

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 24, 2003

GSBCA 16061-RELO

In the Matter of TERRY L. HOOD

Terry L. Hood, Warner Robins, GA, Claimant.

Major John F. Dymond, Staff Judge Advocate, Office of the Staff Judge Advocate, Air Force Reserve Command, Department of the Air Force, Dobbins Air Reserve Base, GA, appearing for Department of the Air Force.

DeGRAFF, Board Judge.

Terry L. Hood is employed by the Department of Defense (DoD). On April 19, 2002, DoD issued a travel authorization in connection with Ms. Hood's permanent change of station from one duty station to another in Georgia. Ms. Hood owned a house at her old duty station in a suburb of Atlanta, and the travel authorization provided that DoD would reimburse her for the real estate expenses she incurred in connection with her transfer. Ms. Hood reported to her new duty station on May 5, 2002.

On August 22, 2002, Ms. Hood signed a contract to sell her house at her old duty station. One contract provision reads:

Closing Costs and Discount Points: Seller shall, at the time of closing, contribute a sum not to exceed \$4,300.00 to be used by Buyer to pay for (a) preparation of the warranty deed and owner's affidavit by the closing attorney; (b) at Buyer's discretion, closing costs, loan discount points, survey costs, and insurance premiums (including flood insurance, if applicable) relating to the Property and/or loan; and (c) at Buyer's discretion, other costs to close including escrow establishment changes [sic] and prepaid items, if allowed by lender. Buyer shall pay all other costs, fees, and amounts for the above referenced items and to fulfill lender requirements to otherwise close this transaction.

This provision, with a blank space that was filled here with the \$4300 figure, is preprinted in the purchase contract that is copyrighted by the Georgia Association of Realtors®.

On September 5, 2002, Ms. Hood closed the sale of her house. The first page of the Form HUD-1, Settlement Statement, summarizes each of the parties' transactions. The summary for Ms. Hood and the summary for her purchasers list \$4300 as being paid by Ms. Hood for the purchasers' closing costs.

On the second page of the HUD-1, the following amounts are listed as "paid from seller's funds at settlement":

Real estate commission	\$12,075.00
Prepare/review/record releases	20.00
State tax/stamps (deed)	172.50

Also on the second page of the HUD-1, the following amounts are listed as "paid from borrower's funds at settlement":

Loan origination fee	645.00
Loan discount	1,048.13
Flood cert. fee	25.00
Tax service fee	65.00
Document prep. fee	385.00
GRMA fee	6.50
Property valuation fee	50.00
Hazard insurance premium	443.00
Hazard insurance - 2 mos.	73.84
County property taxes	218.18
Settlement or closing fee	450.00
Title examination	130.00
Title insurance	
Lender's coverage	152.50
Owner's coverage	302.95
Prepare/review/record deeds	25.00
Recording fees	
Deed	10.00
Mortgage	60.00
State tax/stamps (mortgage)	193.50
Handling/delivery closing docs	45.00

The loan origination fee, loan discount fee, flood certification fee, tax service fee, document preparation fee, Georgia Residential Mortgage Act (GRMA) fee, and property valuation fee are show on the HUD-1 as items paid in connection with the loan. The loan origination fee was one percent of the amount of the purchasers' loan. These fees were paid to the lender, with the exception of the flood certification fee, which was paid to Landsafe Flood, and the tax service fee, which was paid to the lender's tax service. The settlement or closing fee, the title examination fee, and the handling/delivery closing documents fee were paid to the title insurance company that acted as the settlement agent. The fees listed as prepare/review/record releases and prepare/review/record deeds were paid to the title insurance company's attorney. The recording fees and state tax/stamps are listed as government recording and transfer charges.

In a written statement, Ms. Hood's real estate agent explains that in Georgia, a seller usually negotiates a contribution that is customarily between two and three percent of the purchase price of the house, toward a buyer's closing costs. The agent provided several multiple listing service printouts that support his statements. The \$4300 is between two and three percent of the sales price of Ms. Hood's house. DoD says it contacted the Department of Housing and Urban Development, the Georgia Association of Realtors, the Georgia State University Real Estate Research Center, the Atlanta branch of "Caldwell Bankers" (sic) Home Finance Center, and "Caldwell Bankers'" (sic) local primary closing attorney, who said although a sales contract can specify who will pay closing costs, each party's responsibility is determined by how the costs are shown on the HUD-1, and any contribution from one party to another does not negate the parties' responsibilities. DoD also says the terms of the sales contract provided Ms. Hood with no control over how the purchasers used the \$4300.

DoD reimbursed Ms. Hood for the real estate commission, the state tax/stamps (deed), the settlement or closing fee, and the recording fees (deed only). DoD also reimbursed Ms. Hood \$25 for a credit report shown on the HUD-1 as paid outside of closing.

DoD did not reimburse Ms. Hood for the loan discount, hazard insurance, or county property taxes because, according to applicable regulations, amounts paid for these items are not reimbursable under any circumstances.

DoD did not reimburse Ms. Hood for the loan origination fee, the flood certification fee, the tax service fee, the GRMA fee, the property valuation fee, the title examination, title insurance, prepare/review/record deeds, recording fees (mortgage), state tax/stamps (mortgage), or handling/delivery closing documents because DoD said these amounts are "only payable to [sic] the Buyer in the Atlanta metro area market" and to reimburse Ms. Hood for these amounts would result in the purchasers receiving a "windfall at the governments' [sic] expense."

DoD did not reimburse Ms. Hood for the item listed as prepare/review/record releases or for the document preparation fee, although it gave no reason for not doing so.

Not shown on the HUD-1 is a \$285 fee that Ms. Hood paid to All-Pro Pest Services. She says \$200 of this was for an inspection required by Georgia law and \$85 was to renew a pest control policy. Ms. Hood provided a letter from her real estate agent explaining that in Georgia, a seller must provide termite clearance letters at two different points during the sales process. The first letter, which the agent called a "preletter," is required soon after listing the house for sale and the second letter is required at closing. The preprinted sales contract requires the seller to provide two Georgia wood infestation reports, both prepared after inspections by a licensed pest control operator. Ms. Hood provided a receipt for \$285, which says this amount was for the preletter, the final letter, and the renewal cost. The receipt does not say which part of the \$285 was for the inspections and which part was for the cost of renewing the policy. DoD agrees that fees paid for required pest inspections are reimbursable. But, DoD did not reimburse Ms. Hood for any part of the amount she paid to All-Pro Pest Services because, it says, she did not provide any documents to verify that she paid for inspections, instead of for something such as treatment. DoD says that it did not give Ms. Hood "the benefit of the doubt due to other questionable items claimed."

Also not shown on the HUD-1 is \$30.25 that Ms. Hood spent for overnight delivery services in order for sales contract documents to be sent to her husband, who had been called to active duty in Florida, and returned by him to their real estate agent. She enclosed copies of receipts, dated August 27 and 28, 2003, for these expenses. DoD gave no reason for not reimbursing Ms. Hood for these items.

Ms. Hood asks us to review DoD's decision to deny part of her claim for reimbursement.

Discussion

When an agency transfers a federal civilian employee from one official duty station to another, the agency will reimburse the employee for various real estate transaction expenses, provided certain conditions are met. 5 U.S.C. § 5724a(d) (2000). The Federal Travel Regulation (FTR), which applies to all federal civilian employees, and the Joint Travel Regulations (JTR), which supplement the FTR for federal civilian employees of DoD, explain whether an agency can reimburse a particular expense. 41 CFR pt. 302-11 (2002) (FTR pt. 302-11); JTR C14002. We use these guidelines in order to evaluate Ms. Hood's claim.

We agree with DoD that, according to the regulations, certain of the closing costs that Ms. Hood paid are not reimbursable, no matter whether they are paid by a seller or a purchaser. These include the loan discount fee (FTR 302-11.202(d); JTR C14002-A4b(2)); the tax service fee and the GRMA fee because they are finance charges (Larry W. Poole, GSBCA 15730-RELO, 02-1 BCA ¶ 31,776; Waymon T. Saxon, Jr., GSBCA 15419-RELO, 00-1 BCA ¶ 31,209; FTR 302-11.202(g); JTR C14002-A4b(5)); amounts paid for hazard insurance (FTR 302-11.202(c); JTR C14002-A4b(1)); and county property taxes (FTR 302-11.202(e); JTR C14002-A4b(3)). In addition, because the loan origination fee was one percent of the purchasers' loan amount, the document preparation fee is not reimbursable except in circumstances not present here. Poole; FTR 302-11.200(f)(2); JTR C14002-A4a(2). Also, the cost of owner's title insurance is not reimbursable except in certain circumstances not present here. Jeffrey B. Hicks, GSBCA 15860-RELO, 03-1 BCA ¶ 32,083 (2002); FTR 302-11.200(f)(9); JTR C14002-A4a(9).

Amounts paid by Ms. Hood on behalf of the purchasers

The remaining closing costs paid by Ms. Hood on behalf of the purchasers are reimbursable if certain conditions are met. One such condition is that the costs must be customarily paid by the seller. FTR 302-11.200; JTR C14003-C1b. Here, Ms. Hood's preprinted sales contract anticipates that some of a seller's funds will be used to pay part of a purchaser's closing costs, which is one indication that it is customary for a seller to incur such costs. Robert Messie, GSBCA 13807-RELO, 97-1 BCA ¶ 28,924. In addition, we have a written statement from Ms. Hood's real estate agent, who explains that sellers usually negotiate a contribution that is customarily between two and three percent of the purchase price toward their purchasers' closing costs, and he provided multiple listing service printouts that support his statement. Also, less than two years ago, another DoD component agreed that it is customary in the Atlanta area for sellers to pay a large portion of their purchasers' closing costs. Janeen H. Rosenberg, GSBCA 15591-RELO, 01-2 BCA ¶ 31,614 (2000).

Finally, DoD reimbursed Ms. Hood for some of the purchasers' closing costs, which suggests that it is customary for sellers to pay some of their purchasers' closing costs. DoD says that it contacted several organizations and was told that the HUD-1 sets out each party's responsibility for paying closing costs, regardless of what the sales contract provides. DoD also says that Ms. Hood's contract did not require her purchasers to use her \$4300 for closing costs. DoD offers no other support for its statement that some of the costs for which Ms. Hood asks to be reimbursed are "only payable to [sic] the Buyer in the Atlanta metro area market."

On balance, the preprinted sales contract, the statement from the real estate agent, the multiple listing service printouts, the position taken by another DoD component less than two years ago, and DoD's actions in reimbursing Ms. Hood for some of the amount she paid toward her purchasers' closing costs outweigh the information DoD provided regarding what is customary. Although the HUD-1 shows who actually pays the costs of a settlement, it does not show who customarily pays those costs. Also, even if Ms. Hood's purchasers were not required to use her \$4300 for closing costs, the HUD-1 shows that is in fact how they used the \$4300. Ms. Hood has established that it was customary for a seller in her area to make a contribution of between two and three percent of the purchase price toward a purchaser's closing costs. Thus, she should be reimbursed for the part of the \$4300 that was used to pay costs that are allowed by the regulations, as explained below.

DoD should reimburse Ms. Hood for the loan origination fee, which covers the lender's administrative costs in processing the loan, because it was not more than one percent of the loan amount. FTR 302-11.200(f)(2); JTR C14002-A4a(2).

DoD should also reimburse her for the flood certification fee because it appears from the HUD-1 that the lender required the certification. Wayne E. Smith, GSBCA 14844-RELO, 99-1 BCA ¶ 30,247; FTR 302-11.200(f)(12).

If Ms. Hood wishes to be reimbursed for the property valuation fee, she will have to supply more information to DoD regarding this fee. If this is equivalent to an appraisal fee, and if the fee is customary in amount, then it should be reimbursed. FTR 302-11.200(b); JTR C14002-A2.

The cost of a title examination is reimbursable, provided the cost is not included in some other fee and does not exceed the amount customarily charged for such a service. FTR 302-11.200(e); JTR C14002-A3a. It does not appear from the HUD-1 that the title examination fee, which was paid to the title insurance company, is included in any other fee, and DoD does not contend that the amount exceeds the fee customarily paid. Thus, Ms. Hood should be reimbursed for the cost of the title examination.

The cost of mortgage title insurance is reimbursable, provided it is required for the protection of the lender and the cost does not exceed the amount customarily charged for such a service. FTR 302-11.200(f)(8); JTR C14002-A4a(8). The HUD-1 shows that mortgage title insurance was purchased for the lender and DoD does not contend that the amount paid for this insurance exceeds that customarily paid. Thus, Ms. Hood should be reimbursed for the cost of the lender's title insurance.

The attorney's fee for preparing, reviewing, and recording the deeds and the government fee paid to record the mortgage are reimbursable, provided they have not been included in another fee and do not exceed the normal charge for such services. FTR 302-11.200(d); JTR C14002-A3. It does not appear from the HUD-1 that the fees for these services are included in any other fee and DoD does not contend that the amounts exceed those customarily paid. Thus, Ms. Hood should be reimbursed for the fee listed as prepare/review/record deeds and the fee paid to record the mortgage.

The cost of the state tax/stamps is reimbursable. FTR 302-11.200(f)(4), (5); JTR C14002-A4a(4), (5). Thus, DoD should reimburse Ms. Hood for this cost.

If Ms. Hood wishes to be reimbursed for the fee paid to the title insurance company for handling and delivery of closing documents, she will have to supply more information to DoD regarding this fee. It is not clear what services were provided in exchange for payment of this fee or whether the fee for those services was included in some other fee.

Amounts paid by Ms. Hood

The attorney's fee for preparing, reviewing, and recording releases is reimbursable if it is customarily paid by sellers in the area, if the fee has not been included in another fee, and if the fee does not exceed the normal charge for such a service. FTR 302-11.200(d); JTR C14002-A3. It does not appear from the HUD-1 that the fee for this service is included in any other fee and DoD does not contend that the amount exceeds the fee customarily paid. If the fee is customarily paid by sellers in the area, DoD should reimburse Ms. Hood.

It appears the fee Ms. Hood paid to All-Pro Pest Services for the two inspections was customarily paid by sellers in the area, because the preprinted provisions of the sales contract require the seller to pay for the inspections and DoD agrees that such fees are reimbursable. If Ms. Hood wishes to be reimbursed for any of the amount she paid to All-Pro Pest Services, she needs to provide DoD with a receipt that separates the amount she paid for the two inspections from the amount she paid to renew the policy. To the extent the fee was for the inspections, it is reimbursable. FTR 302-11.200(f)(11); JTR C14002-A4a(11).

Courier fees are reimbursable in some circumstances. Poole. If Ms. Hood wishes to be reimbursed for the courier fees, she needs to establish that such costs are customarily paid by sellers in the area, and she needs to explain to DoD why it was necessary for her to use a courier service to send documents from Georgia to Florida and back on August 27 and 28.

Summary

DoD should reimburse Ms. Hood for the loan origination fee (\$645), the flood certification fee (\$25), title examination fee (\$130), lender's title insurance (\$152.50), the fee listed as prepare/review/record deeds (\$25), the fee paid to record the mortgage (\$60), and the cost of the state tax/stamps (\$193.50).

DoD should also reimburse Ms. Hood for the property valuation fee if it is equivalent to an appraisal fee and if it is customary in amount; the fee paid to the title insurance company for handling and delivery of closing documents, if Ms. Hood can establish that the fee was reimbursable; the fee listed as prepare/review/record releases, if it is customarily paid by sellers in the area; the portion of the fee paid to All-Pro Pest Services for the two inspections, if she can supply the appropriate receipt; and the courier fees, if payment was customary in the area and necessary for the sale of the house.

MARTHA H. DeGRAFF
Board Judge