UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 6, 2022

CBCA 7257-RELO

In the Matter of RICHARD R.

Richard R., Claimant.

Marc E. Mandel, Office of the General Counsel, Federal Bureau of Investigation, Washington, DC, appearing for Department of Justice.

O'ROURKE, Board Judge.

A federal employee seeking payment under the property management services allowance must comply with the requirements of the Federal Travel Regulation (FTR) and any additional conditions established by the agency to be reimbursed for these services. Where an agency makes reimbursement of property management fees contingent upon efforts to market the home for rent, the employee must satisfy the agency's requests in order to receive payment. Because claimant satisfied the agency's requests for the first two quarters, we deny the agency's request to recoup those fees.

Background

In January 2020, in anticipation of his reassignment overseas, claimant advertised his California home for rent in various internal agency listings. The advertisement stated that the home would be available for rent on June 1, 2020, and it offered reduced rent to agency personnel. Claimant also reached out to local corporate human resource offices seeking possible tenants. During this time, the COVID-19 pandemic was rapidly spreading, impacting many aspects of government employment, including international travel and official assignments for federal employees. Claimant's overseas departure date was delayed by nearly four months.

On May 31, 2020, claimant and his spouse signed a "California Lease Listing Agreement," which gave a local real estate firm exclusive authorization to lease or rent the property on the owners' behalf. The agreement identified certain material lease terms,

including a monthly rent of $3900 and a security deposit of $11,700. On August 31, 2020, claimant emailed agency representatives, stating:

> As discussed last week, we cannot find ideal, financially satisfactory, sound tenants for my property to rent while assigned [overseas]. The real estate agent and management company who would have rented my property have agreed to manage my property for a small monthly fee. This saves the Bureau and taxpayer a large sum of money versus renting and managing my property. I am requesting review and concurrence for the reimbursement of this contract on a quarterly basis for my home to stay safe and sound while I am assigned for the two-year appointment.

Attached to the email was an unsigned document, entitled "Agreement Between Condo Owner and Property Manager/Caretaker," with an effective date of October 1, 2020. The agreement required the property management firm to inspect the home three times per month in exchange for a monthly fee of $150, to ensure the home stayed in working order, and to prevent problems caused by non-use. The agreement contained a termination clause requiring a seven-day written notice by either party to cancel it. The agency replied on September 3, 2020, requesting a detailed list of property management services for approval but also stating that the agency would only cover a few months of such services for an unoccupied dwelling. The agency informed claimant that he would have to show proof of efforts being made to rent the property. The agency also requested proof of any pandemic-related restrictions that were preventing the property from being rented.

In response, claimant pointed to California Assembly Bill 3088 (the Tenant Relief Act), which extended the moratorium on evictions for unpaid rent due to Covid-19-related financial distress. Claimant explained that, as a result of this law, "we are trying to get renters to pay the entire lease up front, but that is rather difficult, and no potential applicants can pay $48,000, plus a security deposit." For these reasons, claimant renewed his request for approval of the caretaker agreement for the duration of his assignment. He explained to agency representatives that the caretaker agreement was the best solution due to the uncertainty caused by the pandemic, including possible additional early departures for embassy personnel and the potential cost savings to the Government, which he estimated at $26,000. In the same email, claimant reassured the agency, "I'll keep continuing to look for tenants who can pay up front to ensure I do not become financially impacted by the California regulations." Claimant also told the agency representatives that he may have to reconsider the assignment due to his own financial concerns, as paying his mortgage without reimbursement of rent from a tenant presented a substantial financial burden to his family.

On September 9, 2020, claimant received notice of his September 19, 2020, overseas departure date. Shortly before claimant departed, the agency informed claimant that it had reviewed the contract from the real estate company and could only authorize payment "for property management services for managing the residence as a rental, not for property maintenance." The agency cited a provision of the FTR and a Board decision in support of

its position. In response, claimant requested a waiver due to the unusual circumstances presented by the pandemic and the additional hurdles caused by an overseas assignment. The agency denied the request, sympathizing with claimant but explaining that the agency had no control over the rules. "The Federal Travel Regulation is set by the General Services Administration with Congressional authority. The FBI cannot waive rules and regulations set forth in FTR." The agency reiterated the requirement that in order to be reimbursed, claimant would have to show efforts that the property was being marketed as a rental property. Claimant pointed to the agency listings and to the agreement it had with the real estate company, which was still active.

Claimant submitted a voucher for reimbursement of $450 in property management fees for the first quarter, October–December 2020, which the agency reimbursed. In April 2021, the agency informed claimant that it received the second voucher for property management services and would reimburse it but stated, "the next quarter, you will need to provide proof that the property management company has marketed your home for rent and the efforts they are taking to rent it out." The agency reiterated that "to qualify for the reimbursement of property management services, you must be marketing your home for rent." Without proof of efforts to rent the property, the agency stated that it would not reimburse subsequent vouchers for property management fees.

On October 29, 2021, claimant informed the agency that the real estate company was no longer advertising the home for rent since there was less than one year remaining on the listing agreement, and agents will not list a property for rent on the Multiple Listing Service (MLS) if less than one year remains on the period of availability. Claimant clarified that although the real estate company dropped the listing from the MLS, he continued to advertise the property internally on the FBI website in the event a transferring bureau employee or an employee on temporary duty assignment could rent it for a short term. (His homeowner's association prevented the property from being advertised with companies such as Airbnb.) He said that he was unaware of any requirement that the MLS be used to advertise the property for rent in order to qualify for reimbursement of property management services.

In late November 2021, the agency denied further reimbursement of property management fees. Although it had reimbursed claimant $900 for the first two quarters, it required proof of efforts to rent the property during the other two quarters before any additional payments would be made. Claimant requested a review of the agency's decision by the Board. The agency subsequently questioned claimant's intention to rent the property and determined that claimant should not have received the first two payments. The agency now seeks to recoup those payments.

Discussion

This case requires an interpretation of the phrase "manage as a rental property" in the context of relocation allowances for property management services. The FTR defines "property management services" as:

> [P]rograms 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.

41 CFR 302-15.1 (2020) (FTR 302-15.1).

Claimant seeks reimbursement for the types of services included in this definition, but the regulation clearly conditions these services on the property's status as a rental. Since the plain language of the regulation contemplates services that are rendered prior to occupancy, such as "obtaining a tenant" and "negotiating the lease," occupancy is not a pre-requisite for receiving the allowance. Nonetheless, there is no getting around the clear requirement that the property be maintained as a rental, and the FTR appears to empower the agency to make that determination. While the regulation provides detailed information about the purpose of the allowance and an employee's eligibility for the same, the FTR gives the agency considerable discretion in authorizing payment for these services.[1] This includes establishing conditions and procedures for receiving the allowance. Here, the agency interpreted the phrase "as a rental property" to allow for payment of property management services as long as efforts were being made to market the home for rent. The agency stopped reimbursing claimant when it could no longer discern whether the home was being marketed for rent. We find the agency's interpretation and implementation of the FTR to be reasonable.

The agency changed course after reviewing an earlier case decided by the Board in which the employee was not reimbursed for property management fees because the home was not rented. In that case, however, there was no evidence that the employee made any effort to lease the residence. Rather, the employee merely relied on a statement by another employee regarding reimbursement for property management services. *Flordeliza Velasco-Walden*, CBCA 740-RELO, 07-2 BCA ¶ 33,634. Here, unlike the earlier case, the record shows that claimant made considerable efforts to rent the property prior to his departure, despite less than ideal circumstances. Although he was unable to rent it before he

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[1] The regulation states two purposes for the property management allowance. The first is to save the Government money by offering property management services in lieu of allowances for the sale of the employee's residence, which are significantly more expensive. FTR 302-15.2(a). The second purpose is to "relieve employees transferred to OCONUS [outside the continental United States] duty stations from the cost of maintaining a home in CONUS [the continental United States] during their tour of duty." *Id.* 302-15.2(b). There is no dispute that claimant satisfied the requirements for eligibility and purpose.

transferred, the agency communicated to claimant on numerous occasions that efforts to rent the property must be shown in order to receive the allowance.

As we noted, the FTR reimburses federal employees for "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*." FTR 302-15.1 (emphasis added). Although claimant is paying the real estate company for services that are authorized under the regulation, that authorization is contingent upon the property's status as a rental property. The agency determined that "marketing efforts" were sufficient to qualify for reimbursement of the costs of property management services. Once the real estate company dropped the property from the MLS, we cannot determine whether the company marketed the property in other ways. Furthermore, even if the company was not actively marketing the property for rent, if the company was required to negotiate the lease with a tenant that was identified through the agency's internal listings, such an arrangement could be sufficient to qualify for the allowance. Unfortunately, claimant did not provide any information or explanation about the arrangement, and neither the agency nor the Board can fill in the blanks. We do not speculate our way to a decision. Claimant bears the burden of showing entitlement to payment. *Benjamin A. Knott*, CBCA 4579-RELO, 15-1 BCA ¶ 36,019. While we acknowledge claimant's arguments regarding saving taxpayer dollars, especially in light of the regulation's stated purpose, the agency correctly pointed out that the regulations and the agency's requirements had to be met in order to authorize payment. Where payment is not authorized by statute or regulation, an agency cannot decide otherwise, and neither can this Board. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 430 (1990); *Teresa K. Scalise*, CBCA 6568-RELO, 19-1 BCA ¶ 37,470.

We also disagree with claimant's argument that there was a "subjective aspect of [the agency] reimbursing" him for the first two quarters but refusing to pay the fee for later quarters. Rather, we find that the agency properly administered the requirements of the regulation and consistently requested evidence of efforts to market the property for rent. While the regulations do not specify the type or extent of such efforts, claimant must be responsive to the agency's inquiries. Here, the record shows that the agency attempted to accommodate claimant as much as possible in light of the pandemic without running afoul of the FTR, which defined property management services as services rendered by *private companies*. Because claimant provided documentation of the real estate company's efforts to market the property for rent during the first two quarters, the agency's payment of those allowances was proper, and the agency cannot recoup them based on the Board's earlier decision. Claimant did not provide similar information for the third and fourth quarterly payments, such as information regarding the date when the real estate company dropped the property from the MLS or what, if any, marketing efforts the company continued to perform on claimant's behalf. Therefore, claimant is not entitled to reimbursement of the third and fourth quarterly payments, which form the basis of his claim before the Board. Should

claimant submit any additional claims for reimbursement, he must be responsive to the agency's requests for evidence of efforts to market the property for rent.

Decision

For the foregoing reasons, the claim is denied, and the agency's request for repayment of the first two vouchers is also denied.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge