

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

August 16, 2000

GSBCA 15290-RELO

In the Matter of GARY MORRIS

Gary Morris, La Jolla, CA, Claimant.

Ray Hall, Director, Regional Office, Department of Veterans Affairs, San Diego, CA,
appearing for Department of Veterans Affairs.

BORWICK, Board Judge.

Claimant, Gary Morris, a civilian employee of the Department of Veterans Affairs, Veterans Benefits Administration (VBA), agency, contests the agency's attempts to recover amounts it reimbursed claimant for real estate transaction expenses in connection with the sale of the marital home in Sykesville, Maryland, near his old duty station. Claimant allegedly sold his home as a result of his permanent change of station (PCS) transfer from Maryland to San Diego, California. Some years after the agency reimbursed claimant, the agency determined that the marital home did not qualify as a residence within the meaning of the Federal Travel Regulation (FTR). The reason was that claimant, who had separated from his wife as a preliminary step to obtaining a no-fault divorce, had not regularly commuted from the marital home to his old duty station for more than a year before he was officially notified of his impending transfer to San Diego. Claimant filed a claim at this Board alleging that the Sykesville home qualified as a residence entitling him to reimbursement for real estate expenses associated with its sale.

We sustain the decision of the agency regarding the interpretation of the FTR. The agency correctly concluded the Sykesville home was not claimant's residence within the meaning of the FTR because he did not regularly commute from the home for over a year before he was notified of his job transfer.¹ Claimant also complains that the agency denied him due process in establishing and seeking to collect on the debt and that the agency should

¹ The agency also concluded that the sale of the house was incident to claimant's divorce, not his transfer. Claimant contests that ground as well. In view of our disposition of the case, we do not consider that issue.

have waived the debt. We do not address those issues because they are not within our statutory or delegated authority.

The facts as indicated by the record are as follows. On or about January 14, 1994, claimant and his spouse, according to the Property Settlement and Separation Agreement, separated "by mutual voluntary agreement." The Special Master for the Circuit Court of Carroll County, Maryland, later found that on January 14, 1994, claimant and his spouse voluntarily separated and that since that time, they had neither lived together or cohabited with each other.

Claimant states that in 1994 a significant number of promotion opportunities began to come open throughout the VBA. Having a reasonable expectation that he would be selected for one of these openings and an interest in advancing his career, he began to apply for open positions. Considering the extremely slow retail market for homes at that time, claimant thought it prudent to list his home for sale as soon as possible. On January 9, 1995, about one year after separating, claimant and his spouse entered into a listing agreement to sell claimant's house.

On January 16, 1995, claimant and his spouse entered into the separation agreement, "voluntarily and without reservation." Both parties agreed to "live separate and apart in separate places of abode without cohabitation." Claimant and his spouse agreed to divide the property between them and further agreed to "sell the marital residence [in] Sykesville, MD. The parties agree[d] to cooperate in the sale of the marital residence and to execute all necessary documents to effect the sale." The parties agreed to certain financial arrangements to maintain possession of the residence until it could be sold and further agreed to apply the proceeds of the sale of the house to extinguish accumulated marital debts. On February 2, 1995, claimant and his spouse entered into a contract of sale for the house.

During the time claimant and his spouse were separated, starting in January of 1994, claimant maintains that he

was responsible for making the mortgage payments, kept most of my clothes, tools, computer and personal effects in the house, received mail there, had my dog and cat there, was summoned for jury duty at that address, was registered to vote at that address, lived there for extended periods of time when my wife was not there. In effect we shared the residence and I anticipated full time occupancy. My absences were involuntary and temporary.

On April 12, 1995, the Deputy Under Secretary for Benefits notified the Director of the Western Area that claimant had been approved for promotion to the position of Adjudication Officer, in the agency's San Diego, California, regional office. Claimant states that he was notified "at home" of his selection for the position on April 12.

The settlement on the sale of the house occurred on April 19. Also, on April 20, claimant signed the required one-year service agreement. On April 20, the agency issued a PCS travel authorization for claimant's transfer from Sykesville, Maryland, to San Diego,

California. The agency established claimant's reporting date as May 30, and granted claimant reimbursement of real estate transaction expenses. Claimant's default divorce judgment became final on June 15.

Claimant submitted a reimbursement voucher requesting reimbursement of \$14,022 for reimbursement of real estate transaction expenses for the sale of the house in Sykesville, Maryland. An agency accounting document of July 18, 1995, states that the net to which claimant was entitled was \$11,290.54, after suspending \$1620.50 of the costs, adding in the withholding tax allowance, and subtracting federal, medicare, and state taxes and Federal Insurance Contributions Act withholding. A subsequent agency document, dated July 17, states the miscellaneous moving allowance to which claimant was entitled was \$12,401.50. That figure is \$11,290.54 plus \$861.21 in state taxes and \$241.75 in medicare taxes. Both the agency and claimant accept the \$12,401.50 figure as the amount the agency reimbursed claimant for the real estate expenses.

The agency's Office of Inspector General (OIG) received an allegation that claimant had improperly received reimbursement for relocation expenses in connection with the sale of the house in Sykesville, Maryland. The OIG conducted interviews of claimant, his supervisor, and his former spouse, and reviewed pertinent documentation. On October 31, 1997, the Director of the OIG's Hotline and Special Inquiries Division submitted a draft report to the Director of the Veterans Benefits Administration Regional Office (VARO) concluding that claimant was not entitled to reimbursement of the relocation expenses related to the sale of the Maryland home. On December 5, the VARO Director stated that he could not concur in the conclusion.

On March 31, 1998, the Director of the OIG's Hotline and Special Inquiries Division reaffirmed his conclusion. On April 14, 1998, three days before the submission of the OIG's final report, the agency issued a notice of indebtedness to claimant, establishing a debt of \$19,324.54, which was the sum of \$12,401.50 (for real estate reimbursement); \$4822.79 (for withholding tax allowance) and \$2128.25 (relocation income tax overpayment). The notice of indebtedness advised claimant of his right to seek a waiver, which would only be granted if claimant was not at fault in causing the debt. In its final report of April 17, 1998, the OIG advised the agency's Benefits Administration Regional Office that claimant:

improperly received \$11,290[.54] as reimbursement for real estate expenses relating to the sale of a house he and his spouse jointly owned. He was not eligible for reimbursement because the house was not his residence. Further, he did not sell the house incident to his transfer, and he incurred the expenses before he received authorization to move and in the absence of clear administrative intent to transfer him.

On July 29, claimant requested a waiver of the indebtedness. On August 18, the agency's Committee on Waivers and Compromises determined that while claimant did not act fraudulently, he could have prevented the indebtedness had he made it known that he had not resided in his home since January 14, 1994, when he and his spouse separated, and that the sale of his home was dictated by a Property Settlement and Separation Agreement signed by him and his spouse on January 28, 1995.

Claimant appealed the waiver denial within the agency. On March 23, 1999, the Committee on Waivers and Compromises reaffirmed its conclusion, stating:

The evidence clearly shows the employee did not live in the marital home and did not regularly commute to and from work from the marital home since January 14, 1994.

....

Although the issues concerning the marital home being sold incident to the employee's divorce and the employee incurring selling expenses before he was authorized to move are in question, they are not germane in this case since the occupancy requirement was not met.

The agency did, however, restate its conclusion that "the chronology of events indicates that the sale of the house was pursuant to [claimant's] divorce rather than to a job transfer."

On February 29, 2000, the agency issued to claimant a notice on indebtedness and advised claimant that unless he made arrangements within thirty days to pay the debt, or notify the agency in writing that he wished to dispute the debt, the agency would offset claimant's current rate of pay at a rate of fifteen percent of disposable pay per pay period until the debt is liquidated. On March 20, 2000, the agency forwarded the claim to this Board.

Discussion

Under the FTR, an employee is entitled to reimbursement of allowable expenses for the sale of one residence at the employee's old duty station. 41 CFR 302-6.1 (1994). Residence means the "residence or other quarters from which the employee regularly commutes to and from work." 41CFR 302-1.4(k). A commute is regular when it is daily. David Morell, GSBCA 15229-RELO, 00-1 BCA ¶ 30,899. An employee must have also have occupied the residence at the time the employee is first officially notified by competent authority of the employee's transfer to the new duty station. 41 CFR 302-6.1(d). If a separated spouse regularly commutes to work from a place other than his or her marital home, the marital home does not qualify as a residence for which real estate transaction expenses may be reimbursed. Michael L. Martin, GSBCA 13821-RELO, 97-2 BCA ¶ 29,142; Howard C. Spraggins, B-258766 (Feb. 10, 1995); Richard C. Sherwood, B-258268 (Jan. 25, 1995).

Claimant argues that the Maryland house was actually his residence since he was responsible for making the mortgage payments, kept most of his clothes, tools, computer and personal effects in the house, received mail there, had his dog and cat there, was summoned for jury duty there, was registered to vote there, and lived there for extended periods of time when his wife was not present. Those facts, if true, do not establish the house as a "residence" for reimbursement purposes under the FTR; the abode must be the one from which the employee regularly commuted to and from work on a regular, i.e., daily basis. David Morell; Michael L. Martin; Richard C. Sherwood; John K. Bowman, B-247125 (June 12, 1992). Claimant has not presented evidence that he regularly commuted to work from his marital home after January 14, 1994. That claimant took a telephone call at the marital

home from his supervisor informing him of his promotion and transfer does not make the marital home his residence at the time.

Claimant argues that he comes within an exception to the regular commuting rule, citing Jesse A. Greer, B-189122 (Nov. 7, 1977), and its progeny. Greer held that a separated federal employee, who was involuntarily kept from his house by court order, but who intended to occupy his house at the time of his notice of transfer, and who was eventually awarded the house by court order, had substantially complied with the occupancy requirement of the regulation. He was thus entitled to reimbursement of the real estate expenses for selling the house. See also Charles R. Holland, B-205891 (July 19, 1992).

This Board has not considered whether it would adopt the Greer line of cases, and we need not do so here, because the Greer holding is not applicable to claimant. Claimant was not involuntarily barred from his residence by court order, or even by the terms of a property settlement. Richard C. Sherwood. Instead, by the very terms of the separation agreement in this matter, the findings of the Special Master for Carroll County supporting the judgment of divorce, and the final judgment of divorce incorporating the separation agreement, claimant's decision to separate from his wife and to live in separate places of abode was "voluntary."² While matters pertaining to separation and divorce involve emotionally wrenching and life-altering decisions, the choice to voluntarily separate and then divorce is rendered no less voluntary because of its character. Claimant separated from his wife beginning January 14, 1994 and continued to live separate and apart from the marital residence until he was officially notified of his transfer on April 12, 1995, and beyond that time. Claimant's new argument, which contradicts the factual basis for his default divorce, that his absence from his residence was "involuntary and temporary" is disingenuous.

The case of Jack H. Hiller, B-229427 (Aug. 4, 1998), relied upon by claimant, does not assist him. In Hiller, the General Accounting Office found substantial compliance with the residence requirement because the employee was prevented from occupying the house at his old duty station by the Government's actions in transferring him overseas and then canceling the transfer. Claimant's case does not involve circumstances where the Government caused the claimant to vacate the residence.

Claimant also argues that the agency's position amounts to an illegal retroactive amendment of his travel orders. We have applied this principle when the travel order was not clearly erroneous, i.e., when the entitlements granted were not in conflict with law, regulation or agency instruction. Andre Long, GSBCA 14498-TRAV, 98-1 BCA ¶ 29,731. Nothing in that rule, however, entitles an employee to the reimbursement of travel expenses in violation of statute or regulation, Wirth v. United States, 36 Fed. Cl. 517, 534 (1996), or prevents the Government from recovering funds paid in violation of statute or regulation.

² In order to obtain a default divorce in Maryland, the parties must enter into an express or implied mutual agreement to separate accompanied by a mutual intent not to resume the marriage relationship. They must voluntarily live separate and apart for the statutory period. Separation does not occur until the parties cease living in the same house even though intimate relations may have ceased prior to that time. See Carney v. Carney, 295 A.2d 792, 795 (Md. Ct. Spec. App. 1972).

In short, the agency has demonstrated that the agency's reimbursement of claimant's real estate transaction expenses for the sale of the Sykesville house violated the FTR. The agency did not violate the FTR in establishing the debt. The agency's decision, so far as it involves the application of the FTR, is sustained.

Claimant maintains that the agency should have waived the debt, and that in establishing the debt and in its collection activities the agency deprived him of due process. Waiver is strictly for the agency to decide under the applicable statute, 5 U.S.C. § 5584(a) (Supp. III 1997), and it is not an issue for this Board. Patricia Russell, GSBCA 14758-RELO, 99-1 BCA ¶ 30,291. As for due process, under 31 U.S.C § 3702(a)(3), the Board's function in these matter is limited to settling claims against the Government involving expenses incurred by federal civilian employees for official travel and transportation and for relocation expenses incident to transfers of official duty station. The procedures for determining and collecting a debt are set forth in 5 U.S.C. § 5514(a), which provides for a separate internal agency proceeding. The procedural due process the agency provided claimant in establishing or collecting on the debt is not within our statutory and delegated authority to consider. Patricia Russell; Earl G. Gongloff, GSBCA 13860-RELO, 97-1 BCA ¶ 28,792.

ANTHONY S. BORWICK
Board Judge