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**DECISION**



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

**FILE:** B-201153

**DATE:** January 18, 1982

**MATTER OF:** H. Roy Fiscus - Lease Termination Expenses

- DIGEST:**
1. A transferred employee claims expenses incurred in settling an unexpired lease on property which included both his former residence and income-producing farmland. Federal Travel Regulations (FTR) paragraph 2-6.1 (May 1973) authorizes the agency to reimburse those expenses incurred for settling an unexpired lease involving the employee's residence. In an analogous situation, where a transferred employee buys or sells a large tract of land, we have held that FTR para. 2-6.1f limits reimbursement of real estate expenses to those associated with conveyance of the residence and the land which reasonably relates to the residence site. 54 Comp. Gen. 597 (1975). Accordingly, the pro rata reimbursement rule set forth in 54 Comp. Gen. 597 should be applied to the leased land in this case.
  2. A transferred employee did not promptly move his family off the leased land, thus failing to mitigate his damages. The lessor exercised his option under the lease, available due to the vacation of the land after the beginning of a new lease year, to require payment of \$750 in addition to the \$750 minimum liquidation payment. Reimbursement of the \$750 holdover fee is not authorized because the employee failed to promptly move his family off the property prior to the beginning of the new lease year. FTR para. 2-6.2h. Reimbursement of the prorated portion of the \$750 minimum liquidation payment may be made by the agency if it determines that the employee could not reasonably have been expected to sublease the property.

Mr. H. Larry Jordan, a certifying officer for the Department of Agriculture, National Finance Center, has requested an advance decision concerning the claim of Mr. H. Roy Fiscus for lease cancellation expenses incurred incident to a permanent change of official station. The certifying officer questions "whether Mr. Fiscus is entitled to any of the amount claimed." As will be explained below, the claim may be partially allowed if the agency determines that Mr. Fiscus could not reasonably be expected to sublease the property for the remainder of the lease term. He may not be reimbursed, however, for the additional lease cancellation expenses charged as a result of his family's remaining in the residence into the new lease year.

Background

By Travel Authorization No. 090279018, dated June 13, 1979, Mr. Fiscus, an employee of the Department of Agriculture, Forest Service, was authorized a permanent change of station from Eureka, Montana, to Clam Lake, Wisconsin. Further, Mr. Fiscus and his immediate family were authorized "[s]ubsistence for up to 30 consecutive days while occupying temporary quarters prior to time employee moves into permanent residence at new official station." Mr. Fiscus reported to Clam Lake on July 9, 1979.

Previously, Mr. Fiscus had executed a 5-year lease, August 1, 1977, to July 31, 1982, of property at his old official station. The lease terms established a lease fiscal year to run from August 1 through July 31, and required an annual cash payment of \$1,500, with \$750 payable on August 1, 1977, and annually thereafter, and \$750 payable on February 1, 1978, and annually thereafter. Other relevant lease terms are set forth below.

"Should the lessee be transferred to another locality by his employer, the lease may be cancelled by lessee forfeiting the remaining portion of the annual \$1,500 payment, or a minimum liquidation payment of \$750.

\* \* \* \* \*

"No unapproved subleases are permitted.

\* \* \* \* \*

"Lessor agrees to provide the farm house at no cost to the immediate family of the lessees. Lessees agree to keep the house in good repair including prevention of plumbing frost damage. Utility costs will be paid by lessees. Minor maintenance labor will be provided by the lessees with the lessor paying for any lessor approved materials. House modifications not approved by the lessor are not permitted."

As a result of the transfer, Mr. Fiscus could not comply with the lease terms. On August 22, 1979, Mr. Fiscus made a lease cancellation payment of \$750, plus a payment of \$125 for allowing his family to hold-over on the property into the new lease year. The lessor still demanded payment of the remainder of the annual \$1,500 payment which the lease terms required Mr. Fiscus to pay. Consequently, on February 20, 1980, Mr. Fiscus paid the lessor an additional \$625, increasing his total lease cancellation expenses to \$1,500.

Pro Rata Reimbursement

The certifying officer explains that his question arises from the lease terms:

"The lease appears to be for the land only, which was income producing. The lease states that the net crop receipts will be shared equally between the lessor and lessees. The lease also states the lessor shall provide the farm house at no cost to the immediate family of the lessees."

The authority for reimbursement of residence transaction expenses incurred in connection with an employee's permanent change of official station is contained in 5 U.S.C. § 5724a(a)(4) (1976) and Chapter 2, Part 6, of the Federal Travel Regulations (FTR)(FPMR 101-7) (May 1973). Paragraph 2-6.1 provides as follows:

"Conditions and requirements under which allowances are payable. To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to

be paid by him \* \* \* for the settlement of an unexpired lease involving his residence \* \* \* at the old official station;

Provided, That:

\* \* \* \* \*

"f. Payment of expenses by employee - pro rata reimbursement. The expenses for which reimbursement is claimed were paid by the employee. \* \* \* 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."

In 54 Comp. Gen. 597 (1975), we discussed how the proration requirement of FTR para. 2-6.1f applies to an employee's purchase or sale of a large tract of land. <sup>1/</sup> Where a transferred employee buys or sells a large tract of land, we held that FTR para. 2-6.1f limits reimbursement of real estate expenses to those costs associated with conveyance of the residence and the land which reasonably relates to the residence. Set forth in the decision are examples of factors to be taken into account by the agency in determining how much land is reasonably related to the residence, such as: prevailing and customary practices in the locality; zoning laws; past, present, and potential use of the land; local requirements concerning waste disposal systems and percolation; location; and billing practices of real estate brokers, attorneys, and surveyors. Further, the decision recommends that the agency obtain the aid of experts in making these determinations.

Under the particular circumstances present here, we cannot agree with the certifying officer's view that Mr. Fiscus leased only land. The lease terms establish duties and rights regarding the care and use of the farmhouse, even though it was provided at no cost to the

1/ The proration requirement has also been applied in W. Carl Linderman, B-201591, April 16, 1981, 60 Comp. Gen. \_\_\_\_\_; Albert Popp, B-200173, April 9, 1981; and William C. Sloane, B-190607, February 9, 1978.

employee. Therefore, we believe that a portion of the lease payments may be attributable to Mr. Fiscus' use of the farmhouse for a residence. Although no documentation has been provided which would indicate the total number of acres leased, the record suggests that the employee leased land in excess of that which reasonably relates to the residence site, and that much of that land was income producing. The record further shows that Mr. Fiscus was required to pay for settlement of the unexpired lease on the entire parcel leased, not just on the land related to his former residence.

Thus, the principles set forth in 54 Comp. Gen. 597 regarding proration should be applied to the leased land in this case. The Forest Service should determine, in accordance with these principles, the proportion of the lease cancellation fee that applies to the residence and the land reasonably related to it. Additionally, since Mr. Fiscus' family remained in the residence into the new lease year, the Forest Service must also consider how that affects Mr. Fiscus' reimbursement.

#### Duty to Mitigate Damages

The criteria to be applied to determine whether Mr. Fiscus is entitled to reimbursement of any of the expenses incurred in settling his unexpired lease are set forth in FTR para. 2-6.2h, which provides:

#### "Settlement of an unexpired lease.

Expenses incurred for settling an unexpired lease \* \* \* on residence quarters occupied by the employee at the old official station may include broker's fees for obtaining a sublease or charges for advertising an unexpired lease. Such expenses are reimbursable when (1) applicable laws or terms of the lease provide for payment of settlement expenses, (2) such expenses cannot be avoided by sublease or other arrangement, (3) the employee has not contributed to the expenses by failing to give appropriate lease termination notice promptly

after he has definite knowledge of the transfer, and (4) the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in the locality. \* \* \*

In Jeffrey S. Kassel, 56 Comp. Gen. 20 (1976), we discussed the application of FTR para. 2-6.2h as follows:

"\* \* \* We note at the outset that the operative concept in these matters is that of settlement, which involves an adjustment of an account and implies, at least, an attempt to compromise the amount due. Thus, the employee is required to make reasonable efforts to relet the premises immediately upon his transfer. Such efforts include negotiation with the lessor for a reasonable payment in compromise of the outstanding term of the lease, engaging the services of a real estate broker, and placing advertisements in a newspaper [of] general circulation in the locality. \* \* \*" 56 Comp. Gen. at 21.

In Amilcare J. Ciarrocca, B-183018, January 8, 1976, we held that this duty to mitigate damages is continuing and does not end when an employee vacates his former residence.

The lease terms allow cancellation upon Mr. Fiscus' transfer to another locality by his employer, with the penalty being forfeiture of the remaining portion of the annual \$1,500 payment, or payment of a minimum liquidation fee of \$750. Apparently the parties interpreted the lease terms to allow the lessor to demand whichever amount was greater. Although those terms could be interpreted differently, we will accept the parties' interpretation.

Mr. Fiscus' travel authorization was dated June 13, 1979, and he reported to Clam Lake on July 9, 1979. Mr. Fiscus also admits that he knew on May 25, 1979, that he would be transferred. However, Mr. Fiscus did not move his family off the property in Eureka until August 10, 1979, allegedly due to a lack of adequate housing in Clam Lake. Under the lease terms, Mr. Fiscus'

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failure to move his family off the property in Eureka before August 1, 1979, automatically increased his potential liability from \$750 to \$1,500.

While Mr. Fiscus contends that he made several attempts to negotiate a reasonable payment in compromise of the outstanding terms of the lease, he cannot deny that by maintaining his family on the leased land into a new lease year, even though he had been authorized 30 days temporary quarters, he failed to take the simplest steps to mitigate damages. While not falling specifically into any of the categories listed above, Mr. Fiscus' actions were entirely contrary to the concept of lessening his potential lease termination expenses.

Accordingly, we conclude that by failing to move his family off the property prior to the beginning of a new lease year, Mr. Fiscus violated his duty to minimize his lease termination expenses and, therefore, his claim for the \$750 holdover payment is disallowed. While there is nothing in the record to indicate that Mr. Fiscus ever attempted to sublease the property, we cannot say that he could reasonably have been expected to do so. However, if the Forest Service determines that Mr. Fiscus should have attempted to sublease the property, it may disallow the entire claim for lease termination expenses. If, on the other hand, the agency determines that Mr. Fiscus could not reasonably have been expected to sublease the property, it may reimburse him the amount due by applying the proration criteria to the minimum liquidation payment of \$750. The voucher and supporting documents are returned to the Forest Service for further consideration as outlined above.

*for*   
Comptroller General  
of the United States