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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

AGC00034
AGC00042

FILE: B-196002

DATE: March 18, 1980

MATTER OF: Richard E. Whitmer

- DIGEST:
- (1) Employee transferred from position with Department of Defense in Germany to position with United States Forest Service in Alaska. Employee not entitled to real estate expenses incurred in buying a house in Alaska since his old and new official duty stations were not within the United States, its territories or possessions. 5 U.S.C. 5724a(a)(4) and para. 2-6.1 of the FTR.
 - (2) Employee transferred from position with United States Forest Service in Alaska to position with the United States Marine Corps in California. Prior to transferring employee put down a deposit on a house in Alaska. As a result of the transfer the purchase of the house was not consummated and seller retained employee's deposit as liquidated damages. Employee may have those expenses reimbursed as miscellaneous expenses to the extent authorized under para. 2-3.3b of the FTR.
 - (3) Employee transferred from Alaska to California. Prior to transferring employee entered into an agreement to purchase a house in Alaska and paid \$300 deposit. Some time after the purchase contract was signed employee entered into a subsequent agreement with the seller to pay additional earnest money of \$1,000. This subsequent agreement is not a valid modification of the original purchase contract since it was not supported by sufficient consideration. Since the claimant was not legally obligated to pay the additional earnest money he may not be reimbursed for it.

[Request for REAL ESTATE EXPENSES]

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- (4) When an employee transfers from one agency to another, the agency to which the employee transfers is obligated to pay only the expenses incident to the intragency transfer.

The issue is whether Mr. Richard E. Whitmer may be reimbursed for real estate expenses incurred incident to a permanent change of station. For the reasons stated below Mr. Whitmer is entitled to be reimbursed as a miscellaneous expense a part of the deposit he forfeited. However, he is not entitled to receive the expenses incurred by the bank in order to approve his real estate loan.

The issue is presented for an advance decision by letter of September 7, 1979, from Mr. H. Larry Jordan, Authorized Certifying Officer, United States Department of Agriculture.

The facts indicate that by Travel Order No. 08-19-77, dated August 29, 1977, Mr. Whitmer, was authorized to transfer from his position with the Department of Defense in Stuttgart, Germany, to a position with the United States Forest Service in Ketchikan, Alaska. Under these orders the Department of Defense returned Mr. Whitmer and his spouse to Colorado Springs, Colorado, his designated residence prior to going to Germany. Thereupon, the United States Forest Service issued Travel Order No. 10.01.00640, dated September 19, 1977, authorizing Mr. Whitmer and his spouse to travel from Colorado Springs, Colorado, to Ketchikan, Alaska.

On November 14, 1977, Mr. Whitmer and his spouse entered into a contract to purchase a home in Ketchikan. The terms of the contract required Mr. Whitmer to deposit \$300. This deposit was nonrefundable and was to be retained by the seller in the event the sale was not consummated. On that same day, Mr. Whitmer and his spouse also allegedly entered into an agreement with the seller to rent the above house until closing. The rental agreement submitted, however, is not dated.

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On December 21, 1977, Mr. Whitmer and his spouse agreed to pay the seller an additional \$1,000 as earnest money. According to this new agreement the additional earnest money was at the seller's request and was also to be retained in the event Mr. Whitmer did not purchase the house. This new agreement was only signed by Mr. Whitmer and his spouse and not by the seller or the seller's agent. Mr. Whitmer did not remit the additional \$1,000 until February 15, 1978. At this time both Mr. Whitmer and the seller signed a notarized receipt which acknowledged that additional earnest money of \$1,000 was paid to the seller as agreed to by Mr. Whitmer and the seller.

The record also indicates that sometime prior to February 13, 1978, the claimant applied for and accepted a position with the United States Marine Corps in 29 Palms, California. As a result of this transfer, Mr. Whitmer did not purchase the house in Ketchikan. He therefore forfeited the \$1,300, earnest money paid in accordance with the provisions of the contractual agreement.

On February 15, 1978, the National Bank of Alaska submitted a bill to Mr. Whitmer for expenses incurred in approving his real estate loan. This bill was subsequently paid by Mr. Whitmer.

Mr. Whitmer has submitted a voucher claiming reimbursement for the earnest money he forfeited as a result of his transfer from Alaska to California and for the money paid to the National Bank of Alaska. Questions arise concerning whether the above amounts may be paid and, if so, whether Mr. Whitmer is to be paid by the United States Forest Service or the United States Marine Corps.

Mr. Whitmer's voucher may be divided into those expenses incurred incident to his transfer to Alaska and those expenses incurred incident to his transfer from Alaska to California. We will first focus upon those expenses incurred incident to his transfer from Germany

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to Alaska, i.e., his claim for reimbursement of expenses incurred by the National Bank of Alaska in approving his real estate loan.

The statutory authorization for the reimbursement of expenses incurred in connection with residence transactions is contained in 5 U.S.C. 5724a (1976). Subsection 5724a(a)(4) provides that real estate expenses may only be paid when the old and new official stations are located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. The requirement regarding the location of the old and new duty stations is carried over in paragraph (para.) 2-6.1 of the Federal Travel Regulations (FTR), (FPMR 101-7) (May 1973).

Therefore, in accordance with the above statute and regulations Mr. Whitmer may not be reimbursed the expenses incurred in having his real estate loan approved since his old duty station, Stuttgart, Germany, was not located within the United States. Moreover, the fact that Mr. Whitmer first traveled to Colorado Springs, Colorado, prior to moving to Ketchikan is not determinative since Colorado Springs was his residence in the United States for record purposes while he was overseas and not an official duty station.

As indicated above, Mr. Whitmer also claims reimbursement for the earnest money he forfeited as a result of being transferred from Ketchikan, Alaska, to 29 Palms, California. Before determining whether Mr. Whitmer is entitled to these expenses a threshold question to be decided is whether Mr. Whitmer's transfer from Alaska to California was in the interest of the Government or for his convenience. This determination is required by para. 2-1.3 of the FTR. That section requires the payment of travel and transportation expenses and applicable allowances for authorized or approved changes of station unless there is a finding that the transfer is primarily for the convenience or benefit of the employee or at his request.

The record before this Office does not contain a specific finding that Mr. Whitmer's transfer from Alaska to California was in the interest of the Government or

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for his convenience. We have often stated that such a determination is within the discretion of the employing agency. See: B-184251, July 30, 1975. Applicable decisions have set forth guidelines to assist agencies in making such determinations. See: David C. Goodyear, 56 Comp. Gen. 709 (1977), and decisions cited therein.

In the present situation, the Marine Corps in Travel Order No. T-2-78, dated February 21, 1978, authorized Mr. Whitmer and his wife reimbursement for transportation and travel expenses and certain allowances incident to his transfer to 29 Palms, California. It is our view that the action taken by the Marine Corps in authorizing Mr. Whitmer's transfer at Government expense, was in effect a determination by the agency that Mr. Whitmer's transfer was in the interest of the Government. Thus, Mr. Whitmer is entitled to reimbursement of any expenses incurred incident to his transfer.

In situations similar to Mr. Whitmer's we have allowed reimbursement of forfeited deposits where the claimant entered into a contract to purchase a residence at his new duty station, tendered a down payment, received notice of his transfer and instead of completing the purchase of the house elected not to proceed with the settlement. See: Reimbursement of Forfeited Deposit of House Purchase, 55 Comp. Gen. 628 (1976) and cases cited therein. See also: Steven W. Hoffman, B-193280, May 8, 1979. In the above cases reimbursement could not be had on the basis that they were real estate expenses. Reimbursement, however, was permitted as a miscellaneous expense pursuant to paras. 2-3.1 et seq. of the FTR.

We see no difference between Mr. Whitmer's claim and the claim in the above cases. Therefore, under the miscellaneous expense theory Mr. Whitmer may be entitled to the earnest money forfeited pursuant to para. 2-3.3(b) of the FTR.

While there is no question that Mr. Whitmer is entitled to be reimbursed the \$300 deposit he made pursuant to the terms of the purchase contract for the house a question does

arise concerning whether he is entitled to be reimbursed for the additional \$1,000 deposit. When Mr. Whitmer agreed to pay the additional \$1,000 to the seller at the seller's request his agreement served to modify the terms of the original purchase contract. Under the original terms of the contract Mr. Whitmer agreed to pay \$300 earnest money which, as stated previously, would be retained by the seller as liquidated damages in the event the sale was not consummated. The contract also provided for the receipt of additional earnest money. From the terms of the contract it appears that the amount of the additional earnest money is to be filled in at the time the contract is executed. In the present situation this space was left blank by the claimant and the seller. Therefore, when Mr. Whitmer and the seller signed this contract on November 14, 1977, Mr. Whitmer was obligated to only pay \$300 earnest money and if he could secure the needed financing purchase the house for the agreed price. Thus, when the seller requested Mr. Whitmer to pay the additional earnest money and Mr. Whitmer agreed to do so the terms of the contract were changed.

Under Alaska law, the parties to a contract may alter its terms. Slaymaker v. Peterkin, 518 P. 2d 763 (Alaska, 1974). The agreement to rescind or modify an original contract, not for the sale of goods, must have sufficient consideration to support it, as in the case of any contract. Martin v. Maldonado, 572 P. 2d 763 (Alaska, 1977); Holiday Inns of America, Inc. v. Peck, 520 P. 2d 87 (Alaska, 1974); and Northern Commercial Co. v. United Airmotive, 101 F. Supp. 169 (D. Alaska, 1951).

In the present situation, no facts appear to show that required consideration was given for any modification. In the absence of consideration, we do not find that a valid modification has taken place. Therefore, since the claimant was not legally obligated to pay the additional earnest money his payment does not afford a basis for reimbursement. Thus, Mr. Whitmer may receive reimbursement under para. 2-3.3b of the FTR for the \$300 deposit he paid according to the terms of the contract but may not be reimbursed the additional \$1,000 earnest money.

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The final issue to be resolved is whether the Marine Corps or the United States Forest Service is liable for the reimbursable expenses. In the present case, Mr. Whitmer's rights to reimbursement of expenses as authorized by sections 5724 and 5724(a), of title 5, United States Code (1976), arose by reason of his transfer from Germany to Alaska and by reason of his transfer from Alaska to California. As stated above, Mr. Whitmer is only entitled to real estate expenses incurred incident to his transfer from Alaska to California. Under 5 U.S.C. 5724(e), "[w]hen an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by 5 U.S.C. 5724", unless the transfer is the result of a reduction in force or transfer of function. Here, neither of the exceptions are applicable. Also, we have held that when an employee transfers from one agency to another, the agency to which he transfers is obligated to pay only the expenses incident to the intragency transfer, not those incident to a prior transfer. 51 Comp. Gen. 112 at 115-116 (1971). Therefore, since Mr. Whitmer is only entitled to be reimbursed expenses incurred incident to his transfer from Alaska to California the Marine Corps is obligated to pay Mr. Whitmer's claim.

Accordingly, the voucher is returned for action in consonance with the above.



For the Comptroller General
of the United States