UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 6, 2020

CBCA 6620-RELO

In the Matter of GAVIN M. WALLACH

Lawrence Berger of Mahon & Berger, Esqs., Glen Cove, NY, appearing for Claimant.

Natasha D. Hamilton, Assistant Chief, Office of Finance, United States Marshals Service, Department of Justice, Washington, DC, appearing for Department of Justice.

LESTER, Board Judge.

Claimant, Gavin M. Wallach, challenges decisions of the United States Marshals Service (USMS) reducing his temporary quarters subsistence expense (TQSE) and real estate transaction expense reimbursements following his relocation to a new permanent duty station (PDS). He asks that we direct the USMS to make full payment on both.[1] For the reasons set forth below, we must deny his requests.

Background

In June 2017, Mr. Wallach relocated from a PDS in Minneapolis, Minnesota, to a new PDS in Washington, D.C. Mr. Wallach's relocation travel authorization provided for

[1] The USMS notified us in its response to Mr. Wallach's claims that it is no longer contesting certain claimed relocation travel costs and would reimburse Mr. Wallach for them immediately. To the extent that Mr. Wallach still disputes the manner in which the USMS has reimbursed those costs, he may submit a new claim. The current record provides us no basis for reviewing the USMS's calculation.

reimbursement of TQSE incurred after his arrival in Washington. Mr. Wallach notified the USMS Financial Services Division that, as temporary quarters in Washington, he would be renting a room in a home, and he elected to receive TQSE as a total fixed price or lump sum, rather than under the actual expenses reimbursement method.

After arriving in Washington, Mr. Wallach stayed with his brother, rather than at a commercial hotel or a rental service property, for a period of time before finding permanent housing, and he wrote a check for several hundred dollars to his brother that he delineated as rent. Nothing in the record indicates that Mr. Wallach's brother typically rented out rooms in his residence. The agency was unaware when Mr. Wallach selected the lump sum TQSE reimbursement option that he would be staying with his brother and did not learn of it until Mr. Wallach submitted his TQSE reimbursement request in the amount of $6997.50. In response, the USMS notified Mr. Wallach that, under its policy directives, it cannot authorize TQSE payment under the lump sum payment option if the employee is staying with relatives and reduced his TQSE to reflect what it viewed as a reasonable reimbursement of actual incurred TQSE expenses, paying him $1939.50 as TQSE.

Mr. Wallach also submitted a request to the USMS for reimbursement of real estate transaction expenses incurred in selling the residence that he owned in Minneapolis. As part of his move to his new PDS, Mr. Wallach sold his primary residence at his old duty station, closing on the sale in July 2017, and then sought reimbursement of real estate transaction costs totaling $13,196 that he stated he incurred as part of the sale.[2] In reviewing Mr. Wallach's voucher, the USMS determined that the deed associated with that property identified Mr. Wallach as holding title as a tenant-in-common with a second person who was not an immediate family member of Mr. Wallach's. Based upon its interpretation of the deed and the requirements of chapter 302 of the Federal Travel Regulation (FTR), 41 CFR ch. 302 (2017), the USMS determined that Mr. Wallach was entitled to only his pro rata share of the real estate transaction expenses incurred in selling the property. Accordingly, it reimbursed Mr. Wallach for fifty percent of the requested costs, with adjustments for a withholding tax allowance and other withholdings not at issue here, to account for what it viewed as his fifty-percent interest in the property.

Mr. Wallach, through counsel, subsequently requested that the Board review the USMS's reductions of his TQSE benefit and of his real estate transaction expense reimbursement.

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[2] Mr. Wallach's counsel represents in the claim at issue that Mr. Wallach had sought $21,311.90 as expenses associated with the sale of his Minneapolis residence, but the documents attached to Mr. Wallach's claim show that the amount sought was $13,196.

Discussion

TQSE Reimbursement

Mr. Wallach challenges the USMS's decision to reduce his TQSE benefit because he stayed with his brother rather than renting more traditional commercial accommodations.

By statute, employees who transfer in the interest of the Government to a new duty station within the United States "may receive, at the option of their agency, TQSE payments to cover the cost of lodging and subsistence associated with the . . . move." *Christopher W. Harding*, CBCA 4542-RELO, 15-1 BCA ¶ 35,990, at 175,828-29 (citing 5 U.S.C. § 5724a(c) (2012)). "[T]he purpose of the TQSE allowance is to reimburse an employee reasonably and equitably for subsistence expenses incurred when it is necessary to occupy temporary quarters." *Id.*; *see* 41 CFR 302-6.3. The FTR defines "temporary quarters" as referring to "lodging obtained for the purpose of temporary occupancy from a private or commercial source." 41 CFR 302-6.1.

Here, Mr. Wallach's relocation travel orders authorized him to incur TQSE upon his arrival in Washington. Mr. Wallach argues that staying with a relative should qualify for TQSE reimbursement if the employee actually pays the relative in exchange for temporary accommodations. "The fact that the available rental was owned by a relative," he argues, "should have absolutely no bearing on his reimbursement absent any favorable treatment or discount." Claim at 2.

Mr. Wallach's argument conflicts with long-standing precedent applicable to TQSE claims. The FTR contains a provision entitled "Lodging with friend(s) or relative(s) (with or without charge)," which reads as follows:

> (a) Your agency will reimburse you for different types of lodging as follows:
>
> . . . .
>
> (3) *Lodging with friend(s) or relative(s) (with or without charge)*. You [a transferred employee] may be reimbursed for additional costs your host incurs in accommodating you only if you are able to substantiate the costs and your agency determines them to be reasonable. You will not be reimbursed the cost of comparable conventional lodging in the area or a flat "token" amount.

41 CFR 301-11.12(a)(3). Although this provision appears in the part of the FTR addressing temporary duty travel allowances, rather than the chapter addressing relocation allowances,

"for many years, the provision has been held to apply to claims for the relocation benefit of actually-incurred TQSE, as well as to claims for temporary duty lodging costs." *Frank J. Salber*, GSBCA 16836-RELO, 06-2 BCA ¶ 33,330, at 165,285; *see Donald Mixon*, GSBCA 14957-RELO, 00-1 BCA ¶ 30,606, at 151,116 (1999) (applying rule to TQSE reimbursements). Further, in a written agency policy supplementing FTR chapter 302, the USMS has directly addressed TQSE reimbursement for employees who elect to stay with friends or relatives:

> § 302-6.101.1 Reduction in TQSE Allowance
>
> If the transferred employee plans to obtain lodging for temporary quarters with friends or relatives, see § 302-6.102.1 for the maximum amount reimbursable for lodging.
>
> . . . .
>
> § 302-6.102.1 Lodging with Friends or Relatives
>
> If lodging is obtained with friends or relatives, then reimbursement is limited to 15% of the lodging allowance. Meals and incidental expense will not be reduced solely because lodging was obtained from friends or relatives. Claims for reimbursement must be accompanied by a receipt with the name, address, and telephone number of the person from whom lodging was obtained.

USMS Travel and Relocation Policy (USMS Policy) §§ 302-6.101.1, -6.102.1.

"The purpose of th[is] rule is to ensure that while the Government reimburses costs of lodging which are incurred through a business relationship, it does not promote arrangements which are made between closely-aligned individuals for the purpose of enriching the employee, the host, or both," a purpose that "applies with equal force to both temporary duty and relocation situations." *Frank J. Salber*, 06-2 BCA at 165,285-86. The fact that Mr. Wallach agreed to pay several hundred dollars in rent to his brother, who the record does not indicate normally rents out his property, does not overcome this reimbursement limitation.

Mr. Wallach argues that limitations applicable to stays with relatives are relevant only under the actual expense method of TQSE reimbursement and that, here, Mr. Wallach selected the lump sum TQSE reimbursement option. Under the FTR, there are two possible methods of TQSE reimbursement: (1) the actual expense method, which reimburses the employee's actual, documented, and reasonable TQSE (up to a maximum daily allowable

amount) for a period of up to sixty days (with a possible extension of up to an additional sixty days), 41 CFR 302-6.100, -6.104; and (2) the lump sum reimbursement method, which, if offered by an agency, provides the employee with "a lump sum for each day authorized up to 30 days," but without the possibility of an extension. *Id.* 302-6.200. Under the lump sum reimbursement method, the employee does not have to document his or her TQSE expenses, *id.* 302-6.12, and, "if [the employee's] lump sum TQSE payment is more than adequate to cover [the employee's] actual TQSE expenses, any balance belongs to [the employee]." *Id.* 302-6.203.

Although Mr. Wallach notified the USMS that he was electing to take his TQSE as a lump sum, the agency has the discretion to decide, through written rules supplementing the FTR, the extent to which, and the circumstances in which, it will offer the lump sum election. *See* 41 CFR 302-6.200. Here, the USMS's written supplement to FTR chapter 302 expressly provides that the USMS will *not* make lump sum payments available to employees who stay with friends or relatives during the TQSE period and that the actual expense method will apply in such situations:

> § 302-6.200.2 Fixed Amount Reimbursement Not Allowed
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> The fixed amount reimbursement method is not allowed when the employee and/or his or her family stays with friends or relatives. However, the actual expense method is allowed in this situation, with reduced lodging paid, in accordance with § 302-6.102.1 above.

USMS Policy § 302-6.200.2. Because the FTR allows agencies to decide whether, and when, to allow a lump sum payment election, the USMS's written policy is not inconsistent with the FTR, and its adoption precludes Mr. Wallach from enforcing his election to proceed under the lump sum method. Once the agency learned that Mr. Wallach's TQSE involved a stay with a relative, the USMS, in accordance with its written policy, properly applied the actual expense reimbursement method to his TQSE request.

Real Estate Expenses Reimbursement

Mr. Wallach challenges the USMS's decision to reimburse him for only 50%, rather than 100%, of the transaction fees incurred in the sale of his Minneapolis residence.

Citing to FTR 302-2.110, the USMS argues that Mr. Wallach's real estate transaction reimbursement claim is untimely because, after the USMS notified him that his recovery was limited, Mr. Wallach neither submitted a "reclaim" to the USMS within one year from the effective date of his transfer from Minneapolis to Washington nor timely requested a time

extension. The USMS misinterprets the time limitations set forth in the FTR. Various FTR provisions, including the cited provision, require a relocating employee "to complete all aspects of relocation," including the physical acts of moving, settling any real estate transactions, and incurring relocation expenses, within one year (subject to possible extension, if timely requested) of the reporting date at the new PDS. 41 CFR 302-2.110; *see id.* 302-2.9 to -2.12, -11.21, -11.22. The FTR provisions do not, however, establish any specific deadline for the employee's submission of a monetary reimbursement request or claim. Indeed, although FTR 302-11.21 provides that any "claim for reimbursement [of real estate transaction costs] should be submitted to [the employee's] agency as soon as possible after the transaction occurred," it does not set a firm deadline, much less the one-year deadline that the USMS proposes, for that submission to the agency. *See Daniel W. Catalano*, CBCA 4637-RELO, 15-1 BCA ¶ 36,012, at 175,888 ("[T]he FTR does not specify when such a claim must be submitted to the agency."). Outside the context of the FTR, statute establishes a six-year claim submission deadline running from the date of claim accrual. *See* 31 U.S.C. § 3702(b)(1) (2012). Mr. Wallach completed the sale of his Minneapolis residence within one year of the date of his transfer to Washington, D.C., and his claim for real estate transaction costs within six years of the closing date is timely.

As to the merits of Mr. Wallach's real estate expenses claim, the deed to Mr. Wallach's Minneapolis residence, as discussed above, identified Mr. Wallach as co-owner of the property with another individual who is not a member of his immediate family. The FTR provides that, for a transferring employee to receive full reimbursement of covered real estate transaction expenses,

> title to the property for which [the employee is] requesting an allowance for residence transaction must be:
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> (a) Solely in the transferring employee's name; or
> (b) Solely in the name of one or more of [the employee's] immediate family members; or
> (c) Jointly in [the employee's] name and in the name of one or more of [the employee's] immediate family members.

41 CFR 302-11.101. If the transferring employee and/or his or her immediate family members do not hold full title to the property, the agency will reimburse the employee "on a pro rata basis to the extent of [the employee's or immediate family members'] actual title interest plus [the employee's and immediate family members'] equitable title interest in the residence." *Id.* 302-11.103. "The Government will determine who holds title to [the] property based on: (a) [w]hose name(s) actually appears on [the] title document (e.g., the

deed); and (b) [w]ho holds equitable title interest in [the] property as specified in [FTR] 302-11.105." *Id.* 302-11.102.

Under Minnesota law, the deed identifying Mr. Wallach and another individual as co-owners of the property created a tenancy-in-common. *See* Minn. Stat. § 500.19, subdiv. 2 (2000) ("All grants and devises of lands, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."). Nowhere in the deed are the two co-owners' ownership interests defined as unequal. Accordingly, under the title document, Mr. Wallach had a fifty-percent ownership interest in the Minnesota residence and, under FTR 302-11.103, would be entitled to reimbursement of fifty percent of the residential real estate transaction fees on the sale of that property. *See, e.g.*, *Denise M. Wempe*, B-236769 (Feb. 8, 1990) (limiting recovery to fifty percent of real estate transaction fees incurred in sale of property jointly owned with another); *Anthony Stampone III*, B-223018 (Sept. 30, 1986) (same).

Mr. Wallach argues that he holds an "equitable title interest" in the residence that modified the scope of his rights for purposes of his real estate transaction cost reimbursement. FTR 302-11.105 identifies the five situations in which an agency will find such an interest, and Mr. Wallach asserts that he satisfies the fifth category, set forth at FTR 302-11.105(e). Under that category, an equitable title interest exists if the employee and an individual who is not an immediate family member hold title jointly *and* if the employee satisfies the following four conditions, supported by documentation that the agency finds suitable:

> (1) The property is [the employee's] residence.
> (2) [The employee] and/or a member(s) of [the employee's] immediate family has the right to use the property and to direct conveyance of the property.
> (3) Only [the employee] and/or a member(s) of [the employee's] immediate family has made payments on the property.
> (4) [The employee] and/or a member(s) of [the employee's] immediate family received all proceeds from the sale of the property.

41 CFR 302-11.105(e). To show that he meets these conditions, Mr. Wallach alleges that he and his co-owner had a private agreement wherein Mr. Wallach, alone, was entitled to 100% of the equity in the residence upon its sale; that Mr. Wallach was the sole borrower on the mortgage for the property; that the earnest money deposit and the initial payment on the residence when purchased came from Mr. Wallach; that he exclusively paid all mortgage payments on the residence while he owned it; and that all proceeds from the sale went into his bank account. He argues, therefore, that, "despite [his friend's] name appearing on the

deed, Mr. Wallach is entitled to be reimbursed for 100% of all expenses associated with the sale as he was entitled to 100% equity in the subject property."

Although the facts that Mr. Wallach alleges arguably could satisfy subsections (1), (3), and (4) of FTR 302-11.105(e), they are insufficient to establish Mr. Wallach's personal and exclusive right "to direct conveyance of the property," as required by FTR 302-11.105(e)(2). Although, as a tenant in common, he would have a right to convey his *share* of the property to a third party, 20 Am. Jur. 2d *Cotenancy and Joint Ownership* §§ 34, 92, 93, 95 (2019), Mr. Wallach does not allege that he had an independent conveyance right with regard to the property *as a whole*, such as might be shown if his co-owner had executed a power of attorney, a trust agreement, or some other written binding agreement granting Mr. Wallach authority to convey the Minneapolis property without the co-owner's involvement or additional approval. *See Andreas Frank*, GSBCA 16706-RELO, 06-1 BCA ¶ 33,149, at 164,269-70 (2005) (finding written memorandum of understanding executed by the claimant and his real property co-owner prior to the original purchase of the property sufficient to establish the claimant's right to direct conveyance of the property). To the contrary, documents in the record show that the co-owner executed transfer documents as a "seller" as part of the July 2017 sale of the residence to a new third-party owner. *See Stephen H. Clark*, GSBCA 16943-RELO, 07-1 BCA ¶ 33,451, at 165,794 (2006) (finding that claimant did not have right to direct conveyance of the property where both claimant and co-owner signed settlement sheet as sellers on sale of property). To the extent that Mr. Wallach had some side agreement with his co-owner that would have allowed him to direct conveyance of the co-owner's share of the property, Mr. Wallach has not identified that agreement and, in any event, did not submit it to the agency in support of his claim, as required by FTR 302-11.105(e)(5). In such circumstances, the agency acted properly in determining that Mr. Wallach did not establish an "equitable title interest" under FTR 302-11.105. Accordingly, the USMS properly limited Mr. Wallach's reimbursement to fifty percent of the July 2017 real estate transfer transaction fees.

Decision

For the foregoing reasons, Mr. Wallach's claims are denied.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge