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

June 19, 2002

GSBCA 15814-RELO

In the Matter of LAURA E. KILPATRICK

Laura E. Kilpatrick, Golden, CO, Claimant.

Helen O. Sherman, Director, Office of Finance and Accounting Policy, Department of Energy, Washington, DC, appearing for Department of Energy.

NEILL, Board Judge.

Claimant, Ms. Laura E. Kilpatrick, is an employee of the Department of Energy (DOE). She asks that we review a decision by her agency denying her claim for a home marketing incentive payment of $9000. The agency declined to pay the claim because the bona fide buyer whom Ms. Kilpatrick found through her own marketing efforts failed to complete the purchase of claimant's home. For the reasons explained herein, we affirm the agency's decision and deny the claim.

Background

Claimant, while working in DOE's Operations Office in Albuquerque, New Mexico, was offered a position in the agency's field office in Golden, Colorado. She accepted the offer. Because the housing market in the Albuquerque area was slow, Ms. Kilpatrick elected to sign up for the homesale program run by DOE's relocation services contractor. Under this program, transferring employees have the opportunity to sell their homes to a relocation contractor at an appraised value. The principal advantages of such a program for DOE's employees are that the employee is thus assured that his or her house will be sold, the equity in the home becomes available once the contractor's offer is accepted – even before settlement, and none of the selling costs are deducted from the employee's equity.

DOE's homesale program also offers a home marketing incentive payment of three percent of the selling price, not to exceed $9000, when the transferring employee who uses DOE's relocation services contractor finds a bona fide buyer for his or her residence. Ms. Kilpatrick planned to take full advantage of this aspect of the agency's homesale program. She, therefore, undertook to market independently and aggressively her home in Albuquerque. She eventually found a married couple willing to purchase her former home from DOE's relocation management contractor at a price higher than the contractor's original

appraised value for her home. The relocation services contractor agreed to purchase the home from claimant and to resell it to these buyers at this "amended value." A contract for resale to the buyers found by the claimant was signed and closing was scheduled to take place on or before August 1, 2000.

Ms. Kilpatrick transferred title to her home to the relocation services contractor and, on June 15, 2000, received the equity in her home based upon the price offered by the buyers she had found. On that same date, the relocation management contractor invoiced DOE for its services in conjunction with its purchase and subsequent resale of claimant's home. The contractor's June 15 invoice was for $38,480. The charge was based not on the contractor's standard fee of 26.45% of the property's appraised value, but on the contractor's lower "amended value fee" (10.4% of the contract purchase price).

The purchasers found by Ms. Kilpatrick for her home in Albuquerque did not go to closing as planned. On inspecting the home prior to August 1, the buyers noted the presence of a foul odor in the house and discolored water coming from the faucets. As a result, they rejected their contract with the relocation services company and demanded a return of their earnest money.

On December 11, 2000, the relocation management company again invoiced DOE for services provided in conjunction with claimant's residence. This time the contractor's invoice noted that the resale was a "fall thru." The contractor, therefore, sought a total of $97,336 (26.45% of the property's appraised value prior to the aborted sale). Due credit was, of course, given for the $38,480 already paid to the contractor per its earlier invoice.

Claimant firmly believes that she is entitled to the home marketing incentive payment of $9000 for several reasons. She contends that she complied with all requirements set out in the applicable regulation to qualify for payment. As a result, she insists that the agency must pay because otherwise it will be in violation of its own regulations. Ms. Kilpatrick looks upon these regulatory requirements much as one would look upon a unilateral contract. She understands the regulations as promising to make a home marketing incentive payment if one successfully meets the requirements set out in the regulation. Because she met these requirements, claimant suggests that the agency is now contractually bound to make the incentive payment.

Ms. Kilpatrick explains that her former residence would have sold as planned had the relocation services contractor taken proper care of the premises after her departure. She writes that after her departure, because of the low humidity in the area, the water in the plumbing lines from the house to the septic fields evaporated, thus permitting the odor from the fields to back up into the house. An occasional flushing of toilets or running of water by the contractor could have avoided this problem entirely. Ms. Kilpatrick deems it most unfair that, after she had done all that was required of her under the regulations, she should be deprived of her home marketing incentive payment solely because of the negligence of the relocation services contractor. She also notes that, in this case, the contractor stands to profit from its alleged incompetence since, in view of the buyers' rejection of the contract, the contractor has been able to increase significantly its charge for services.

The agency's position in this matter is relatively simple. It states that Ms. Kilpatrick is not eligible for the incentive payment because the bona fide buyers that she produced did not complete the purchase. As a result, instead of paying the relocation services contractor the lower "amended value fee," DOE was required to be pay the much higher standard fee. Since the purpose of the home marketing incentive is to reduce the Government's overall payment to the relocation contractor, it makes little sense to the agency to pay the incentive to an employee when it has already been required to pay the relocation management contractor its standard fee.

Discussion

The basis for the home marketing incentive payment program is found in 5 U.S.C. § 5756(a) (2000). This statute sets out three fundamental requirements which must be met as a prerequisite to a home marketing incentive payment, namely, (1) that the residence be entered into a relocation services program under which the private contractor will purchase the house; (2) that the employee finds a buyer who completes the purchase of the residence through the program; and (3) that the sale of the residence results in a reduced cost to the Government.

In implementing this statute, the Federal Travel Regulation (FTR) in effect at the time of Ms. Kilpatrick's transfer explained the purpose of the home marketing incentive payment in these words:

> What is the purpose of a home marketing incentive payment?
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> > To reduce the Government's relocation costs by encouraging transferred employees who participate in their employing agency's homesale program to independently and aggressively market, and find a bona fide buyer for, their residence. This significantly reduces the fees/expenses their agencies must pay to relocation services companies and effectively lowers the cost of such programs.

41 CFR 302-14.2 (1999) (FTR 302-14.2).

As to the basic requirements set out in 5 U.S.C. § 5756, they were reflected in the following provision of the FTR:

> Under what circumstances will I receive a home marketing incentive payment?
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> You will receive a home marketing incentive payment when:
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> (a) You enter your residence in your agency's homesale program;
> (b) You independently and aggressively market your residence;
> (c) You find a bona fide buyer for your residence as a result of your independent marketing efforts;
> (d) You transfer the residence to the relocation services company;

> (e) Your agency pays a reduced fee/expenses to the relocation services company as a result of your independent marketing efforts; and
> (f) You meet any additional conditions your agency has established, including but not limited to, mandatory marketing periods, list price guidelines, closing requirements, and residence value caps.

FTR 302-14.5.

We have repeatedly denied claims for the home marketing incentive payment when any one of these requirements of this provision of the FTR has not been met. See, e.g., Gregory R. Littin, GSBCA 15564-RELO, 01-2 BCA ¶ 31,604; Regina M. Rochefort, GSBCA 15127-RELO, 00-1 BCA ¶ 30,879. Ms. Kilpatrick contends that, at least as of the end of June 2000, she had met these requirements. She had entered the agency's homesale program; she had successfully marketed her residence; she had transferred the residence to the relocation services company; a contract of sale had, by then, been signed by the company and the buyer whom she had found; and the relocation services contractor had invoiced the agency at the reduced rate as a result of her marketing efforts. Ms. Kilpatrick insists that the subsequent failure of the relocation services company to complete the sale was attributable solely to causes readily within the control of the company and should not, therefore, result in her being deprived of the payment to which she is entitled.

Regardless of the reason for the sale not being completed, the indisputable fact is that the buyer whom Ms. Kilpatrick found did not go to closing. Further, it is clear that, as a result, the agency did not realize any savings which might have been attributable to the claimant's efforts. The authorizing statute for the home marketing incentive payment program expressly states that one prerequisite to the home marketing incentive is that such a sale be completed. While this condition may not be expressly set out in FTR 302-14.5, we nevertheless find it to be implicit in the provision's requirement that the agency pay a reduced fee/expenses to the relocation services company as a result of the employee's independent marketing efforts. Surely, the provision cannot eliminate a condition which is imposed by statute.[1]

Given the de facto failure of the sale which Ms. Kilpatrick attempted to facilitate, there is simply no authority under the home marketing incentive payment statute to pay her claim. The claimant argues at length that, in some situations where there is affirmative misconduct on the part of the Government, the Government is estopped from refusing to pay a claim even in the absence of a statutory provision authorizing payment. In this case, claimant has in mind two possible instances of alleged misconduct. The first is said to be the agency's failure to negotiate a contract with the relocation services contractor which would have ensured that the contractor could not benefit from its own ineptness to complete a sale

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[1] We have in the past noted that the wording of FTR 302-14.5 is not as clear as it could be. Donald L. Boyle, GSBCA 15080-RELO, 00-1 BCA ¶ 30,653 (1999). Presumably this led to a change in that provision effective February 19, 2002. 66 Fed. Reg. 58,194, 58,240 (Nov. 20, 2001). This case suggests that an express reference in that provision to the condition that the purchase facilitated by the transferred employee must be completed would also serve as a useful clarification of the current wording of the provision.

made possible by the marketing efforts of the transferred employee. The second instance of alleged misconduct is the failure of the agency to comply with its own regulation setting out the requirements to be met in order to qualify for a home marketing incentive payment.

We find neither allegation convincing. We are not ready to conclude that the agency was singularly remiss in not negotiating a contract provision which would cover a situation such as that which allegedly occurred here. We are far from convinced that the relocation services contractor, in losing the initial contract and prolonging the process, inevitably stands to make more profit than would otherwise have been made. Holding the property for an additional period ties up monies which could otherwise be invested and remarketing the property and renegotiating a second contract will clearly involve additional costs – all of which must be deducted from the higher fee.

As for the agency's alleged violation of its own regulations, we find no such violation. We can find no justification for applying the regulatory requirements for a home marketing incentive payment solely to the facts as they existed prior to rejection of the contract by the buyers whom claimant found. The Government ultimately did not pay a reduced fee or expenses to the relocation contractor. The primary purpose of the home marketing incentive payment program is, as stated, to reduce these fees or expenses. As the agency points out, paying the claimant pursuant to the program would make little sense when, in fact, the agency has realized no savings as a result of her marketing efforts.

Claimant's contention that she is entitled to payment for what, in effect, constitutes her performance of a unilateral contract is similarly unavailing. First, as already noted, we do not consider that she met the requirements set out in the regulation. Even if she had done so, however, this line of argument is of no benefit to her. It is well established that, absent specific legislation, federal employees derive the benefits and emoluments of their position from appointment rather than from any contractual or quasi-contractual relationship with the Government. See Bessie White, GSBCA 15775-RELO (Mar. 28, 2002) (and cases cited therein).

It is regrettable that the intended sale of claimant's residence did not take place as planned – particularly if, as claimant alleges, the problem which arose could have been easily avoided by the relocation services contractor. Nevertheless, it is clear that in this case two of the three basic requirements set out in the authorizing statute for the home marketing incentive payment program have not been met. The bona fide buyer's contract was not completed and the agency realized no reduction in fee or expenses as a result of the employee's marketing efforts. Accordingly, we find that the agency acted correctly in denying Ms. Kilpatrick's claim. James M. Turner, GSBCA 15580-RELO, 02-1 BCA ¶ 31,753.

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EDWIN B. NEILL
Board Judge