

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievant}
Grievant

and

Department of State

Record of Proceeding
FSGB No. 2007-046

Date: May 2, 2008

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Alfred O. Haynes
Jeanne L. Schulz

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Holly Rich
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant was responsible for payment of her travel expenses to the funeral of her mother-in-law, despite having received approval for death Emergency Visitation Travel (EVT)¹ from the Human Resources (HR) Officer at post, because she was not a related family member of the decedent and because her husband, who was not stationed abroad, was able to attend the funeral from his home in the States.

OVERVIEW

Grievant is a Human Resources (HR) Specialist with the Department of State (the Department) who was assigned to the Regional Support Center in {post}. She provided HR support to several posts throughout Europe and South and Central Asia. While she was away from her post, providing training in the Ukraine, grievant learned from her husband that his mother was ill. Grievant immediately contacted her office in {post} and requested medical EVT; however, when she learned later that day that her mother-in-law had died, she changed her request to death EVT. Post approved her requested EVT and grievant departed {post} to attend the funeral in Virginia.

Shortly afterwards, the Department advised post by cable that grievant was ineligible for death EVT for her mother-in-law. Grievant was advised when she returned to post that she was obligated to pay for her travel, which she did. She then grieved the decision, which the agency denied.

In her appeal to this Board, grievant argued that the Department construed the applicable EVT regulations too narrowly, insisting that she was an eligible employee who traveled from an overseas post to attend an eligible event – a funeral – occasioned by the death of an eligible family member – her mother-in-law. She contends that the restrictions in the applicable regulations did not preclude her authorization to travel to the funeral because the regulation included “open-ended signifiers” that permitted more circumstances for death EVT than the one mentioned in the regulations.

The Board found that a clear reading of the applicable regulations precludes death EVT for family members who are not related by blood to the deceased person. The Board further found that the only exceptional circumstance under which EVT could be approved for an in-law requires that the employee’s spouse, who is related to the deceased, be disabled from traveling to the funeral because of illness, injury or other similar circumstance, and that the employee be expressly authorized to travel in the spouse’s stead by the chief of mission.

The Board concluded that the language of the regulation did not permit any other exceptional circumstance other than those similar to the one example provided. In any event, an exceptional circumstance required authorization from the chief of mission, which was not given in this case. The Board concluded that grievant did not establish that the agency abused its discretion in denying her EVT and that the agency should not

¹ Emergency Visitation Travel (EVT) is authorized by 3 FAM 3740 under four circumstances: (1) Medical; (2) Death; (3) Incapacitated Parent; and (4) Unusual Personal Hardship.

be equitably estopped from denying the EVT. Accordingly, the Board concluded that grievant was unable to demonstrate that she fit any of the criteria, either for death EVT or for an exceptional circumstance.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

{Grievant}, a Human Resources Specialist with the Department of State (Department), appeals the denial of her grievance in which she claimed that the Department wrongfully denied her request for Emergency Visitation Travel (EVT) when she attended the funeral of her mother-in-law. She insists that she is an eligible employee entitled to be reimbursed for the cost of her travel occasioned by the death of a family member. For relief, she asks for:

- (1) reimbursement by the Department of all of her travel expenses to and from the funeral site, and
- (2) all other appropriate relief deemed just and proper.

II. BACKGROUND

{Grievant} is a Human Resources (HR) Specialist, at the FP-02 level, assigned to the Regional Support Center in {post}. She provides HR support to eleven posts throughout Europe and South and Central Asia.

On April 4, 2007, while {Grievant} was in Kiev providing HR training, she learned from her husband, who was living in the United States, that his mother was seriously ill.² {Grievant} contacted her HR Office in {post} and requested medical EVT, under the provisions of 3 FAM 3744 (1). Later, that same day, when {Grievant} learned that her mother-in-law had died, she changed her request to death EVT, under the provisions of 3 FAM 3744 (2). On April 5, {Grievant} returned to {post} and received approval from post for her death EVT request.³ On April 6, she departed post for Fredericksburg, Virginia to attend the funeral services for her mother-in-law.

² {Grievant's} mother-in-law also lived in the United States, in Virginia.

³ The authorization was signed by Sharon K. Featherstone, a Human Resources Officer.

On April 10, the Department (HR/ER/WLP) sent a telegram to {post} (State 00046827) stating that {Grievant} was ineligible for death EVT because she was not a related family member as listed in 3 FAM 3744 (7). The Department instructed the post to collect from {Grievant} the cost of her travel. {Grievant} paid the cost of her travel, but filed a grievance on July 30, 2007. The Department denied the grievance on August 29, 2007. On November 5, {Grievant} appealed the Department's decision to the Foreign Service Grievance Board.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant contends that, under the provisions of 3 FAM 3740, she is clearly eligible for EVT in this case. Grievant acknowledges that the provision relied upon by the Department, 3 FAM 3744 (7) states: "Ordinarily, only the employee or the spouse related to the seriously ill, injured or deceased family member will be authorized for EVT." She argues, however, that "the Department ignored basic rules of statutory interpretation" when it denied her grievance. Her statutory analysis is as follows:

According to 3 FAM 3744 (2), EVT is authorized in the event of death only when "[a] member of the employee's or the employee's spouse's immediate family has died." Clearly, the person who died was a member of grievant's spouse's immediate family since parents are included in the definition of "immediate family member(s)" under 3 FAM 3745 (2). Moreover, grievant was an "eligible employee" according to 3 FAM 3743a, because she was a "U.S. Foreign Service employee on assignment abroad." Only one member of her family traveled as allowed by the regulations. She received approval from post to travel and did not learn that her EVT was not authorized until after she had embarked on her travel. Finally, in interpreting 3 FAM 3744 (7), the words "ordinarily"

and “such as” are non-exclusive “open-ended signifiers” that allow for EVT to be authorized in circumstances other than the one identified in the citation. Grievant contends that 3 FAM 3744 (7) was intended to permit “open-ended determination[s]” concerning EVT authorizations.

THE DEPARTMENT

The Department argues that EVT is not an entitlement, but is instead a benefit allowed only under restricted circumstances. The Department contends that the plain language of the regulations, specifically 3 FAM 3744 (7), makes clear that EVT was not authorized in this instance. 3 FAM 3744 (2) allows for death EVT authorization only when a member of the employee’s, or the employee’s spouse’s family, has died. To the extent that this provision creates any ambiguity as to whether employees qualify for EVT upon the death of an in-law, the ambiguity is clarified in 3 FAM 3744 (7).

3 FAM 3744 (7) expressly provides that only the individual who is related by blood to the decedent will be authorized EVT unless “exceptional circumstances” are found. An exceptional circumstance must include a decision by the chief of mission that an employee who is related to the deceased is unable to travel and that the spouse of the related employee may travel in his or her place. The Department concludes that in this instance, pursuant to 3 FAM 3742 and 3743, neither grievant nor her husband was eligible for EVT to attend the funeral of grievant’s mother-in-law because (1) grievant was not a related person; (2) the chief of mission did not find exceptional circumstances to permit her to travel in place of her husband; and (3) grievant’s husband resided in the United States at the time of his mother’s death and therefore was not “on assignment abroad.”

IV. DISCUSSION AND FINDINGS

In all grievances other than those involving disciplinary actions, the grievant bears the burden of proving, by a preponderance of the evidence, that the grievance is meritorious. 22 CFR 905.1(a). In the instant matter, grievant must prove that the agency denied her a financial benefit to which she is entitled under applicable laws or regulations. 22 CFR 901.18 a (7).

The parties correctly focus their attention on two provisions of 3 FAM 3740. 3 FAM 3744(2) provides that EVT is authorized only under the following circumstances:

(2) DEATH – a member of the employee’s or the employee’s spouse’s immediate family⁴ has died (Requires approval by the post.)

3 FAM 3744 (7) provides:

Ordinarily, only the employee or the spouse related to the seriously ill, injured or deceased family member will be authorized for EVT. However, in exceptional circumstances, such as the critical illness or injury of the traveler who otherwise would be authorized for EVT, the chief of mission . . . may authorize the spouse to travel in place of such traveler. . . .

A clear reading of these provisions establishes that an employee who experiences the death of an in-law family member will ordinarily not be authorized for EVT because he or she is not the “related” family member of the deceased. The term “related” in 3 FAM 3744(7) unquestionably means related by blood because any other meaning would render the remaining sentence in the regulation meaningless. That is, if both the blood relative and his or her spouse were included in the term “related” as that term is used in the first sentence of 3 FAM 3744 (7), the exception which allows for the spouse to

⁴ “Immediate family member” is defined in 3 FAM 3745(2) as: “The spouse of the employee, and the children (including stepchildren, adopted children, and those who are or were under legal guardianship) and parents of the employee and the employee’s spouse. For EVT travel in cases of death, immediate family members shall include the siblings (including stepbrothers and stepsisters) of the employee and the employee’s spouse.” (Citation omitted).

receive EVT in place of the “traveler who otherwise would be authorized” would make little sense. The rules of statutory construction have long required that we presume that the drafters of a regulation did not intend for the terms therein to be in conflict. *Rodgers v. United States*, 185 U.S. 83 (1902). See also, *Lawson v. Suwanee Fruit & S. S. Co.* 336 U.S. 198 (1949). Thus, by the very terms of this regulation, grievant would not “ordinarily” be authorized to receive EVT as a result of the death of her mother-in-law because she was not related to the deceased.

Grievant argues that the Department misconstrues the word “ordinarily” as used in the regulation. “In determining the scope of a statute, we look first to its language . . . giving the ‘words used’ their ‘ordinary meaning.’” *Moskal v. United States*, 498 U.S. 103, 108 (1990).⁵ The word “ordinarily” means “customarily” or “generally” or “as a rule.” Thus, the regulation announces a general and customary rule reserving EVT for related family members only. The regulation then provides for exceptions to the general rule. However, the exceptions are constrained by the example given in the regulation. In order to prevail, therefore, grievant must prove by preponderant evidence that her situation was an exceptional circumstance that fit within the language of the example. *Ryan v. Carter*, 93 U.S. 78 (1876).

The example given in the regulation defines an exceptional circumstance as when the related employee is also stationed abroad, but is critically ill or injured; this requires that the chief of mission specifically authorizes the in-law employee to travel in the spouse’s stead. Grievant does not argue that she met any of these criteria. Rather, she

⁵ See, *Bread PAC v. Federal Election Commission*, 455 U.S. 577, 580 (U.S. 1982) which held: “Our analysis of this issue of statutory construction ‘must begin with the language of the statute itself,’ . . . and ‘[absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’”

argues that we should read into this one unambiguous exception an intent by the drafters to permit any other exception as decided (presumably by persons other than the chief of mission), in “open-ended determination[s].”

The words “such as,” as used in 3 FAM 3744 (7), mean “like,” “similar to,” or “of the type previously mentioned.” Concise Oxford American Dictionary, Oxford University Press, Inc., 2006. By definition, then, the example given in the regulation does not include “open-ended determinations” as grievant argues. Instead, an exceptional circumstance would have to be like or similar to the example provided in the regulation. This would include situations in which the related employee - here, grievant’s husband - was unable to travel to the funeral of a relative through no fault of his own.

Grievant fails to argue how her circumstances warrant approval under the exceptional circumstances provision. Her husband was not prevented by illness, injury, or any similar disability to travel to his mother’s funeral. He, in fact, attended the funeral without the need for EVT at all since he was in the United States where the funeral was held. Grievant further fails to explain how she qualified for the exception in the absence of authorization from the chief of mission. Grievant’s argument ignores the plain language of the exception when she states: “the HR officer here [at post] also believed after reading the regulations that I was eligible for the travel.” Receipt of approval from someone in the HR office at post is simply not the equivalent of receiving approval from the chief of mission.

Grievant argues that she should be reimbursed for her travel because she relied on the approval that she received from post. This raises questions whether the agency abused its discretion when it denied EVT after grievant began her travel and after she had received approval from her post.

14 FAM 515, captioned “Traveler’s Responsibility,” provides:

c. The traveler is responsible:

- (1) For the correct performance of official travel;
- (2) For the payment of any charges incurred through failure to comply with the governing regulations, regardless of who may have assisted the traveler in making travel arrangements; and
- (3) For the value of tickets in traveler's possession purchased with U.S. Government funds or through the exchange of transportation requests. . . .

Under this provision, the grievant is responsible for the “correct performance” of her EVT and for payment of the cost of such travel if it does not conform with governing regulations, even though the post pre-approved the travel. The fact that grievant received an erroneous approval from someone in her HR office before she embarked on her travel does not absolve her of her duty to read and understand the regulations that unambiguously disallowed her travel to the funeral of her mother-in-law in the absence of express approval from her chief of mission.

On the facts presented, grievant ought not to have relied on the approval document, but instead upon a plain reading of the applicable regulations. The fact that grievant was a senior official in the HR Office who provided regional training to other HR offices underscores her duty to be familiar with travel regulations.⁶ This Board, therefore, concludes that the agency did not abuse its discretion in denying EVT on the

⁶ According to the United States Department of State website: “Foreign Service Human Resources Officers (HROs) . . . are responsible for . . . [p]roviding counseling, interpreting regulations and informing American Foreign Service employees of procedures affecting their assignments, performance evaluations, leave and retirement benefits, health and life insurance programs, salary, allowances, differentials and official travel. . . .” (Emphasis added). See <http://www.careers.state.gov/specialist/opportunities/hroff.html>.

facts presented, notwithstanding the fact that someone at post had already approved such travel.⁷

Lastly, we note that grievant does not indicate whether she applied to the agency Exceptions Committee (EC) for relief. 14 FAM 514 provides an avenue by which an employee who is denied reimbursement for travel may seek a ruling to override the agency's decision. Given that grievant clearly does not fit within the one category of exceptions to the general rule that she was not entitled to EVT, this appears to have been her only recourse.

V. DECISION

The grievance appeal is denied.

⁷ See FSGB 97-42 (January 21, 1998) ("Mistaken information does not relieve grievant of his obligation to know the law and rules."); FSGB 97-3 (June 26, 1997) ("Mistaken information regarding the shipment of an automobile resulting in grievant paying for conversion costs does not justify requiring the agency to reimburse grievant since to do so would oblige the government to make an unauthorized payment"); FSGB 96-66 ("Erroneous information about reimbursable R&R travel does not absolve the grievant of his duty to understand the applicable travel regulations.")