

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2015-056

And

September 7, 2016

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Bernadette M. Allen

Harlan F. Rosacker

Special Assistant

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Pro se

Representative for the Choose an item.:

Margaret E. McPartlin
Attorney Adviser, HR/G

Employee Exclusive Representative:

American Foreign Service Association

Held: The Board found that grievant was entitled to reimbursement of his stepson's roundtrip travel costs between post and another country in the region after post management decided that the stepson's early departure from the host country was in the post's best interest. The Board found that the agency's approval of an Involuntary Separate Maintenance Allowance (ISMA) should have included approval of the stepson's airfare. Accordingly, the Department is obliged to reimburse the grievant for the cost of the airfare.

Summary: Grievant appealed the Department of State's denial of reimbursement for travel expenses he incurred after post management decided that the grievant's stepson's departure from the host country was in the post's best interest. This followed a single-vehicle accident when police found that the stepson was driving without a local driver's license and a breath test showed an alcohol level above the legal limit of 0.05. The grievant and his dependents did not have the protections of diplomatic immunity.

Noting that the stepson's lack of diplomatic immunity potentially made him subject to criminal charges, and not convinced that the grievant could control his stepson, post concluded that it was in the post's best interest for the young man to depart the host country. Post management offered three options: 1) grievant and family could depart post early, since the end of tour was imminent, 2) grievant's wife and stepson could make use of "advance travel," or 3) grievant's stepson could depart post alone. In the end the grievant purchased a ticket for his stepson to stay with grandparents in the Philippines until the grievant's assignment ended. Grievant applied for ISMA, which the Department approved at a later time, for his stepson's stay outside the host country.

In light of the Department's subsequent granting of ISMA covering the stepson's period of absence from post, the Board found that the travel to stay with his grandparents was not personal travel and should be reimbursed.

DECISION

I. THE GRIEVANCE

The grievant appeals the Department of State's denial of his request to be reimbursed for travel expenses he incurred when post management at the U.S. Embassy in [REDACTED] (host country) required his stepson to leave the country after he was involved in an automobile accident. The Department approved his request for Involuntary Separate Maintenance Allowance (ISMA) covering the period his stepson was living with relatives in another country in the region for the convenience of the U.S. Government; thus, the grievant contends that per Department of State Standardized Regulations (DSSR)¹ he also should be reimbursed for the \$869.63 he paid for his stepson's travel to another country in the region and later return to the host country to join with the family for a permanent change of station.

II. BACKGROUND

[REDACTED] (grievant), a Foreign Service specialist in the Department of State, was assigned to the U.S. Embassy (embassy) in [REDACTED] (post), from November 2010 until April 2014. During this tour he was accompanied by his wife and his stepson who, in 2014, was 20 years old. On February 26, 2014, the host country Director of Protocol at the Department of Foreign Affairs and Trade (DFAT) informed the embassy's deputy chief of mission (DCM) by letter that the local police had investigated a single-car accident involving grievant's stepson early on the morning of February 23. The police reported that grievant's stepson had been driving without a local driver's license and that he failed a breath alcohol test, with a blood alcohol content greater than the legal limit of .05 percent. After the stepson was taken to the

¹ DSSR 264.1 (3) b, "Involuntary SMA (ISMA) For Convenience of the Government": "An SMA application based on 'for the convenience of the Government' reasons should be annotated . . . to reflect . . . [w]here, in the interest of the Government, the agency has: . . . recommended that the family member leave the post of assignment."

police station, he informed officers that his father worked at the U.S. Embassy and was released. DFAT informed the DCM on February 26, however, that, since the grievant was an Administrative and Technical officer without diplomatic immunity, the stepson could face prosecution for his offenses (exceeding the alcohol consumption limit, negligent driving and unlicensed driving). DFAT urged the DCM to speak to grievant and his stepson “about the incident and ensure that” the stepson not drive again in the host country, and ensure that DFAT not be asked to renew the stepson’s visa.

The DCM, Management Counselor and Regional Security Officer met with grievant to discuss options for ensuring that his stepson not drive during the remainder of his father’s assignment. Not convinced the grievant could prevent his stepson from driving, post management concluded it would be most appropriate for grievant’s stepson to leave post. With grievant’s assignment scheduled to end on or about April 26, the DCM offered the option of an early departure. After weighing the options, and in light of preparations the family was already making for an April departure, grievant and his wife ultimately decided to send their stepson to stay with grandparents in another country in the region until they could all leave post together on Permanent Change of Station (PCS) orders. The Embassy obtained assurances from the host government that the stepson could return to join his parents at a host country airport for their immediate travel to the United States. The stepson departed post on March 15 and returned to the host country on April 26, 2014. Grievant paid for the airfares, which totaled \$869.63.

On April 21, 2015, grievant filed a grievance with the Department challenging the denial of his request for ISMA for his stepson. The Department denied his grievance in part on October 22, and requested that he resubmit his claim with additional information for review no later than November 2. After grievant supplied the additional information, the Department approved

ISMA for grievant's stepson and paid the allowance on or about October 30. Reimbursement of his stepson's travel expenses was not approved, and grievant appealed to the Foreign Service Grievance Board (Board) on December 21. He filed a Supplemental Submission on March 18, 2016 and the Department submitted its response on April 15. The Record of Proceedings was closed on May 5.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Subsequent to the incident involving his stepson, grievant attempted to convince the DCM that his stepson should remain at post. In an email message dated March 3, 2014, to the DCM, grievant promised that the stepson would not drive during the remainder of time that grievant was at post; that the stepson would abstain from alcoholic beverages; and that he would be at home by 9:00PM unless he was working.

Grievant claims that he was confident that he could enforce these restrictions, but post management directed that his stepson leave the country. As evidence he cites a June 3, 2015 memorandum from the Regional Human Resources Officer (RHRO) to the Grievance Staff stating that post management had "concluded that the most appropriate course of action would be for [grievant's] stepson to depart post," since it had concluded that grievant was unable to provide adequate assurances on preventing his stepson from driving.

In response to the Department's arguments, grievant contends that the stepson's travel to and from his ISMA location was not "personal travel." Grievant did acknowledge to the DCM in an email dated March 5, 2014, that he would be out of pocket for the airfare prior to his stepson's travel. However, he asserts that these early discussions did not address the issue of ISMA and were "solely directed towards the most expedient and mutually agreeable means of

meeting post management's requirement that [his stepson] leave post." As support for his claim for reimbursement of travel expenses he cites the following:

14 FAM 536.1-4 SMA Travel Financed by Employee

An employee who initially pays the costs of advance travel of family members may subsequently claim reimbursement of travel and transportation expenses if the agency later authorizes an SMA grant for the affected family members. An employee may not recover a greater amount than would have been incurred had the U.S. Government procured the travel (*see* 14 FAM 545.3, subparagraph b and e(3)).

Grievant asserts that the Department in essence conceded that post management's decision had been made for the convenience of the government when it ultimately granted ISMA for the period the stepson remained in another country in the region, in accordance with DSSR 262.1 Involuntary SMA. He maintains that the fact that the U.S. Government paid the cost of his stepson's subsequent return flight from ██████████ to the U.S. under PCS orders is irrelevant and that the costs of Involuntary Separation Travel should now be reimbursed.

B. THE DEPARTMENT

The Department asserts that post management's conclusion that the grievant's stepson should leave ██████████ early was an appropriate management decision and that the grievant understood its necessity. The former RHRO at the Embassy recalled that grievant changed his mind frequently about how to proceed, which made it difficult to keep track of his most recent plans. "One day he wanted to send [his stepson] to his home leave address, while the next he planned to send his stepson to a family member in another state." The RHRO asserted that it was solely grievant's decision to send his stepson to grandparents in another country in the region and that he had elected not to include the associated expenses as part of the travel he would request for his family on his PCS orders. Instead, grievant had arranged and funded the travel separately. After his stepson left for the other country in the region, grievant applied for

SMA for him, and noted that he was out of pocket for the travel costs. While the post informed him that “SMA is generally only available for separations of more than three months and not available the last 90 days at Post,” grievant nonetheless applied for the allowance.

In response to grievant’s contention that the travel was reimbursable under 14 FAM 536.1-4, the Department maintains that it was not “advance travel”; rather, it was “personal travel and for the limited purpose of the stepson residing with relatives until his parents completed their assignments.” The Department explains that, per DSSR Section 261.1, ISMA “is an allowance given to assist an employee to meet the additional expenses of maintaining family elsewhere than at the employee’s foreign post of assignment” and, per DSSR Section 262.1, may be authorized “when the agency determines a need to exclude members of the family from accompanying an employee to the area.” It asserts that grievant made it clear before his stepson’s departure that he was paying out-of-pocket for his stepson’s transportation. This was personal travel. The stepson’s travel from post to the U.S., however, was on grievant’s travel orders, and grievant could then claim reimbursement for his stepson’s travel expenses in traveling to the U.S.

IV. DISCUSSION AND FINDINGS

As provided in 22 CFR § 905, “In all grievances other than those governing disciplinary actions, the grievant has the burden of proving, by preponderance of the evidence, that the grievance is meritorious.” After careful consideration of the arguments and evidence presented by the parties and our review of the applicable regulations in DSSR 262.1-4 and 15 FAM 536, the Board concludes that grievant is entitled to reimbursement for travel costs he incurred when embassy management determined that for the convenience of the government his stepson should leave post for the remainder of grievant’s assignment.

It is clear from the record that grievant and his wife had to weigh a number of complicated practical and family issues as they considered options for complying with post management's decision that their son should leave post "sooner rather than later." It is also apparent from the record that guidance from the HR office was premised on an assumption that the decision to send the stepson to relatives in another country in the region was personal and that he thus should bear the travel costs. The RHRO acknowledges having discouraged grievant from seeking SMA, based on an assumption that he was likely ineligible because the period of absence was less than three months and was within the last 90 days at post. There is nothing in the record suggesting that HR explained or discussed ISMA (without these eligibility restrictions) in connection with the stepson's advance travel to another country in the region. We do not find dispositive the fact that grievant acquiesced at that time in paying these costs out-of-pocket.

The Board notes that Department decided on or about October 30, 2015, to approve ISMA for the grievant's stepson. In our view, that action is tantamount to approving the advance travel for the grievant's stepson and consequently obliges the Department to reimburse grievant for the cost of the airfare to and from the approved ISMA location and back to the grievant's post of assignment on April 26, 2015.

14 FAM 536.1-1a provides that "[t]ravel may be authorized for all eligible family members for whom SMA is granted under Section 260 of the Department of State Standardized Regulations (DSSR)." While departmental regulations describe circumstances in which SMA may not be granted, the Department has not cited any regulations that would preclude payment or reimbursement of a family member's travel expenses to the approved SMA location once SMA had been granted. 14 FAM 536.1-3b makes clear that SMA travel may be to an alternate

foreign location. In this case, the SMA terminated on April 26, 2015, the date on which DFAT had agreed grievant's stepson could return to the host country. The embassy's need for the stepson's absence had expired. On the following day the family traveled to the U.S. on PCS orders.

Once the Department approved ISMA, the stepson's travel could no longer be considered personal. We find persuasive grievant's argument that this travel constitutes "advance travel," as described in 14 FAM 536.1-4 SMA Travel Financed by Employee. In this regulation and in 14 FAM 532.4, which provides more examples of "advance travel" by family members for which an employee may be reimbursed, "advance travel" can be considered a generic term for travel by family members that is taken before an employee becomes eligible to travel or before an employee receives travel orders. There is nothing in 14 FAM 536.1-4 suggesting that the circumstances for "advance travel" related to SMA are in any way limited by the provisions for "advance travel" in 14 FAM 532.4.

While the need for SMA or ISMA may often be obvious before an employee departs for a post, the circumstances described in this grievance appeal are but one example of the many unanticipated situations when the need to depart to a different location becomes apparent after the employee and family are at post. Whatever reservations the embassy might have had at the time the stepson left the host country and relocated to another country in the region, once the Department approved ISMA, those reservations were moot.

The Board finds that grievant has met his burden of proving by preponderance of the evidence that he is entitled to the relief he has sought -- reimbursement of his stepson's roundtrip travel costs between Post and the ISMA location.

V. **DECISION**

The Department is ordered to reimburse grievant for the expenses of his stepson's round-trip travel between Post and the ISMA location. Such reimbursement is on a cost-constructive basis in accordance with 14 FAM 536.1-3b.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Bernadette M. Allen
Member



Harlan F. Rosacker
Member