The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harold R. Fine--Relocation and travel expenses

File: B-224628

Date: January 12, 1988

DIGEST

1. Under the Federal Travel Regulations, temporary quarters subsistence expenses are ordinarily limited to temporary quarters in the vicinity of the old or new duty station and are justified elsewhere only for unique circumstances, if reasonably related to the transfer and not for vacation purposes. The employing agency properly denied the expenses for the employee's son living in an apartment and working in the city where the family formerly resided but which was not one of the employee's official stations involved in the transfer. Similarly, after another son left the new duty station to live at college for the regular school term, that son's expenses were unrelated to the transfer and not allowable.

2. Temporary quarters subsistence expenses may be reimbursed while the employee is taking annual leave on trips away from temporary quarters established at the old or new duty station, provided the trip does not delay termination of temporary quarters and occupancy of a permanent residence at the new duty station. The fact that annual leave in excess of 240 hours might be forfeited if not taken before the end of the leave year should not be considered in making the determination as to whether use of the leave delayed the occupancy of permanent quarters. Any disallowance of the expenses wnen temporary quarters are interrupted for trips during annual leave does not add to the maximum period of 60 consecutive days of temporary quarters subsistence expenses authorized by the Federal Travel Regulations.

3. An employee in temporary quarters is not entitled to reimbursement for the cost of telephone installation. A telephone user fee is reimbursable if ordinarily included in motel and hotel bills in the local area of temporary quarters.

4. Under the Federal Travel Regulations, an employee who is authorized common carrier air travel but who, as a matter of personal preference, flies his personally owned aircraft is limited to the lesser of that cost or the constructive cost of common carrier air travel. The employee is not entitled to the higher actual cost of his relocation travel by using his privately owned aircraft merely because he may have saved the Government money by hauling household goods authorized for shipment under a Government Bill of Lading. The value of hauling these household goods may not be used in computing the cost comparison between travel by common carrier and privately owned aircraft.

5. If lower-class space is generally available on scheduled flights, the Federal Travel Regulations provide that a first-class air fare may not be used to compute the constructive cost of common carrier air travel in reimbursing the employee the lesser of the constructive cost or the actual travel cost by privately owned aircraft used as a matter of personal preference. Although in this case the coach seats may have been booked on flights until the day after the travel began, less than first-class travel was generally available on scheduled flights.

6. The Federal Travel Regulations prohibit reimbursement of a broker's fee or real estate commission for services in purchasing a residence at the new duty station. Where under state law a "real estate broker" is defined to include a person negotiating a purchase, the employee's real estate consultant was a broker, and his fee for negotiating the price of a condominium at the new duty station, as well as for related services, was a broker's fee prohibited by the applicable regulations.

7. To be reimbursed real estate expenses for the sale of the residence at the old duty station, the Federal Travel Regulations provide that settlement must occur within 2 years after the employee's transfer, with an additional 1-year extension which may be authorized by the agency. The time limit may not be increased beyond the maximum 3-year period because the employee had additional transfers subsequent to his transfer from the duty station where the residence is located.

8. An employee is not entitled to interest for delayed payment of travel expenses under the Prompt Payment Act, 31 U.S.C. §§ 3901-3906 (1982). Interest under the Act is payable only to business concerns furnishing property or services to the Government.

DECISION

Mr. Harold R. Fine, an employee of the Department of Energy, has made several claims involving his three transfers between permanent duty stations and a travel claim for a period of temporary duty. These claims have been submitted to the Comptroller General for an advance decision, together with Mr. Fine's related questions.1/ We have decided the claims under separate headings below.

BACKGROUND

The Department of Energy first transferred Mr. Fine from Cincinnati, Ohio, to Richland, Washington, on September 26, 1982. He was next transferred from Richland, Washington, to Washington, D.C., on August 16, 1983, immediately following a period of temporary duty in Washington, D.C. Finally, on August 13, 1984, Mr. Fine was transferred from Washington, D.C., to Albuquerque, New Mexico.

OPINION

Location of Temporary Quarters

The Department of Energy disallowed temporary quarters subsistence expenses for Mr. Fine's sons, Raymond and Michael, in connection with his transfer from Washington, D.C., to Albuquerque, New Mexico. The agency concluded that the sons' living quarters were not in the vicinity of Albuquerque and were not incident to the transfer there, as required by paragraph 2-5.2(d) of the Federal Travel Regulations.2/ This provision states that as a general rule temporary quarters must be in the vicinity of the old or new official station. The regulation also provides that temporary quarters will not be allowed at other locations unless they are justified by circumstances unique to the individual employee or family and are reasonably related to and incident to the transfer. Further, the regulation provides that occupancy shall not be approved for vacation purposes or other reasons unrelated to the transfer.

1/ V. Joseph Startari, Authorized Certifying Official, Department of Energy, submitted the request for a decision.

2/ Federal Travel Regulations (FTR), para. 2-5.2(d) (Supp. 10, Nov. 14, 1983), incorp. by ref., 41 C.F.R. § 101-7.003 (1983).

In Laurence R. Sanders, 65 Comp. Gen. 326 (1986), we held that FTR para. 2-5.2(d) allows reimbursement if the temporary quarters subsistence expenses would not have been incurred but for the transfer to the new duty station. In that decision, a family member was temporarily separated from the employee's residence, and we allowed temporary quarters expenses where the separation was a direct result of the transfer and for a compelling reason.

In this case according to Mr. Fine, his son Raymond (age 18) remained in Cincinnati almost 4 months after the transfer and then rejoined the family in Albuquerque on December 13, 1984. It is not clear that the apartment rental and meal costs claimed as temporary quarters subsistence expenses for him in Cincinnati would not have been incurred absent the transfer. Mr. Fine states that Raymond remained in Cincinnati to meet a job commitment, to show prospective renters or buyers the Fine's house, and to do minor maintenance on the house. We are unable to conclude based on the record before us that the temporary quarters for Mr. Fine's son Raymond in Cincinnati may be allowed. Such use does not appear justified under the circumstances nor incident to Mr. Fine's transfer from Washington, D.C., to Albuquerque, New Mexico.

Mr. Fine also claims reimbursement for temporary quarters for his son Michael. It appears that Michael accompanied the family to Albuquerque and remained there for a time until he returned to college in Ellensburg, Washington. The Department of Energy denied that part of Mr. Fine's claim for Michael's temporary quarters expenses at college.

In similar cases where the family members have vacated the residence at the old duty station and occupied temporary quarters while at the new duty station, we have allowed separate temporary quarters for dependents while awaiting the beginning of the next college session. This entitlement has been justified because, had it not been for the employee's transfer, the minor would have occupied the family residence until the commencement of college without the need of temporary quarters. See Richard T. Bible, B-208302, Sept. 27, 1982. But our decision in Bible points out that if the quarters at school are intended for occupancy throughout a major portion of the school semester and are solely for educational purposes, there is no entitlement because they are not incident to the transfer. When Michael left the family quarters in Albuquerque to return to college in Ellensburg and to occupy a residence there for educational purposes, his living arrangements

were unrelated to the transfer and are therefore not reimbursable by the Government.

Mr. Fine states that temporary quarters should be allowed for his sons because they were initially authorized in official travel orders and only later were denied in amended travel orders. In that regard, it is well established that travel orders may not be modified retroactively so as to increase or decrease the rights which have become fixed under the applicable statutes and regulations unless an error is apparent on the face of the orders and all the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence in preparing the orders. Roy A. Harlan, B-198939, Apr. 3, 1981.

In this case Mr. Fine's travel orders and authorization of July 18, 1984, stated only in general terms:

> "Authorized temporary quarters nte 60 days for employees and family."

Thus, Mr. Fine's travel orders and authorization included no commitment of any specific number of days for particular family members. In this case, the agency did not exercise its discretion to determine specific entitlement for Raymond and Michael until after it had an opportunity to review all of the facts and circumstances. Consequently, the rule against retroactive modification of travel orders is not for application. See Mary Lou Young, B-217852, Sept. 30, 1985.

We find that the Department of Energy reasonably exercised its discretion under FTR para. 2-5.2d in determining that there was no justification for allowing temporary quarters subsistence expenses for Raymond and Michael at locations other than the old or new duty stations.

Absence From Temporary Quarters While on Leave

Mr. Fine has raised the question whether an employee is allowed temporary quarters subsistence expenses when on annual and sick leave. It appears that Mr. Fine and his wife traveled away from their temporary quarters in Albuquerque and that on some of these days Mr. Fine was on leave or temporary duty. Temporary quarters expenses were disallowed for certain trips in September, October, and December 1984, while temporary quarters were maintained in Albuquerque, as well as in August 1983, when Mr. Fine had temporary quarters in Washington, D.C., incident to his transfer there.

Our decisions have held that once temporary quarters are established at the new or old duty station, a trip away from them while on annual leave may be allowed without deducting temporary quarters subsistence expenses, provided the trip does not delay moving into permanent quarters. Jon C. Wade, 61 Comp. Gen. 46 (1961). On the other hand, the regulations provide that temporary quarters should be reduced or avoided if the employee has had adequate opportunity to complete arrangements for permanent quarters. Temporary quarters are to be regarded as an expedient to be used only for as long as necessary until the employee can move into permanent residence quarters. See FTR paras. 2-5.1 and 2-5.2d. In the present case, the record does not indicate whether or not the trips while on leave delayed entrance into permanent quarters. Consequently, this issue is referred back to the employing agency for determination in accordance with Wade, supra.

Mr. Fine also asks whether temporary quarters are authorized during annual leave when the leave, if not taken, would be forfeited because of its accumulation in excess of 240 hours at the end of the leave year. He also asks whether the expenses are authorized on sick leave days and whether, if the expenses are unauthorized on leave days, the 60-day maximum in temporary quarters is extended by the number of leave days.

Concerning the possible forfeiture of annual leave, the standards set forth in Wade would apply irrespective of leave forfeiture considerations. With respect to sick leave, we are unaware of any rule that would prevent reimbursement of temporary quarters merely because the employee is on sick leave.

As to extending temporary quarters for days when temporary quarters subsistence expenses are unauthorized, we note that the maximum period of 60 days runs consecutively without interruption except for periods of official necessity such as relocation travel and temporary duty. FTR para. 2-5.2a(1). We have also held that the maximum number of consecutive days may be interrupted by sick leave requiring the employee to be away from temporary quarters, thereby extending the maximum by the period of the interruption. See Bobby L. Cook, 63 Comp. Gen. 222 (1984). However, absences from temporary quarters for other personal reasons not of official necessity do not interrupt the running of the 60-day period. See Roy C. Hitchcock, 57 Comp. Gen. 696 (1978). The maximum period of 60 consecutive days is therefore not extended by annual leave days away

from temporary quarters. See Luther S. Clemmer, B-199347, Feb. 18, 1981.

Telephone Installation

While occupying temporary quarters in the vicinity of Albuquerque, New Mexico, Mr. Fine claimed charges for the installation of a telephone. This expense was disallowed by the employing agency in accordance with our decision in 52 Comp. Gen. 730 (1973). That decision permitted reimbursement of telephone use fees but denied reimbursement of a telephone installation for prolonged temporary duty in a rented apartment. The test is whether such expenses represent accommodations or services ordinarily included in the price of a hotel or motel room as determined by examining the charges in the local area of the temporary lodging. Kevin L. Mendenhall, B-223239, Apr. 2, 1987. This standard for temporary duty lodging is applicable to temporary quarters subsistence expenses. Patrick T. Schluck, B-192723, Feb. 14, 1979.

We note that the General Services Administration recently amended the Federal Travel Regulations, Supp. 20 (51 Fed. Reg. 19660, 19667, May 30, 1986), effective July 1, 1986, to specifically authorize such items as a monthly telephone use fee "if ordinarily included in the price of a hotel or motel room in the area concerned." FTR para. 1-7.9. But this amendment expressly states that a telephone use fee allowed "does not include installation and long distance calls." The amended regulation is consistent with our previous interpretation of the prior regulations and reflects the policy in effect prior to July 1, 1986. Mendenhall, cited above. Therefore, we conclude that Mr. Fine's claim for the telephone installation charge was properly denied.

Constructive Travel Costs By Commercial Air

For his relocation travel incident to his transfer from Richland to Washington, D.C., Mr. Fine was authorized common carrier travel by air. Since he elected to fly his privately owned aircraft, he was limited to that cost, not to exceed the common carrier expense authorized. The Department of Energy reimbursed him the constructive cost of common carrier air fare and appropriate taxicab fares totalling $249 plus the one-half day per diem of $11.50 he would have received had he flown by common carrier rather than his private aircraft.

Mr. Fine sought reimbursement for $928.73 for per diem and the cost of flying his aircraft, and he bases his claim on his savings to the Government by transporting between 600 to 1,000 pounds of his household goods in his aircraft rather than shipping them under a Government Bill of Lading by common carrier as authorized by the Department of Energy.

The Federal Travel Regulations provide that a privately owned conveyance, including an aircraft, may be used as a matter of personal preference instead of the common carrier transportation authorized. However, reimbursement may not exceed the lesser of the allowable cost of travel by the private conveyance (including the allowable per diem) or the constructive cost of common carrier travel (including constructive per diem and the costs that would have been incurred for travel to and from common carrier terminals and allowable baggage). FTR para. 1-4.3.

The constructive cost the Government would have incurred had the household goods been shipped by common carrier, rather than flown in Mr. Fine's aircraft, may not be used in the comparison between common carrier constructive cost and the expense of traveling by private conveyance. The constructive cost is restricted to the cost-comparison items expressly set forth in FTR para. 1-4.3. See Thomas L. Wingard-Phillips, 64 Comp. Gen. 443, 446 (1985). The cost of hauling household goods is not included in those items.

Mr. Fine seeks additional travel reimbursement in another cost comparison between privately owned and constructive common carrier travel involving his return travel from temporary duty from Washington, D.C., to Richland, before he was transferred to Washington, D.C. On July 31, 1983, Mr. Fine flew by commercial airline from Washington, D.C., to Cincinnati, and from there to Richland by his privately owned aircraft. Since constructive travel by common air carrier from Washington to Richland was less than his actual travel cost, he claimed reimbursement for the amount of the constructive travel he had computed. However, Mr. Fine based the computation on first-class commercial air because lower-class space was booked (space unavailable) between Washington and Richland until the day after he commenced the trip and because his travel orders would have expired. The Department of Energy limited his reimbursement to the constructive air fare of coach fare, $135 less than the first-class fare.

We assume that Mr. Fine's travel orders authorized common carrier air travel by the most direct route between Washington and Richland and that Mr. Fine, as

a matter of personal preference, elected to travel by commercial air to Cincinnati and from there to Richland by his privately owned aircraft. If so, the constructive cost rules in FTR para. 1-4.3a apply, and that provision bases constructive cost on coach accommodations rather than first-class if coach is scheduled on flights serving origin and destination, "regardless of whether space would have been available." Since coach air travel was scheduled between Washington, D.C., and Richland, the Department properly limited Mr. Fine to coach fare in computing the constructive cost.

We further note that had Mr. Fine taken first-class air, he would have been limited to coach fare at Government expense. None of the reasons or procedures justifying first-class fare as set forth in FTR para. 1-3.3d(2) would have applied to his situation when he left Washington, D.C., on July 31, 1983.

Fee of Realty Consultant

Following Mr. Fine's transfer to Washington, D.C., on August 16, 1983, he paid $150 to a realty consultant to arrange for purchase of a condominium as a permanent residence in Alexandria, Virginia. The realty consultant negotiated a purchase price pursuant to Mr. Fine's instructions, prepared an earnest money agreement and presented it to the seller, located a source for FHA financing, and found an attorney to handle the closing.

The Department of Energy denied reimbursement of the fee because the tasks performed by the realty consultant were in the nature of those ordinarily performed by a real estate broker, and the agency points out that FTR para. 2-6.2a expressly forbids reimbursement of a broker's fee or real estate commission for services in purchasing a residence at the new duty station. On the other hand, Mr. Fine argues that the realty consultant was not a real estate agent or broker. He believes that the fee is allowable under FTR para. 2-6.2(c) authorizing, among other things, the "costs of preparing conveyances, other instruments, and contracts and related notary fees" to the extent they are not included in a brokerage fee.

In Virginia a "real estate broker" is defined as a person or organization who for compensation "sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, including units or interests in a condominium * * *." Code of Virginia § 54-730. Since the realty consultant

negotiated a purchase price for the condominium, that person evidently met the definition of a "real estate broker" based upon that service he performed for Mr. Fine. The fee of $150 covered the negotiation and other services and must be considered a fee for services of a realtor for the purchase of a residence at the new duty station. The denial of reimbursement was required by FTR para. 2-6.2a.

Time Limit for Selling Cincinnati Residence

The entitlement to real estate expenses incident to relocation requires the employee to sell or purchase the residence at the old or new duty station within a fixed time limitation. Mr. Fine requests clarification of when the time limitation began to run for real estate selling expenses on his Cincinnati residence where his family members continued to reside after his transfer from there to Richland, Washington. His inquiry is directed to his transferring two times in less than 1 year, first from Cincinnati to Richland and from there to Washington, D.C. We understand that Mr. Fine rented the home after his family members vacated it upon his third transfer to Albuquerque.

The applicable authority is contained in para. 2-6.1e of the Federal Travel Regulations (Supp. 4, August 23, 1982), and it provides that the settlement dates for the purchase or sale of a residence must occur within 2 years after the date the employee reports for duty at the new duty station. Under certain circumstances, the agency may allow an additional year. FTR para. 2-6.1e(2).

In Mr. Fine's case, the 2-year period on the Cincinnati home commenced when he reported for duty in Richland on September 26, 1982. This date is not changed by his subsequent transfers. The time period ran 2 years from that date, but a 1-year extension was granted by the agency at Mr. Fine's request for extenuating circumstances. Unless settlement occurred within this 3-year period ending September 26, 1985, he has no entitlement to real estate expenses.

Interest Under the Prompt Payment Act

Mr. Fine's final inquiry is whether he is entitled to the payment of interest on his claims from the Department of Energy under the Prompt Payment Act, 31 U.S.C. §§ 3901-3906 (1982). He filed a claim for permanent change-of-station travel on March 27, 1985, and received payment for part of the claim on October 26, 1985, without any interest.

Tne Department of Energy denied interest under the Prompt Payment Act because Mr. Fine was not a vendor receiving a late payment.

The denial was proper. The Prompt Payment Act at 31 U.S.C. § 3902 authorizes an agency to pay interest if payment for property or services acquired from a business concern is overdue. The relocation travel reimbursement to Mr. Fine was paid to him as an employee, not to a business concern providing property or services to the Government, and we are unaware of any other statute which would authorize the payment of interest on such claims.

Milton J. Socolar

for Comptroller General
of the United States