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

FILE: B-195920 DATE: June 30, 1980

MATTER OF: Ralph A. Neeper - Forfeited earnest money deposit

DIGEST: Employee who contracted to buy a house and paid a $2,500 earnest money deposit, but who canceled contract and forfeited the deposit to accept a promotion and transfer to another locality, may not be reimbursed for his loss as a residence transaction expense. However, forfeited deposit may be partially reimbursed under 5 U.S.C. 5724a(b) as a miscellaneous expense, notwithstanding the fact that he voluntarily applied for the transfer, where reassignment was in interest of the Government.

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GAO 00412

This action is in response to the request of the Comptroller, Defense Mapping Agency (DMA), for an advance decision on the question of whether an agency employee may be reimbursed for a real estate earnest money deposit he forfeited when he was transferred to a new duty station incident to his acceptance of a promotion. The request was forwarded to this Office on August 27, 1979, by the Department of Defense Per Diem, Travel and Transportation Allowance Committee after being approved and assigned Control No. 79-31.

Prior to his transfer, Mr. Ralph A. Neeper was working at the DMA Aerospace Center in St. Louis, Missouri, as a grade GS-11 computer specialist. On August 24, 1977, a vacancy announcement was published advertising a competitive selection opening for a grade GS-12 computer specialist position at the DMA School, Ft. Belvoir, Virginia, and on September 24, 1977, Mr. Neeper applied for the position.

At the time, Mr. Neeper was residing with his family in a rented apartment in St. Louis. On October 15, 1977, the Neepers signed a contract for the purchase of a house in St. Louis, and over the next 10 days spent a total of $2,733 preparing to close the agreement. This included a $2,500 earnest money deposit paid to the owner of the property and other expenditures totalling $233 for a credit report, legal fees, a pest certification, etc.

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On October 25, 1977, Mr. Neeper was advised that he had been selected from the field of applicants for appointment to the grade GS-12 position in Virginia. Several days later he accepted the promotion and transfer offered to him.

In November 1977 Mr. Neeper told the owner of the house in St. Louis that he was withdrawing from his agreement to purchase the property because of the transfer, and he asked for the return of the $2,500 earnest money deposit. The owner refused, asserting that the property had been taken off the market on the basis of the sales agreement and that Mr. Neeper's voluntary acceptance of a transfer did not constitute proper grounds for completely rescinding the agreement. Mr. Neeper then filed a complaint with a consumer protection agency of the State of Missouri, but the State agency declined to intervene in the matter.

Upon relocating his family to the Ft. Belvoir area in December 1977 Mr. Neeper claimed and was reimbursed various relocation allowances specifically authorized by statutory law and implementing administrative regulations. The allowances included a house-hunting trip, costs of settling the unexpired lease on the family's apartment in St. Louis, mileage and per diem allowances, a temporary quarters subsistence expense allowance, and expenses incurred in purchasing a house near Mr. Neeper's new duty station at Ft. Belvoir.

Mr. Neeper also claimed reimbursement of $2,733 for the forfeited earnest money deposit and related expenses he incurred in connection with his cancelled purchase of the house in St. Louis.

In their request for an advance decision, DMA officials question whether Mr. Neeper's claim for that additional amount may be allowed in whole or in part. They express doubt as to whether the amount claimed may properly be regarded as a reimbursable real estate expense since Mr. Neeper did not own or occupy the house prior to his transfer.

In the event Mr. Neeper's claim may not be fully allowed as a residence transaction expense incident to the sale of a residence, DMA officials question whether the claim may nevertheless be allowed as a miscellaneous expense, subject to the monetary limitations imposed by the applicable laws and regulations on the amount which may be paid as a miscellaneous expenses allowance. In that connection, they note that while our Office has in the past allowed reimbursement of forfeited earnest money deposits as a miscellaneous expense, our past decisions do not make it clear whether payment is limited to circumstances in which the forfeiture results from an involuntary transfer ordered by the Government. They therefore question whether a forfeited earnest money deposit may be reimbursed as a miscellaneous expense where, as in the case of Mr. Neeper, the cause of the forfeiture was the employee's voluntary acceptance of a position in a different locality.

Provisions of statutory law governing the payment of travel, transportation and relocation allowances of transferred Federal employees are contained in chapter 57 (subch. II) of title 5, United States Code. With respect to the allowable real estate expenses of a transferred employee, 5 U.S.C. 5724a(a) provides in pertinent part that under such regulations as the President may prescribe an agency may reimburse the employee for:

> "(4) Expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old station and purchase of a home at the new official station required to be paid by him 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. * * *"

Implementing regulations applicable to Defense Department employees are contained in chapter 2 (part 6) of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973), and chapter 14 of Volume 2, Joint Travel Regulations (2 JTR). As is noted by DMA officials, one of the conditions under 2 JTR for payment of expenses incurred in connection with real estate transactions at the old duty station is that "* * * the dwelling at the old duty station was the employee's actual residence at the time he was first definitely informed by appropriate authority that he was to be transferred to a new duty station."

We have consistently held that, under 5 U.S.C. 5724a(a), an earnest money deposit forfeited in accordance with a contract of sale of property which was not the employee's residence is not a reimbursable selling expense. See Matter of George T. Quinn, 55 Comp. Gen. 628 (1976); Matter of David D. Lombardo, B-190764, April 14, 1978; and decisions therein cited. Hence, Mr. Neeper's claim for $2,733 incident to the cancellation of a sales contract at his old duty station may not be allowed as a reimbursable real estate expense under 5 U.S.C. 5724a(a).

However, in addition to the other travel, transportation, and relocation allowances specifically authorized by law for a transferred Federal employee, 5 U.S.C. 5724a(b) provides as follows for an allowance to cover other miscellaneous expenses:

> "(b) Under such regulations as the President may prescribe and to the extent considered necessary and appropriate, as provided therein, and notwithstanding other reimbursement authorized under this subchapter, an employee who is reimbursed under subsection (a) of this section or section 5724(a) of this title is entitled to--

"(1) an amount not to exceed 2 weeks' basic pay, if he has an immediate family; or

"(2) an amount not to exceed 1 week's basic pay, if he does not have an immediate family.

However, the amounts may not exceed amounts determined from the maximum rate for GS-13."

Regulations issued pursuant to that provision of law are contained in chapter 2 (part 3), FTR, and chapter 9, 2 JTR. Those regulatory provisions do not specifically list a forfeited real estate earnest money deposit as an item covered by the miscellaneous expense allowance.

Nevertheless, as is noted by DMA officials, our Office has in the past authorized payment under the miscellaneous expense allowance to reimburse an employee for the deposit he made on the purchase of a residence which he later forfeited because of his transfer to a new duty station. See Matter of George T. Quinn, 55 Comp. Gen. 628, supra; Matter of David D. Lombardo, B-190764, supra; Matter of Steven W. Hoffman, B-193280, May 8, 1979. In some of the cases in which we authorized reimbursement, the transfer was not involuntary but was the result of the employee's application for a position vacancy at a different location, although that fact was not expressly stated in our decisions. See, for example, Matter of Mark S. Siegler; B-180377, August 8, 1974.

The fact that an employee initiated a transfer may warrant a determination that the transfer was for his own convenience rather than in the interest of the Government and thus defeat his entitlement to any reimbursement for relocation expenses. See Matter of Michael J. DeAngelis, B-192105, May 16, 1979; compare Matter of Stephen P. Szarka, B-188048, November 30, 1977. However, as in Mr. Neeper's case, once it has been determined that his transfer is in the interest of the Government, his relocation expense entitlement,

including his right to reimbursement of a forfeited purchase deposit, is not affected by the fact that he may have desired, applied for or otherwise undertaken to assure his prospects of transfer.

Mr. Neeper's case involves the additional consideration that he entered into the contract to purchase the St. Louis residence after he had applied for the position at Ft. Belvoir. We do not believe that this fact in any way limits his entitlement to reimbursement. Our decisions have long recognized that an employee who has been given notice of a transfer is obligated to avoid unnecessary expenses. See Matter of Warren L. Shipp, B-196908, May 28, 1980, involving avoidable residence transaction expenses, and Matter of Jeffrey S. Kassel, 56 Comp. Gen. 20 (1976) discussing a transferred employee's duty to minimize lease termination costs. In no case have we held that an employee's obligation to avoid or minimize relocation expenses arises merely as a result of his having applied for a position involving a possible transfer.

Thus, we hold that Mr. Neeper may be reimbursed for the forfeited earnest money deposit as an item of miscellaneous expense. Since the $2,500 amount of the forfeited deposit exceeds the maximum reimbursement for miscellaneous expenses allowable under 5 U.S.C. 5724a(b), the additional purchase related expenses of $233 claimed by Mr. Neeper would not in any case be reimbursable.

Documentation from DMA indicates that Mr. Neeper has raised questions concerning amounts he has been reimbursed in connection with his 1977 transfer. Because the certifying officer's submission does not identify any specific item or amount as in issue, we assume that the matter has been resolved within DMA.

Milton J. Socolar

Acting Comptroller General
of the United States