

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

May 14, 2003

GSBCA 16072-RELO

In the Matter of JEFFREY L. TROY

Jeffrey L. Troy, Milwaukee, WI, Claimant.

David A. White, Certifying Officer, Federal Bureau of Investigation, Department of Justice, Washington, DC, appearing for Department of Justice.

NEILL, Board Judge.

Claimant, Mr. Jeffrey Troy, is an employee of the Federal Bureau of Investigation (FBI). He asks that we review his agency's determination that he is not entitled to reimbursement of a fee which he was obliged to pay to his broker on the occasion of his purchasing a residence at his new permanent duty station (PDS). The agency contends that the charge in question is a broker's fee which, by regulation, is not reimbursable to employees who purchase a residence at their new PDS. For the reasons set out below, we affirm the agency's determination.

Background

_____ Towards the close of 2002, Mr. Troy was transferred to Milwaukee, Wisconsin. Prior to his transfer, Mr. Troy sought the assistance of a real estate agent in the Milwaukee area to help him find a new residence. Mr. Troy explains that even before his arrival in Milwaukee on a househunting trip, this agent spent a considerable amount of time attempting to find a home which would meet Mr. Troy's needs. During Mr. Troy's eight-day visit, he and the agent worked together daily in an effort to locate a suitable home. After bidding unsuccessfully on one home, Mr. Troy submitted a bid on a second house. That bid was successful; agreement was reached on the purchase of the house subject to the house passing inspection.

On returning from his househunting trip to Milwaukee, Mr. Troy was informed that the house he planned to purchase had failed to pass inspection. He, therefore, returned to Milwaukee at his own expense to continue his search for a suitable home. The low inventory of homes in the Milwaukee area eventually led Mr. Troy to explore the possibility of purchasing a home for sale by owner. One was eventually found and purchased.

The compensation clause of the agreement Mr. Troy entered into with his realtor provided that his broker would be entitled to a "success fee" of 2.4% of the purchase price of any property Mr. Troy might buy or contract for during the period of the agreement. This fee was to be collected from the seller of the property. Mr. Troy explains that, in the case of the home for sale by owner, the seller was unwilling to pay the broker's fee. The matter was eventually resolved by increasing the price of the home. The price was increased by 2.4% of the price initially agreed upon. Thus, in effect, Mr. Troy paid the broker's fee.

In seeking reimbursement for various costs associated with the purchase of his new residence in Milwaukee, Mr. Troy sought to be reimbursed for the broker's fee for which he was ultimately responsible. A special addendum explaining the details of the transaction was included in his voucher. The agency declined to reimburse Mr. Troy for the fee on the ground that section 302-11.202 of the Federal Travel Regulation (FTR), 41 CFR 302-11.202 (2002), expressly prohibits reimbursement of employees for this cost if such fees or commissions are paid in connection with the purchase of a home at the employee's new official station.

Discussion

Mr. Troy challenges the agency's refusal to reimburse him for the broker's fee on several grounds. First, he contends that the Employee Voucher Preparation Guide provided to him does not specifically exclude the expense. Second, prior to submitting his offer on the house for sale by owner, he specifically asked an employee in the agency's Transfer Advance and Payment Unit (TAPU) whether this broker's fee of 2.4% would be allowable. Mr. Troy states that he was told it was reimbursable. Third, Mr. Troy points out that, in this move as well as in the previous four moves he has undertaken as an FBI employee, he has always attempted to act in a fiscally responsible manner so as to keep to a minimum any claim he might submit for reimbursement of temporary quarters subsistence expenses (TQSE). In this particular case, by returning to Milwaukee at his own expense after the purchase arranged for during his first househunting trip failed, Mr. Troy was able to secure permanent housing before his actual move and thus avoid incurring any TQSE. Finally, Mr. Troy argues that denial of the claim constitutes a financial hardship for him and is particularly inappropriate since the total of the reimbursements he claims, including reimbursement for the broker's fee, would still be well within the allowable maximum of five percent of the purchase price of the residence he purchased at his new official station.

Mr. Troy plainly arranged for the purchase of a residence at his new PDS in a responsible and efficient manner. It is regrettable that, in the face of such conscientious action on his part, he should have received erroneous advice from a fellow employee assigned to the agency's TAPU. Nevertheless, these considerations cannot justify our setting aside the agency's denial of his claim.

In his initial request for reimbursement for his broker's fee, Mr. Troy explained that he was seeking the reimbursement in accordance with FTR 302-11.200. This particular provision lists a number of expenses generally associated with the sale of a residence at the old official station or the purchase of a residence at the employee's new official station and

states that they are reimbursable provided the costs are reasonable and customarily charged to one in the employee's position as either the seller or purchaser of a residence in the locality. Mr. Troy contends that the 2.4% fee he paid in connection with the purchase of his residence is "customary and reasonable when purchasing a home for sale by owner wherein the owner does not agree to pay the real estate agent."

Claimant's reliance on FTR 302-11.200 is misplaced. It is not enough that payment be reasonable and customary in the locality where the residence is purchased. Such a fee or commission, first and foremost, must be listed as a reimbursable cost. FTR 302-11.200 lists as reimbursable only a broker's fee or real estate commission paid in connection with the *sale* of the employee's residence at the last official station. Furthermore, in a subsequent provision, FTR 302-11.202, reimbursement of a broker's fee or commission for the purchase of a residence at the employee's new official station is expressly prohibited.

It is upon this latter provision of the FTR that the agency correctly relied in denying Mr. Troy's request for reimbursement. The agency has provided us with a copy of the agreement Mr. Troy signed with his broker. Nothing provided to us by Mr. Troy persuades us that the "success fee" which he ultimately was obliged to pay to his broker differs essentially from the broker's fee or commission mentioned in FTR 302-11.202. We have consistently upheld this prohibition of reimbursement. Devon Scott Shelley, GSBCA 15867-RELO, 02-2 BCA ¶ 31,968; Richard G. Britner, GSBCA 15542-RELO, 02-1 BCA ¶ 31,774 (citing cases).¹ The silence of the agency's voucher preparation guide regarding the prohibition in FTR 302-11.202 certainly does not render it inapplicable to agency employees. As a civilian employee of the Federal Government, Mr. Troy is subject to the FTR. It is well established that federal employees subject to the provisions of the FTR are charged with knowledge of it. Actual ignorance of the FTR's provisions cannot enlarge the employee's entitlements under it. Daniel H. Coney, GSBCA 15444-RELO, 01-2 BCA ¶ 31,500; Mark Hummel, GSBCA 15205-RELO, 00-1 BCA ¶ 30,901; Jacqueline Williams, GSBCA 15026-RELO, 99-1 BCA ¶ 30,528.

The regulatory prohibition cited by the agency to Mr. Troy effectively settles this matter regardless of any equitable considerations which might otherwise favor payment of his claim. The Government simply may not authorize the payment of money in violation of statute or regulation. Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996) (citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). Payment, in the absence of proper authorization, cannot be justified solely by the fact that a claimant may have relied in good faith and to his or her detriment on the incorrect advice of an agency official. While it may seem grossly unfair that a claimant cannot be paid under these or similar circumstances, it must be recognized that the overriding concern in such cases is the protection of the taxpayers' interest in not having unlawful disbursements made from public funds. See Barry

¹ We note that the cases cited refer to the prohibition as found elsewhere in earlier editions of the FTR, namely at FTR 302-6.2. As of February 19, 2002, the prohibition in question now appears in FTR 302-11.202. 66 Fed. Reg. 56,194 (Nov. 20, 2001).

McGuire, GSBCA 15346-RELO, 01-1 BCA ¶ 31,343; Patricia A. Tobin, GSBCA 14483-RELO, 98-1 BCA ¶ 29,663.

Decision

Mr. Troy's claim is denied.

EDWIN B. NEILL
Board Judge