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DECISION

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

FILE: B-204046 DATE: August 27, 1981

MATTER OF: Daniel J. Totheroh--Pro rata reimbursement of real estate expenses

DIGEST: A transferred Federal employee who sold the 30-acre tract of land and mobile home where he had resided at his old duty station may be reimbursed for the expenses of the land sale only on a prorated basis since the applicable regulations require that reimbursement be limited to the expenses of selling that part of the land "which reasonably relates to the residence site," and the employing agency determined that only one-third of the 30-acre tract was reasonably related to the employee's homesite. The agency's determination may not be disturbed in the absence of proof that it is clearly erroneous. Paragraph 2-6.1f, FTR. 54 Comp. Gen. 597 (1975).

This action is in response to correspondence dated July 10, 1981, from a Certifying Officer of the Department of Agriculture's National Finance Center requesting an advance decision on the propriety of issuing payment on a reclaim voucher in the amount of $4,636.09 submitted by Mr. Daniel J. Totheroh, an employee of the Department's Forest Service. That amount represents additional real estate expenses claimed by Mr. Totheroh incident to his transfer from Redding to Placerville, California, in April 1980. In light of the facts presented, and the applicable provisions of law and regulation, we have concluded that the reclaim voucher may not be paid.

At the time of his transfer in April 1980, Mr. Totheroh was residing in a mobile home located on a 30-acre tract of land near Redding, California. In August 1980 he sold the mobile home and the land. He has been reimbursed real estate expenses associated with the sale of his mobile home. His present claim relates to the voucher he submitted in September of 1980 on which he claimed real estate expenses incurred in connection with the sale of the 30-acre parcel on which the mobile home was situated. In April 1981 the County Supervisor of the Farmers Home Administration at Redding advised officials of the National Finance Center that the 30-acre tract of land sold by Mr. Totheroh could reasonably be divided into three 10-acre homesites, and that the purchaser of the property intended to divide the acreage up in just that manner. National Finance Center officials therefore concluded

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that only one-third of the 30-acre tract had been reasonably related to Mr. Totheroh's residence site. Under applicable regulations permitting only pro rata reimbursement of real estate expenses when an employee sells land in excess of that which reasonably relates to the residence site, the National Finance Center allowed him only one-third of the amount he had claimed as reimbursement for brokers' fees, transfer taxes, and title insurance costs associated with his sale of the 30 acres.

In May 1981 Mr. Totheroh submitted a reclaim voucher for amounts disallowed in his original claim. He indicated that he disagreed with the opinion of the Farmers Home Administration. He said it was his understanding that the person who had bought the land from him had not actually split it into three 10-acre homesites, and he also said it was his own opinion that the entire 30-acre tract could actually support only one homesite. In that connection, he indicated he was very familiar with the land, and it was his belief that the costs of obtaining additional water and electrical power would, as a practical matter, prevent building additional homes on the land in the foreseeable future. Thus, he suggested that an erroneous assessment of the land's potential use had been used as the basis for the partial disallowance of his original claim, and that he should instead have been paid on the basis that the 30-acre tract of land was indivisible and reasonably related in its entirety to the maintenance of his old residence.

In the alternative, Mr. Totheroh suggested that regardless of whether the 30-acre tract of land might be divided into three 10-acre homesites or otherwise be further developed, his actual use of the land at the time he owned it should govern the issue of whether all or only part of the land was reasonably related to his residence site. He said that during the 4 years he owned the 30 acres, he used the land solely for his own personal residence, and he never attempted to subdivide the property into smaller parcels, put it to commercial use, or develop it in any other way. He suggested that regardless of the size of the property, or its potential future use, he should be reimbursed for his expenses incurred in selling the entire tract of land because he had personally used that entire tract solely as a residence site and for no other purpose.

When Forest Service officials in California forwarded the matter on to the Department of Agriculture's National Finance Center, they recommended that Mr. Totheroh's statements be given favorable consideration, and that his reclaim voucher be paid in accordance with an earlier decision of our Office, B-166709, May 21, 1969.

In requesting an advance decision on the propriety of making payment on the reclaim voucher, the Certifying Officer says that in processing Mr. Totheroh's original claim, the National Finance Center asked for an appraisal from the Farmers Home Administration concerning the 30-acre tract of land sold by him in accordance with instructions contained in our decision 54 Comp. Gen. 597 (1975). On the basis of that same decision, only part of the original claim was allowed because the appraisal indicated that the tract could be divided into three 10-acre homesites and because of other information received indicating Mr. Totheroh had obtained a right-of-way for three private residences in the access road to the land. The Certifying Officer asks whether, in those circumstances, there may be any basis for paying Mr. Totheroh any amount beyond that previously allowed to him.

The reimbursement of expenses incurred by a transferring Federal employee in selling his residence is governed by subsection 5724a(a)(4) of title 5, United States Code, and the implementing regulations contained in chapter 2, Part 6, of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973). Paragraph 2-6.1f, FTR, provides in pertinent part as follows:

> "Payment of expenses by employees - pro rata entitlement. * * * The employee shall also be limited to pro rata reimbursement when he sells or purchases land in excess of that which reasonably relates to the residence site."

The application of this provision of regulation was considered at some length in Matter of K. Diane Courtney, 54 Comp. Gen. 597 (1975), supra, which involved a transferred employee who said she had purchased a 43-acre tract of land for the sole purpose of using it as the site of a mobile home for her personal residence, and not for purposes of speculation, subdivision, or commercial development. We held that

as a general rule it is the responsibility of the agency concerned to make the initial determination as to what portion of the land reasonably relates to the residence site and as to the amount of the claimed expenses allowable for that portion. We included the potential future use of the land as a matter to be taken into account by the agency in making those determinations, and we recommended that the determinations be made with the aid of real estate experts familiar with local conditions. Thus, in the specific circumstances presented for consideration in that decision, we essentially held that the employee was entitled to no more than pro rata reimbursement of the expenses incurred in the real estate transaction for that portion of the 43-acre tract determined by the agency to be reasonably related to the residential site of her mobile home, notwithstanding her assertion that she intended to use the entire 43 acres solely for her own personal residence. Moreover, in a subsequent decision we specifically held that an agency determination under paragraph 2-6.1f, FTR, which is supported by an expert opinion from the Farmers Home Administration is presumed to be correct and proper, and may not be disturbed in the absence of proof that it is clearly erroneous. See Matter of William C. Sloane, B-190607, February 9, 1978.

In the present case, therefore, a determination under paragraph 2-6.1f, FTR, of what portion of Mr. Totheroh's 30-acre tract of land "reasonably relates to the residence site" was the responsibility of the employing agency, i.e., the Department of Agriculture. In making that necessary determination, Department officials should have and did take the potential future use of the land into consideration, and in our view those officials properly and prudently relied on the independent, expert opinion from the Farmers Home Administration indicating the tract was conducive to division into three separate homesites when they determined that only one-third of the tract reasonably related to Mr. Totheroh's personal residence. Although Mr. Totheroh disagrees with the expert opinion and the Department's determination, no evidence has been presented proving that opinion and determination to be clearly erroneous. Furthermore, as indicated, the fact that Mr. Totheroh did not personally subdivide the 30-acre tract of land when he owned it does not in itself support a conclusion that the entire tract was reasonably related to the maintenance of his residence. Hence, we have

no basis for disturbing the determination made by the Department of Agriculture in this case.

With respect to the suggestion made by Forest Service officials that payment of further amounts to Mr. Totheroh might be justified on the basis of our decision B-166709, May 21, 1969, in that decision we allowed an employee full reimbursement of the expenses he incurred in selling an unproductive 18-acre farm he used as his residence site. The conclusion reached in that decision was based on the applicable regulations contained in Bureau of the Budget Circular No. A-56 which did not specifically provide for pro rata reimbursement when an employee purchased or sold land in excess of that which related to the residence site. Compare B-163187, February 19, 1968. Those regulations have since been superseded by the Federal Travel Regulations which now govern the reimbursement of a transferred employee's relocation expenses and contain the provision quoted above. The current regulations have been interpreted by decisions, including 54 Comp. Gen. 597, supra, which supersede our holding in B-166709, supra. Thus, the conclusion is not contolling in the present case since that conclusion was based on different, superseded regulations.

In summary, the agency in this case has applied the provisions of 5 U.S.C. 5724a(a)(4) and paragraph 2-6.1f, FTR, in a thorough manner and in accordance with guidelines set forth in 54 Comp. Gen. 597, supra. We therefore find no basis for disturbing the agency's determination.

Accordingly, the reclaim voucher may not be certified for payment.

Shilton J. Socolar

Acting Comptroller General
of the United States