

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

January 25, 2002

GSBCA 15513-RELO

In the Matter of NOREEN KINNAVY

Noreen Kinnavy, Fairfax, VA, Claimant.

Dennis D. Sokol, Director, Office of Administration, International Broadcasting Bureau, Washington, DC, appearing for International Broadcasting Bureau.

HYATT, Board Judge.

Claimant, Noreen Kinnavy, is employed by the International Broadcasting Bureau (IBB), a relatively newly formed government entity which was previously part of the United States Information Agency. Ms. Kinnavy incurred certain relocation expenses pursuant to orders that were issued and then cancelled by the agency prior to the implementation of her transfer. The agency believes that it lacks the authority to reimburse certain of the expenses incurred and has forwarded her claim to the Board for our review. After reviewing this claim, we agree that the agency does not have a mechanism with which to reimburse Ms. Kinnavy. Nonetheless, as explained in more detail below, we believe that the circumstances are such that the claim should be paid, and we therefore are recommending payment as a meritorious claim under a General Services Administration (GSA) pilot program.

Background

Ms. Kinnavy has been employed by IBB and, formerly, by USIA for more than thirteen years. In 1996 she was transferred from Washington, D.C., to Miami, Florida, as part of the Office of Cuba Broadcasting consolidation. In January 1998, she was relocated back to Washington, D.C. She was not able to sell her home in Florida prior to the 1998 move, although she did sell it a few months later. Ms. Kinnavy then bought a home in the Washington, D.C., area. She states that the transfer to Washington, and particularly the delay in selling the Florida home, resulted in a significant financial burden that was not fully compensated by the Government.

In the summer of 1998, claimant's immediate supervisor informed her that her job was likely to be relocated again. Later that year he suggested that her job would move to either

Miami or Caracas, Venezuela. In April 1999, he told Ms. Kinnavy that she would be relocated to Miami and that she would be reporting there on October 1, 1999. Ms. Kinnavy requested travel orders so that she could commence preparing for a move. Initially, her supervisor gave her invalid travel orders, without the necessary approvals to validate the transfer. Eventually, Ms. Kinnavy was able to get properly authorized orders. By that time, in July 1999, she considered that it was too late to sell her Washington area house before her reporting date in October. As a result, she contacted a real estate company and arranged to have her house rented out for a year. In connection with this process she paid a real estate commission and a fee to a property management company. The tenant was entitled to take occupancy on October 1, 1999.

In September 1999, Ms. Kinnavy's immediate supervisor left the agency abruptly and Ms. Kinnavy's scheduled relocation to Miami was cancelled. She promptly undertook to terminate the lease she had entered into on her house, but was unable to do so in time to avoid moving out by October 1. The tenant objected to cancellation of the lease. After much negotiation, Ms. Kinnavy was able to break the lease, but had to pay the tenant the amount of \$2000 to do so. She also paid a \$725 commission to the property management company had contracted to manage the leased property for her, and a commission to Weichert Realty in the amount of \$362.50. She filed a request to have these, and other various minor expenses, reimbursed.

Although BBS has reimbursed Ms. Kinnavy the miscellaneous expenses allowance she is eligible for under the applicable regulations, it has not compensated her for the \$2000 she had to pay her prospective tenant in order to break the lease, or for the amounts paid to the management company and realtor. The agency understands that these expenses were incurred solely because the relocation orders were issued and then cancelled, but does not believe the applicable regulations permit reimbursement.

Discussion

Both the Board and the General Accounting Office (GAO), which considered relocation expense reimbursement claims until 1996, have adopted a general rule to resolve employee claims grounded in the cancellation of a transfer: When an agency cancels a transfer due to circumstances beyond an employee's control, it should reimburse the employee for expenses that it would have reimbursed had the transfer been completed, provided the employee incurred the expenses before the agency canceled the transfer, in good faith, and in anticipation of the transfer. Michael J. Halpin, GSBCA 14509-RELO, 98-1 BCA ¶ 29,730; accord Terry M. Neeley, GSBCA 14930-RELO, 99-2 BCA ¶ 30,496; Orville H. Myers, 57 Comp. Gen. 447 (1978); Dwight L. Crumpacker, B-187405 (Mar. 22, 1977). We note that the agency has followed this rule to the extent it has determined that the expenses claimed would have been paid under applicable regulations had the transfer occurred. Had Ms. Kinnavy sold her house in reliance on her travel orders, the allowable expenses associated with the sale would have been reimbursed. Further, had Ms. Kinnavy contracted to sell her house, but not yet gone to closing, costs of extricating herself from the legal obligation to sell the house would likely have been reimbursable. See Katherine J. Allan, B-235978 (Oct. 26, 1990). The agency's concern here is that there is no mechanism under applicable statutory provisions and the implementing regulations to compensate the

employee in these circumstances where, rather than selling the house at the old duty station, the employee has opted to lease the house to a tenant.

In 1996, Congress enacted legislation giving agencies the authority, under regulations promulgated by the General Services Administration (GSA), to "pay to or on behalf of an employee who transfers in the interest of the Government expenses of property management services instead of expenses" associated with the sale of the residence at the old duty station." 5 U.S.C. § 5724a(d)(8) (2000). In March 1997, the Federal Travel Regulation was amended to implement this authority. 41 CFR 302-15 (1997). The FTR defines "property management services" to be:

programs provided by private companies for a fee, which help an employee to manage his/her residence at the old official station as a rental property. These services typically include, but are not limited to, obtaining a tenant, negotiating the lease, inspecting the property regularly, managing repairs and maintenance, enforcing lease terms, collecting the rent, paying the mortgage and other carrying expenses from rental proceeds and/or funds of the employee, and accounting for the transactions and providing periodic reports to the employee.

Id. 302-15.1 (1999). The FTR also states that the purpose of the allowance for property management services when authorized in connection with a domestic transfer is to reduce overall relocation costs reimbursed by the Government. Id. 302-15.2. Each agency is to develop its own policies and procedures governing when property management services will be reimbursed. Id. 302-15.70. Thus, to the extent an agency has a policy or procedure permitting it to reimburse its employees for property management services in connection with the rental, rather than sale, of the old residence, fees paid to a management company and to a real estate company could legally be reimbursed in accordance with that policy. In addition, because it appears that this provision provides parity in payment of expenses for rental of the old residence as compared to sale of the old residence, by analogy, it would be appropriate for an agency, as a result of a cancellation of a transfer, to allow for payment of the costs of obtaining a release from the contractual obligation to the prospective tenant, as well as fees paid to a management company.

Although IBB in general follows the provisions of the FTR, it has not yet implemented this particular provision and did not authorize these expenses in connection with Ms. Kinnavy's transfer. Thus, the agency has no vehicle with which to compensate Ms. Kinnavy for the lease-breaking expenses she incurred in connection with the home she owns at the current duty station. Accordingly, the Board cannot authorize payment of these expenses either. Thomas Gozzo, GSBCA 14168-TRAV, 97-2 BCA ¶ 29,290.

The remaining avenue by which Ms. Kinnavy might be reimbursed is through a test program under which the Board may refer cases to the appropriate official within GSA with a recommendation for payment. Under this test program, initiated on April 28, 2000, the Administrator of General Services has authorized the Board to refer claims to the GSA Deputy Associate Administrator, Office of Transportation and Personal Property (MT) if administrative relief should be granted for legal or equitable considerations, but such relief

is unavailable under the existing statutory or regulatory scheme. Roy Katayama, GSBCA 15605-RELO, 01-2 BCA ¶ 31,542. Claims of this nature are commonly referred to as "meritorious claims." The purpose of the test program is to allow MT to achieve the same results as would be obtained if the Meritorious Claims Act, 31 U.S.C. § 3702(d) (Supp. V 1999), were utilized, but in a more efficient manner.

We recently addressed the standard by which we would consider recommending a claim for disposition under the pilot program in Katayama, in which the Board observed:

We will not apply a hard and fast rule when we determine whether equitable considerations compel us to conclude that a claim is meritorious. In reaching our decisions, we will consider and balance several factors. At the outset, we recognize that deeming a claim "meritorious" is highly extraordinary, since Government employees are charged with knowledge of all applicable laws and regulations and are expected to comply with them. We will look to see whether the claim presents equitable considerations of an unusual nature which are unlikely to constitute a recurring problem. We will consider whether an agency directed an employee to incur the claimed expenses. We will also consider whether an agency's actions caused an employee to incur the claimed expenses. We may also consider other factors, as warranted by the circumstances presented by individual claims.

Id. at 155,714; accord Jacqueline Butler, GSBCA 15478-RELO (Oct. 17, 2001). Unlike the claim in Katayama, this situation does not arise because the employee received and relied upon erroneous advice about her entitlements from the Government. Instead, Ms. Kinnavy was directed to move and made appropriate preparations to comply with her relocation orders. Through no fault of hers, her orders were cancelled unexpectedly. Because she did not believe she had sufficient time, before her planned move, to sell her home in Northern Virginia, claimant arranged to lease it instead. The costs incurred to obtain a tenant, and then to break the lease, are a direct consequence of the agency's decision to cancel her transfer after issuing valid orders directing a move. This is not the type of situation that recurs with frequency. Under these circumstances, payment of these expenses would be equitable and, although not expressly authorized, would comport with the intent of the FTR as it currently implements applicable statutes. See Terry M. Neeley, GSBCA 14930-RELO, 99-2 BCA ¶ 30,496.

Decision

In accordance with the above, we refer the claim for reimbursement of the amount of \$3087.50, the fees paid by Ms. Kinnavy to retain a management company, obtain a suitable tenant, and then to break the lease, to the GSA Deputy Associate Administrator, Office of Transportation and Personal Property, with our recommendation that it be paid.

CATHERINE B. HYATT
Board Judge