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**DECISION**



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

**FILE:** B-194448

**DATE:** December 11, 1979

**MATTER OF:** Neil Gorter - [Claim for Real Estate Expenses]

- DIGEST:**
1. Employee stationed in Guam received orders transferring him to California. After listing house with real estate broker, employee accepted transfer to overseas post and later contracted to sell his house. Employee is not entitled to real estate expenses incident to overseas transfer. 5 U.S.C. § 5724a(a)(4). Where employee's transfer is cancelled, he may be allowed any reimbursable expenses incurred prior to cancellation of transfer.
  2. Employee seeks reimbursement of real estate expenses incident to cancelled transfer from Guam to California. Employee did not actually incur expenses prior to cancellation, but real estate listing agreement provided for payment of the six percent real estate commission if he withdrew the property from sale before agreement expired. The employee may be reimbursed brokerage commission incurred upon subsequent sale of residence only if such provision is enforceable, under local law. William E. Jackson, Jr., B-181321, November 19, 1974.

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This decision is in response to the appeal by Mr. Neil Gorter of our Claims Division settlement denying his claim for real estate expenses incident to the sale of his home at his old official duty station in Guam.

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Mr. Gorter was employed by the Department of the Interior and was assigned to the Office of the Comptroller of Guam when he advised Interior on January 4, 1978, that upon completion of his overseas tour on September 30, 1978, he planned to return to his former duty station in Sacramento, California. On January 26, 1978, the agency prepared a Standard Form 52, Personnel Action, transferring Mr. Gorter to Sacramento effective September 30, 1978. Mr. Gorter listed his house with a real estate broker on March 5, 1978, but it appears that on March 9, 1978, he was officially notified of his transfer to

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Majuro Island in the Trust Territories of the Pacific Islands. A travel authorization was issued March 16, 1978, for his transfer to Majuro Island.

Mr. Gorter signed a contract for sale of his house in Guam on April 15, 1978, and settlement took place on May 23, 1978. Mr. Gorter claimed real estate expenses in the amount of \$2,830 incident to the sale of his residence, but his claim was denied by the agency and our Claims Division on the basis that under the applicable law, real estate expenses may not be paid incident to a transfer to an overseas duty station (Majuro Island). On appeal Mr. Gorter argues that he entered into a binding contract to sell his residence on March 5, 1978, at a time when he fully intended to move to Sacramento and was under orders to do so. In this regard, we note that the exclusive listing agreement between Mr. Gorter and Bonded Realty Co., Inc., provided for payment of the six percent commission not only upon sale of the property by the broker but in the event the property was withdrawn from sale or if the authorization was revoked during the 3-month term of the agreement.

Under the provisions of 5 U.S.C. § 5724a(a)(4) (1976) employees are entitled to reimbursement for certain real estate expenses in connection with a transfer of official duty station provided the old and new duty stations are located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. Thus, in the present case Mr. Gorter would be entitled to reimbursement for real estate expenses incident to his transfer from Guam to Sacramento, California, but not incident to his transfer from Guam to Majuro Island, the latter duty station not being a territory or possession of the United States. See Linderman and Hestir, B-191121, August 29, 1978.

With regard to Mr. Gorter's entitlement to reimbursement based upon his intended transfer to Sacramento, we have held that where a transfer of official station has been cancelled and certain expenses would have been reimbursable had the transfer been completed, an employee may be reimbursed for real estate expenses incurred prior to the cancellation of the transfer. B-177898, April 16, 1973; B-177439, February 1, 1973; and B-174505, December 21, 1971.

The record indicates that Mr. Gorter signed the listing agreement on March 5, 1978, but that he was notified of his transfer to Majuro Island on March 9, 1978, and he was issued travel orders to that effect on March 16, 1978. Mr. Gorter did not enter into a binding contract for sale of his residence until April 15, 1978, well after his transfer to Sacramento had been cancelled. In addition, there is no indication in the record before us that Mr. Gorter actually incurred any expenses prior to March 9, 1978, when his transfer to Sacramento was cancelled. Thus, the only remaining question in this case is the legal effect of the provision in the listing agreement requiring payment of the real estate commission where the property is withdrawn from sale during the term of the agreement.

We note that in William E. Jackson, Jr., B-181321, November 19, 1974, we held that a claim involving similar circumstances could not be paid since, under applicable state law (Wisconsin), the seller could unilaterally cancel the listing agreement at anytime without obligation and without incurring any expense. However, state law is not uniform on this issue. See, for example, Blank v. Borden, 524 P. 2d 127 (Cal. Sup. Ct. 1974), holding such a provision was enforceable and Wright v. Schutt Construction Co., 500 P. 2d 1045 (Ore. Sup. Ct. 1970), holding such a provision was unenforceable. See also 69 ALR 3d 1270.

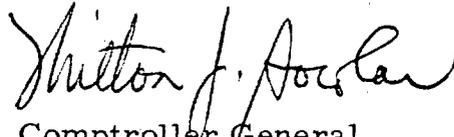
We have been unable to determine whether such a listing agreement provision would be enforceable under Guam law. However, if Mr. Gorter can demonstrate or if the agency otherwise can determine that this listing agreement provision would be enforceable under Guam law, the agency may reimburse Mr. Gorter for his brokerage fees in the amount of \$2,730, since he would have been liable for this amount if he had cancelled his listing agreement upon notice of transfer to Majuro Island. If the agency determines there is doubt as to whether this provision is legally enforceable in Guam, then the burden of proof must rest with the employee to establish the Government's liability for these expenses. See 4 C.F.R. § 31.7.

Since it appears that the \$100 claimed by Mr. Gorter for certifications and legal and related costs was for real estate related expenses incurred after March 9, 1979, they would not

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be reimbursable in any event. Once he was notified that his transfer was cancelled, the Government's obligation to reimburse Mr. Gorter's transfer-related expenses was limited to those expenses already incurred or those which could not be avoided. Therefore, even assuming the validity of the listing agreement provision discussed above, the Government's obligation for real estate expenses would be limited to the amount payable if the employee had withdrawn the property from sale and would not extend to the greater amount payable in the event the sale was consummated.

Accordingly, the claim may be allowed only insofar as it is determined that the listing agreement provision is enforceable.



For the Comptroller General  
of the United States