel with her POV. While the process followed by FWS was unconventional for someone familiar with traveling in the interests of the Government, there was nothing in that process to alert claimant to the fact that the travel might later be impacted by some additional FWS reviewing authority after her travel had begun.

The agency "must select the method most advantageous to the Government, when cost and other factors are considered." 41 CFR 301-10.4 (2014) (FTR 301-10.4). The FTR presumes that the most advantageous method of transportation by order of precedence will be common carrier, government vehicle (GOV), POV, or special conveyance for travel. FTR

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[5] FWS does not dispute that $2111.89 remains unpaid.

301-10.3 "POVs should be determined to be the most advantageous method of transportation only after your agency evaluates the use of a common carrier, a Government-furnished automobile, and a rental car." FTR 301-10.5(d).

FTR 301-10.4, however, provides that the form of travel must be "the method most advantageous, when costs *and other factors* are considered." (emphasis added.)[6] Other factors for an agency to consider might include, but are not limited to "energy conservation, total cost to the Government (including costs of per diem, overtime, lost worktime, and actual transportation costs), total distance traveled, number of points visited, and number of travelers." FTR 301-10.4.

While it is generally assumed that common carrier transportation is the most advantageous method of transportation, an agency may authorize use of other modes of transportation, rather than common carrier, when the use of common carrier:

(a) Would interfere with the performance of official business;

(b) Would impose an undue hardship upon the traveler; or

(c) When the total cost by common carrier would exceed the cost of the other method of transportation.

FTR 301-72.2.

In longstanding case law, the Board has held that where relevant statutes and regulations do not provide for payment for a particular purpose, an agency may not make such a payment. *Lauren R. Potempa*, CBCA 5136-RELO, 16-1 BCA ¶ 36,275, at 176,929 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)). Thus, an agency employee's erroneous advice cannot obligate the Government to make payment of monies that are not authorized by statute and regulation. *Beth A. Wilson*, CBCA 600-RELO, 07-1 BCA ¶ 33,546, at 166,152 (citing *Suzanne S. Lowe*, GSBCA 16696-RELO, 06-1 BCA ¶ 33,202).

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[6] "The travel of an employee shall be by the most expeditious means of transportation practicable and shall be commensurate with the nature and purpose of the duties of the employee requiring such travel." 5 U.S.C. § 5733 (2012).

In this matter, however, the emails authorizing claimant's travel were not contrary to the holdings premised on the reasoning of *Richmond*, because the FWS employee who authorized claimant's travel had the discretion to authorize the use of the POV, even without creating a formal cost comparison. Further, the "after the fact" assessment of a FWS reviewing official, who disagreed with the initial authorization, cannot serve to limit claimant's recovery, particularly since the authorized travel had already begun. Here, the authorizing official assured claimant that the agency would reimburse POV mileage, lodging, and M&IE. This assurance occurred the day before signing an authorization for claimant to use her POV. Claimant traveled in reliance on this assurance and arrived in Nevada believing she would be recompensed appropriate mileage, lodging, and M&IE.

The record shows that FWS employees who interacted with Ms. Derrien as she was planning her travel, believed that claimant's use of her POV would be the most advantageous to the Government. This Board has noted that FTR 301-72.2 gives "agencies discretion to use 'methods of transportation other than common carrier' when appropriate." *Herbert H. Galliart*, CBCA 3242-TRAV, 13 BCA ¶ 35,294, at 173,397. We held in *Gilda E. Best*, CBCA 4121-TRAV, 15-1 BCA ¶ 35,814 that:

> Constructive cost analysis is appropriate under applicable regulations when an *employee elects* to use his or her POV instead of the authorized mode of transportation, 41 CFR 301-10.309 (2014), *but is not to be used when the employee, as in this case, has been authorized use of the POV as an alternative mode of transportation*. *William T.Cowan, Jr.*, GSBCA16525-TRAV, 05-1 BCA ¶ 32,906 (agency may not reduce an employee's entitlement to the constructive cost of previously authorized air travel when the agency subsequently authorized the claimant to travel by POV); *see also Michael C. Biggs*, CBCA 928-TRAV (Apr. 23, 2008).

Id. at 175,143 (emphasis added).

Under the circumstances present here, the FWS authorizing official had the discretion to approve the use of the POV, and it was up to that FWS official to properly consider whether use of the POV was most advantageous to the Government. She was not, however, required to conduct a cost comparison. The FTR instructs agency officials:

> When determining whether the use of a POV to a TDY location is the most advantageous method of transportation, agencies must consider the total cost

> of using a POV as compared to the total cost of using a rental vehicle, including rental costs, fuel, taxes, parking (at a common carrier terminal, etc.), and any other associated costs.

FTR 301-70.102. While the regulation requires an agency to consider competitive cost when authorizing travel using a POV, an agency is not required to conduct a cost comparison as the basis of this authorization.

Ms. Derrien began her travel authorized to use her POV and to be reimbursed appropriate mileage, lodging, and M&IE. It is well-settled that "valid travel orders cannot be revoked or modified retroactively, after the travel is completed, to decrease rights that have already become fixed." *Renee Cobb*, CBCA 5020-TRAV, 16-1 BCA ¶ 36,240, at 176,819; *see Tomila K. Hearon*, CBCA 3995-TRAV, 15-1 BCA ¶ 35,904, at 17,512; *Nidavan Kanasawadse*, GSBCA 16508-TRAV, 05-1 BCA ¶ 32,913, at 175,512. The rule applies unless there was an error on the face of the orders or the orders were clearly in conflict with a law, regulation, or agency instruction. *Jeffrey E. Koontz*, CBCA 3251-TRAV, 13 BCA ¶ 35,318, at 173,372; *Jack J. Pagano*, CBCA 1838-TRAV, 10-1 BCA ¶ 34,408, at 169,877.

It appears that the process FWS used to approve Ms. Derrien's fellowship travel may have been deficient in several ways, ways that were only discovered during a review conducted after claimant began her travel. Having determined that the FWS authorizing official had the discretion to determine that claimant's use of her POV was most advantageous to the Government, once Ms. Derrien's travel began on June 14, 2015, FWS could no longer revoke or revise that authorization because a reviewing official later disagreed with the determination or concluded that a FWS official improperly performed a cost comparison. Based on the original travel authorization, Ms. Derrien is entitled to the remaining $2111.89 in costs associated with the use of her POV, lodging, and M&IE.

Ms. Derrien also asks to be paid interest on the amount of her claim. The Board has recognized that in the Travel and Transportation Act of 1998, "Congress . . . waived sovereign immunity by granting interest to employees on certain tardy payments." *Nicholas J. Thacker*, CBCA 4981-RELO, 16-1 BCA ¶ 36,231, at 176,765 (citing Pub. L. No. 105-264, § 2(g), 112 Stat. 2350, 2352 (1998)); *Michael G. Valle*, 17-1 BCA ¶ 36,762, at 179,150. The FTR provides that an "agency must reimburse [an employee] within 30 calendar days after [he or she] submit[s] a proper travel claim." FTR 301-52.17. The "agency must pay [the employee] a late payment fee, in addition to the amount due [him or her], for any proper

travel claim not reimbursed within 30 calendar days of [his or her] submission of it to the approving official." FTR 301-52.19. An agency must:

> (a) Calculate late payment fees using the prevailing Prompt Payment Act Interest Rate beginning on the 31stf a proper travel claim and ending on the date on which payment is made; or
>
> (b) Reimburse [the employee] a flat fee of not less than the prompt payment amount, based on an agency-wide average of travel claim payments;
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> (c) In addition to the fee required by paragraphs (a) and (b) of this section, your agency must also pay you an amount equivalent to any late payment charge that the card contractor would have been able to charge you had you not paid the bill.

FTR 301-52.20. The record is fractured as to what was paid, what it was for, and when it was paid. Accordingly, we use the October 6, 2016, voucher as establishing the date that Ms. Derrien submitted a voucher for the claimed costs. Ms. Derrien is entitled to interest on her claim from the thirty-first day subsequent to October 6, 2016, until paid.

Decision

Claimant is entitled to $2111.89 in costs associated with the use of her POV, lodging, and M&IE, plus interest from the thirty-first day subsequent to October 6, 2016, until paid.

PATRICIA J. SHERIDAN
Board Judge