

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

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February 20, 2004

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GSBCA 16330-RELO

In the Matter of JANICE AYALA

Janice Ayala, Laredo, TX, Claimant.

Edgardo Aviles, Chief, Travel Section, National Finance Center, Bureau of Customs and Border Protection, Indianapolis, IN, appearing for Department of Homeland Security.

**DANIELS**, Board Judge (Chairman).

The question posed by this case is whether Janice Ayala, an employee of the Department of Homeland Security who was transferred from one permanent duty station to another in July 2003, is entitled to be reimbursed for the entire broker's commission she incurred in selling her home at her old duty station. The commission Ms. Ayala paid was seven percent of the sales price. The agency believes that the usual and customary commission paid by sellers at the location of the home, El Paso, Texas, is six percent. The agency asks whether it may limit reimbursement to six percent of the sales price.

Statute provides that when an agency transfers an employee from one duty station to another in the interest of the Government and within the United States, the agency "shall pay to or on behalf of" the employee "expenses of the sale of the residence . . . of the employee at the old official station . . . that are required to be paid by the employee." 5 U.S.C. § 5724a(d)(1) (2000). The statute leaves to the Administrator of General Services, in writing the Federal Travel Regulation (FTR), the responsibility of setting detailed rules to implement this directive. Id. The FTR contains the following provision regarding reimbursement of broker's fees:

What residence transaction expenses will my agency pay?

Provided that they are customarily paid by the seller of a residence at the old official station . . . , your agency will pay the following expenses:

(a) Your broker's fee or real estate commission that you pay in the sale of your residence at the last official station, not to exceed the rates that are generally charged in the locality of your old official station . . . .

41 CFR 302-11.200 (2002).

The Department of Homeland Security asserts that "the usual and customary commission rate for the El Paso area is 6 percent." The agency provides no support for this statement. Nevertheless, because the burden of establishing a right to payment is on the employee, we must accept the statement as true unless Ms. Ayala can persuade us that more likely than not, higher rates were generally charged in El Paso at the time she sold her house there. See Board Rule 401(c) (48 CFR 6104.1(c) (2002)); Kathleen M. Lewis, GSBCA 15613-RELO, 01-2 BCA ¶ 31,616 (citing cases); Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903.

Ms. Ayala explains that she sold her home through a broker selected by Cendant Mobility, the agency's designated contractor for assisting her with the transfer. She trusted Cendant Mobility to choose an appropriate broker not only because it was the agency's designee on this move, but also because it had assisted her well, in its capacity as the agency's designee, on previous moves she had made in the interest of the Government. The broker selected by Cendant Mobility has stated, "While all [our] commissions are negotiable, it is our policy to charge 6% or 7% as a Real Estate commission. . . . [I]t is quite common [for brokers in the area] to be paid 7% on Mobility transactions." Ms. Ayala says that she attempted to secure corroborating information from the Association of Realtors in El Paso and the Department of Housing and Urban Development, but that neither was able to provide her any information as to sales commissions charged in the El Paso area.

In response to these statements, the agency notes only that while Cendant Mobility acted as a relocation services contractor on Ms. Ayala's previous transfers, it merely provided administrative support for the agency on this move.

In some cases we have considered, transferred employees have provided empirical data which supports their contentions as to the commission rates generally charged in the areas in which they sold their old homes, and we have accepted that data as persuasive that the rates used by the agency were unreasonably low. E.g., Dan A. Berkebile, GSBCA 14845-RELO, et al., 99-2 BCA ¶ 30,492. In other cases, employees have submitted no more than a statement from a broker saying that he generally charges the fee which he charged the employee, and we have found that insufficient to prove that the rate is generally charged in the community. E.g., Robert L. Sprute, GSBCA 13866-RELO, 97-1 BCA ¶ 28,866.

Ms. Ayala's submission falls somewhere between these extremes. It contains no empirical data, yet it provides more information than the mere fact that the commission she paid is one generally charged by her broker. The broker's statement that brokers in the El Paso area commonly charge a seven percent commission on transactions like the one in which Ms. Ayala was involved is some relevant evidence on the matter at issue. We give the statement heightened importance because it comes from a broker selected by the contractor who was engaged by the agency to assist the employee in selling her home. The fact that the statement is directed to the particular class of transactions with which we are concerned in this case also makes the statement pertinent. Richard J. Brenner, GSBCA 15309-RELO, 00-2 BCA ¶ 31,014; Dawn S. Daugherty, GSBCA 14065-RELO, 97-2 BCA ¶ 29,050.

While we would prefer to have more substantial evidence, the broker's statement provided by Ms. Ayala is the only information we have on the matter. Some evidence is better than none, and the agency has put forward none. We therefore conclude that the Department of Homeland Security must reimburse Ms. Ayala for the entire brokerage commission she paid in selling her house in El Paso, rather than the amount limited by an artificial rate thought by the agency to be standard in the area.

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STEPHEN M. DANIELS  
Board Judge