

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

November 26, 2003

GSBCA 16271-RELO

In the Matter of MICHAEL CUTAIA

Michael Cutaia, M.D., Brooklyn, NY, Claimant.

Keith C. Boerner, Loan Guaranty Officer, Loan Guaranty Division - Property Management Section, Department of Veterans Affairs, Manchester, NH, appearing for Department of Veterans Affairs.

DANIELS, Board Judge (Chairman).

Dr. Michael Cutaia was transferred by the Department of Veterans Affairs in March 2002 to the Brooklyn campus of the agency's New York Harbor Healthcare System. Nearly a year later, he purchased a house in Brooklyn, a borough of New York City. The agency reimbursed him for most of the expenses he incurred in buying this residence, but has refused to pay for a "mansion tax" and a home inspection fee. Dr. Cutaia asks us to review the denial of reimbursement of these two expenses.

The matter of the "mansion tax" is straightforward. This tax is imposed by the State of New York "on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more." N.Y. Tax Law § 1402-a(a) (McKinney 2002). The tax is required by the State to be paid by the buyer and is in the amount of one percent of the purchase price of the property. *Id.* (a), (b). The home Dr. Cutaia purchased cost more than one million dollars, and he paid the tax imposed by the State on the conveyance of the property.

The Federal Travel Regulation (FTR) requires an agency to reimburse a transferred employee for transfer taxes and other similar charges he incurs in purchasing a residence at his new duty station, provided that those taxes and charges (a) are normally paid by a home-buyer in that location and (b) do not exceed specifically stated limitations or amounts customarily paid there. 41 CFR 302-11.200(f)(4), (6) (2002). There should be no doubt that the "mansion tax" was in nature, if not in name, a transfer tax; that it was required by law; and that it did not exceed prescribed limitations. The Department of Veterans Affairs must therefore, pursuant to the FTR, reimburse Dr. Cutaia for this expense.

In opposing the employee's request for reimbursement, the agency appears to believe that because it has already repaid Dr. Cutaia for the portion of a transfer tax he paid, it has fulfilled its obligations under the FTR provisions cited above. The agency apparently does not appreciate that the other transfer tax was imposed by the City of New York, see N.Y. City, N.Y., Rules, tit.19, § 23-03(b)(9) (2002), and that the State's "mansion tax" is separate from and additional to the City's tax on the transfer of residential real property. As a purchaser of such property located in both the City and State of New York, Dr. Cutaia was required to pay both taxes. Both are reimbursable under the FTR.

The matter of the home inspection fee is much more difficult. The FTR makes such fees reimbursable "when they meet three tests: the fees must be (a) customarily paid by the purchaser of a residence in the locality in question, (b) in an amount no greater than is customarily paid in that locality, and (c) required by federal, state, or local law, or by the lender as a precondition to the purchase." Verna Pope, GSBCA 15718-RELO, 02-1 BCA ¶ 31,822 (citing a provision now at 41 CFR 302-11.200(f)(11)). The issue here is whether the fee that Dr. Cutaia paid meets the third prong of this test – specifically, whether it was required by the lender as a precondition to the purchase.

The bank which made a mortgage loan on the property did not expressly require Dr. Cutaia to pay for a home inspection as a precondition to making this loan. The lender did require him to secure a homeowners insurance policy as a precondition to making the loan, however, and his insurance company required him to have an inspection of the premises before it would issue a homeowners policy on the property. Does this conjunction of facts establish a sufficiently close link between the lender's requirement and the payment of the home inspection fee as to permit a conclusion that the fee was a precondition to the purchase?

This is a close question. On the established facts alone, we can conclude only that the fee was indirectly required by the lender as a precondition to making the loan. The FTR treats some items in the same way, whether their determinant is direct or indirect. At 41 CFR 301-74.2, employees are directed to consider all "direct and indirect" costs to the Government when planning a conference, and at 41 CFR 302-12.9, certain relocation benefits are said to be potentially taxable to a transferred employee, whether they are received or accrued either "directly or indirectly." Similarly, a regulation some of whose provisions are incorporated into the FTR, Regulation Z of the Board of Governors of the Federal Reserve System (see 41 CFR 301-11.202(g)), defines the term "finance charge" to include "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 CFR 226.4(a). The FTR provision concerning home inspection fees, however, says simply that such fees are reimbursable "when required by . . . the lender as a precondition to sale or purchase." 41 CFR 302-200(f)(11). It does not say whether the lender's requirement may be indirect as well as direct. We think that the regulation is best understood conservatively, to encompass indirect determinants only when it does so explicitly. The regulation-writers have not explicitly included an indirect requirement by a lender as a possible prerequisite for reimbursement of home inspection fees. Therefore, on the established facts, we believe that the agency has acted correctly in not reimbursing Dr. Cutaia for his payment of a home inspection fee.

We hasten to add that if the employee could demonstrate not just that his insurance company required a home inspection as a precondition to writing a homeowners' policy, but also that all or virtually all insurance companies would have required such an inspection as a precondition to writing such a policy, our conclusion would be different. In that situation, the lender's insistence on the borrower's having a homeowner's insurance policy would effectively be a direct mandate that the borrower pay for an inspection in order to get a loan. Were Dr. Cutaia to make such a showing to his agency, he should be reimbursed for the inspection fee he paid.

STEPHEN M. DANIELS
Board Judge