

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-215206**DATE:** October 24, 1984**MATTER OF:** William H. Hutchinson - Attorney's Fees
Incident to Settlement of Unexpired Lease**DIGEST:**

An agency questions whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are reasonable, and the potential liability of the Government was considerably greater than the amount settled on. To the extent that B-175381, April 25, 1972, is inconsistent, it will no longer be followed.

Mr. Edward L. Davis, Assistant Director, Administration, Fish and Wildlife Service, Department of the Interior, has requested an advance decision on the propriety of a claim for reimbursement of attorney's fees resulting from litigation to settle an unexpired lease when an employee was transferred to a new duty station. The claim is allowed since there is no prohibition in the regulation barring payment of legal expenses incurred incident to litigation when an employee settles an unexpired lease.

Mr. William H. Hutchinson, an employee of the Fish and Wildlife Service, was transferred from Newton Corners, Maine, to Socorro, New Mexico, pursuant to a travel authorization dated December 29, 1982. On December 22, 1982, Mr. Hutchinson signed his employment agreement and gave his landlord in New Hampshire oral notice that in February (approximately 6 months prior to the expiration of the lease) he would be vacating the property which he was leasing. A confirming written notification was furnished on December 28, 1982. The agency states that Mr. Hutchinson made no further attempt to negotiate a settlement with his landlord.

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Mr. Hutchinson's lease agreement contained the following pertinent provisions:

1. "Lessee will pay the sum of \$700 * * * as security deposit for the faithful performance by the Lessee of the terms and provisions of this agreement.
2. "The Lessee shall not assign nor sublet * * *
3. "In the event of default of Lessee's obligations * * * Lessee shall be responsible and liable for all attorneys' fees and other costs to correct default * * *"

Subsequently, the landlord went to court and obtained an order from the court dated February 3, 1983, attaching \$5,000 from Mr. Hutchinson's bank account. The \$5,000 represented \$4,200 of unpaid rent (6 months X \$700) and \$800 in attorney's fees. Mr. Hutchinson also received a summons to appear in court. Mr. Hutchinson then retained an attorney to represent him.

The property which Mr. Hutchinson had leased was sold on or about April 15, 1983, and settlement was made on the landlord's complaint against Mr. Hutchinson in late April as follows:

1. Unpaid rent for March and 1/2 April	\$1,050.00
2. Gas for said time period	136.66
3. Electricity for said time period	22.84
4. Advertisements	35.25
	<u>\$1,244.75</u>
5. Plus 25% Attorney's Fees	311.19
6. Plus costs of filing suit and fees	111.00
	<u>\$1,666.94</u>
7. Less security deposit	<u>-700.00</u>
 FINAL OBLIGATION	 <u>\$ 966.94</u>

Mr. Hutchinson was reimbursed for items 1 through 4 totaling \$1,244.75, but he was not reimbursed for the landlord's attorney's fees (\$311.19), the costs of filing suit and fees (\$111.00) or for his own attorney's fees of \$282.00. The basis for the agency denial of the above unreimbursed costs was paragraph 2-6.2c of the Federal

Travel Regulations FPMR 101-7 (FTR) (Supp. 4, October 1, 1982). That paragraph provides reimbursement for certain legal and related expenses, but states that the costs of litigation are not reimbursable.

However, the above-cited regulation is not applicable in Mr. Hutchinson's case since the regulation refers to reimbursement of legal fees incurred with respect to the sale and purchase of residences. Therefore, that regulation may not serve as a basis to deny Mr. Hutchinson's claim for expenses incurred incident to settlement of an unexpired lease.

The applicable regulation here is FTR paragraph 2-6.2h (Supp. 4), which provides for reimbursement of expenses incurred incident to the settlement of an unexpired lease as follows:

"Expenses incurred for settling an unexpired lease (including month-to-month rental) on residence quarters occupied by the employee at the old official station may include broker's fees for obtaining a sublease or charges for advertising an unexpired lease. Such expenses are reimbursable when (1) applicable laws or the terms of the lease provide for payment of settlement expenses, (2) such expenses cannot be avoided by sublease or other agreement, (3) the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he/she has definite knowledge of the transfer, and (4) the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality * * *."

Attorney's fees for settlement of an unexpired lease have been allowed where an employee hired an attorney because he was being threatened with litigation. B-169526, May 22, 1970. In that case we authorized reimbursement of both the landlord's and lessee-employee's attorneys' fees incurred incident to arriving at a prelitigation settlement of the lease. In a later case we allowed an attorney's fee incident to the settlement of an unexpired lease but stated concerning litigation expenses that "* * * there are no provisions made in section 4.2f of Circular No. A-56 for reimbursement of such expenses incident to the settlement of

an unexpired lease." B-175381, April 25, 1972. Section 4.2f was the predecessor regulation of paragraph 2-6.2h of the FTR, the regulation applicable in this case. Although paragraph 2-6.2h is not identical in wording to section 4.2f, they are substantially the same and neither regulation expressly provides for legal or litigation expenses incident to the settlement of an unexpired lease.

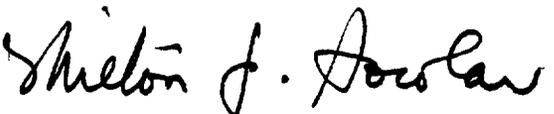
We think now, on reconsideration, that the better view would be to allow litigation expenses where the applicable laws or terms of the lease provide for payment of such expenses for settling an unexpired lease and the evidential provisions of paragraph 2-6.2h are met. The reason for this is that when an employee is transferred and is forced by the Government's action to breach his contract to rent a home, legal action by the landlord to recover his damages may be taken even though there is no fault on the part of the employee. The very nature of the Government's actions, of transferring the employee, forces the employee to break his contract thereby leaving the employee at the mercy of the landlord as to the action to be taken to recover the landlord's damages.

If the landlord threatens litigation, we have allowed payment of the landlord's and the employee's legal fees incident to the subsequently arranged settlement. B-169526, supra. It would be anomalous to deny an employee's legal expenses, incurred incident to litigation on the breach of his lease, merely because the landlord chooses to force a result in court rather than by settlement prior to the onset of litigation since such a result could be dictated purely by chance. As noted above, paragraph 2-6.2c of the FTR does not apply to the settlement of an unexpired lease and the prohibition against reimbursing the costs of litigation contained in that paragraph are inapplicable in these lease settlement cases. Accordingly, there is no regulatory bar to the payment of litigation expenses in lease settlement cases.

Mr. Hutchinson did not negotiate a settlement prior to the litigation being initiated. However, in the circumstances of this case, we do not see this as a failure to mitigate the damages. Mr. Hutchinson could have retained an attorney as soon as he knew he was to be transferred but it is doubtful that a settlement could have been arranged at that time on as good terms as were finally obtained. The landlord, had he not subsequently sold or rented the

house, could have demanded 6 months rent, \$4,200, instead of one and a half months rent (\$1,050) which he finally obtained. It is doubtful that the attorney could have negotiated a lesser settlement since the landlord did not know exactly what his losses were until the sale of the house was accomplished. There is no showing, therefore, that Mr. Hutchinson acted imprudently or to the Government's detriment. Further, the terms of the lease made Mr. Hutchinson liable for the landlord's attorney's fees and costs. The \$422.19 in the landlord's attorney's fees and costs, and Mr. Hutchinson's own legal fees of \$282 are reasonable considering the potential liability to the Government of \$4,200 in rent.

In view of the above, the \$704.19 in legal fees may be certified for payment. To the extent that B-175381, April 25, 1972, is inconsistent with this decision, it will no longer be followed.


Acting Comptroller General
of the United States