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DECISION



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

FILE: B-202018

DATE: November 24, 1981

MATTER OF: Patricia A. Wales - Real Estate Expenses -
Brokers' Commission

DIGEST: Transferred employee sold her interest in residence to former husband. Although sale of interest in residence constitutes residence transaction within meaning of 5 U.S.C. § 5724a(a)(4) and FTR para. 2-6.1, broker's fee paid may not be reimbursed absent showing that employee was legally obligated to make such payment to brokerage firm under law of state where residence was located. Employee may be reimbursed legal and advertising costs, but since she held title to residence with person not a member of immediate family at the time of the sale, as defined in FTR para. 2-1.4d, reimbursement is limited to extent of her interest in residence.

This is in response to a request from Gerald R. Pierce, Authorized Certifying Officer, Department of Housing and Urban Development (HUD), concerning the entitlement of Ms. Patricia A. Wales to reimbursement for certain real estate expenses.

Effective August 28, 1978, Ms. Wales was transferred from her position with the Department of the Army in El Paso, Texas, to a position with HUD in Denver, Colorado. Ms. Wales was authorized reimbursement for relocation costs, including the costs of the sale of a residence at the old duty station. The 1-year time limitation for the completion of real estate transactions was extended on August 28, 1978. It is Ms. Wales' entitlement to reimbursement for the costs associated with sale of her residence which is presently at issue.

The facts which caused doubt as to Ms. Wales' entitlement were set forth in the administrative report as follows:

"Patricia A. Wales and her former husband Robert Wales were divorced in September 1978, and the divorce decree called for the proceeds from the sale of their residence to be split.

After unsuccessfully trying to sell the house, Patricia sold the house to Robert in August 1979, for which she received \$6000 from Robert. Later an amendment was made to the divorce decree to provide for the \$6000 payment rather than the split of the proceeds.

"Robert Wales initially tried to sell the house himself, and when this proved unsuccessful, he listed the house with Winco Associates, a real estate firm. When the sale was made from Patricia to Robert, Winco Associates claimed they were entitled to a commission of \$6,088.25 (7% of the sales price of \$86,975) and threatened lawsuit if it was not paid. Patricia paid \$6,088.25 commission to Winco Associates and claimed reimbursement on April 24, 1980, and was paid the amount by this office."

The certifying officer has asked whether the transfer of Ms. Wales' interest to her former husband constituted a sale so as to entitle her to reimbursement for the broker's fee and for real estate expenses. In addition to the broker's fee, Ms. Wales claimed advertising expenses in the amount of \$199.88 and legal and related costs in the amount of \$325. It appears that, like the broker's fee, these costs have already been reimbursed by the agency. The certifying officer has also asked whether Ms. Wales was legally obligated to pay the broker's fee.

In Kirk Anderson, 56 Comp. Gen. 862 (1977) we held that the transfer of an employee's interest in a residence to his estranged wife was a sale within the meaning of 5 U.S.C. § 5724(a)(4)(1976), which governs reimbursement of an employee's relocation expenses. Thus, Ms. Wales' transfer of her interest in the residence to her former husband may also be considered a sale.

However, 5 U.S.C. § 5724a(a)(4) authorizes reimbursement of only those expenses which employees are required to pay. Chapter 2, part 6 of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR), which was issued pursuant to that statute, contains similar language. In accordance with those provisions we have held that a broker's commission may be reimbursed only where the employee has incurred a legally

enforceable obligation. See Mathew Biondich, B-197893, June 4, 1980, and cases cited therein.

In determining whether a debt is legally enforceable in this situation we look to the State law. Article 6573a, Section 28, of the Revised Civil Statutes of the State of Texas provides in pertinent part as follows:

"No action shall be brought in any court in this State for the recovery of any commission for the sale or purchase of real estate unless the promise or agreement upon which action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunder duly authorized."

The listing contract, which was signed on April 6, 1979, provided that Winco Associates would have an exclusive listing on the house until July 20, 1979. The contract further provides for the payment of a commission if the property is sold after the listing period under the following conditions:

"* * * such commission shall be payable to the Agent if the Agent was the procuring cause of the sale, or if the property was sold within 90 days after the expiration of the exclusive listing to a purchaser whose attention was called to the property by the agent provided the Agent shall have advised the Owner in writing of the identity of such prospective purchaser on or before the date of expiration of this exclusive listing * * *."

According to a deed in the record, Ms. Wales transferred her interest to her former husband on August 20, 1979, which was after the expiration of the listing contract. Although the contract was amended on June 1, 1979, to change the price of the house from \$90,000 to \$94,500 and the commission, from flat amount of \$1,450 to 7 percent of the sale price, it does not appear that the contract was extended beyond its original termination date. Therefore, under the terms of the contract Winco Associates would be entitled to the commission only if they were the procuring cause of the sale or if they called the property to the attention of the purchaser and identified him in writing to the owner. We do not believe that it can be argued that Winco Associates was

the procuring cause of this sale or that they called the property to the attention of Mr. Wales. It does not appear that Ms. Wales was legally obligated to pay the commission under the contract and, therefore, she is not entitled to reimbursement for the commission paid. Steps should be taken to collect that amount from her unless she can show that she was obligated to make payment under Texas law.

In relation to reimbursement of expenses associated with the sale or purchase of a residence, 5 U.S.C. § 5724a(a)(4) sets forth certain requirements relating to the title to the property. These requirements are carried over into FTR para. 2-6.1c which states, in pertinent part, that real estate expenses may be reimbursed provided that:

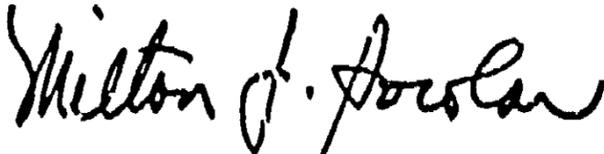
"The title to the residence or dwelling at the old or new official station, or the interest in a co-operatively owned dwelling or in an unexpired lease, is in the name of the employee alone, or in the joint names of the employee and one or more members of his immediate family, or solely in the name of one or more members of his immediate family. * * *" (Emphasis added.)

Paragraph 2-1.4d of the FTR defines "immediate family" as any of the following members of the employee's household: spouse, certain children, or dependent parents of the employee or of the employee's spouse. Clearly a former husband is not included in this definition. Our decisions hold that in these circumstances an employee may be reimbursed expenses only to the extent of his interest in the residence. See Thomas G. Weideman, B-195929, May 27, 1980, and cases cited therein.

We assume that Ms. Wales had a 50 percent interest in the residence. Therefore, if the legal and advertising costs she claimed are otherwise appropriate for reimbursement she is entitled to half the amount claimed. The amount finally allowed may be set off against the broker's fee she is obligated to refund. Should Ms. Wales show that she was legally obligated to pay the broker's fee she would be entitled to reimbursement for only one half of the amount claimed. If reimbursement of the broker's fee is finally allowed, the prevailing commission rate in the area should be determined to insure that that rate is not exceeded here. In

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addition, we have held that the provision authorizing reimbursement of advertising costs does not authorize such reimbursement if an employee is reimbursed for a broker's fee which includes advertising costs. 46 Comp. Gen. 812 (1967).

for 
Comptroller General
of the United States